



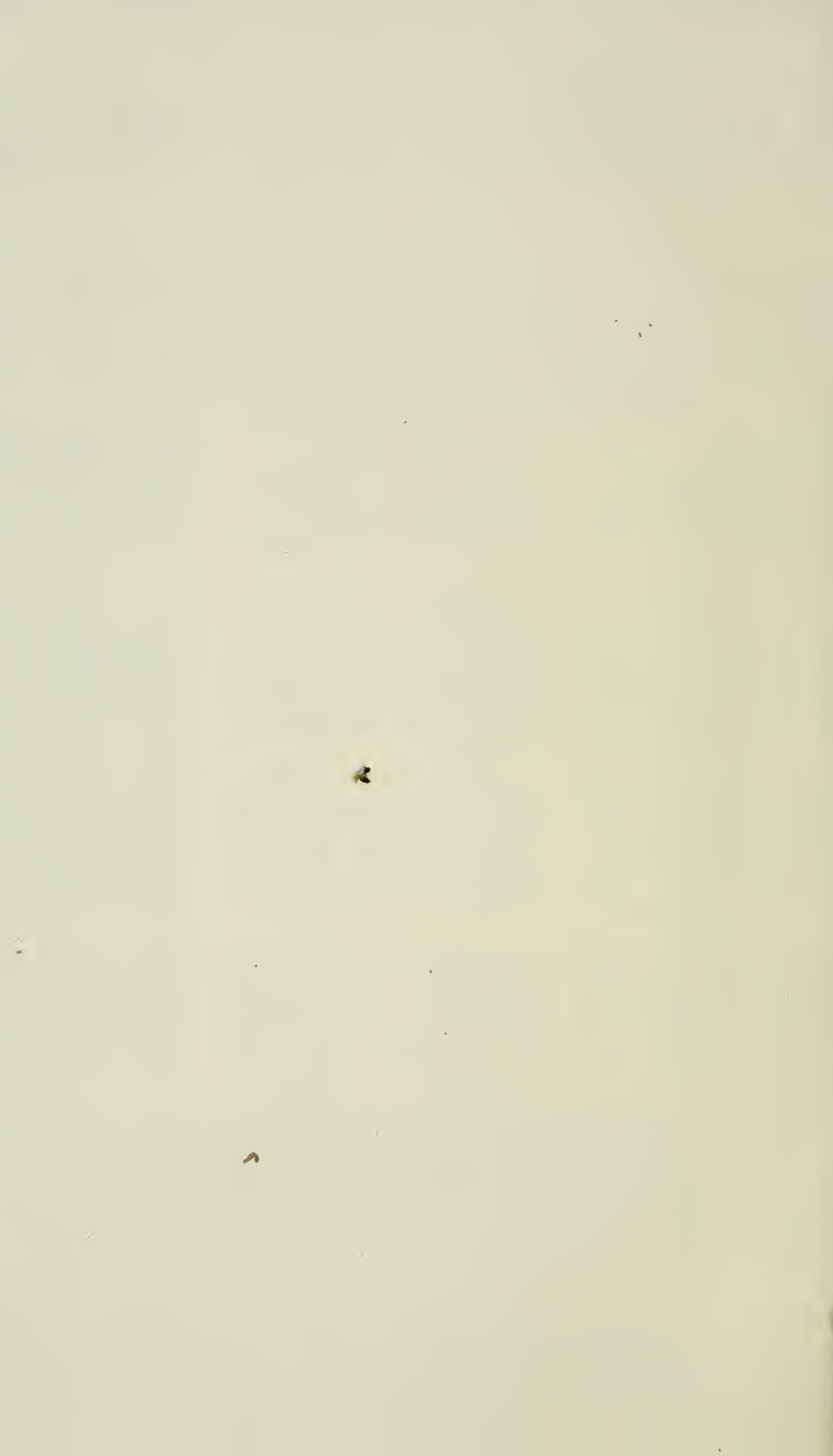
FROM THE LIBRARY OF
PROFESSOR DAVID MELLINKOFF

WHO DONATED HIS COLLECTION
TO THE
UCLA SCHOOL OF LAW
HUGH & HAZEL DARLING
LAW LIBRARY

AUGUST 1999

"CLEANSED OF WORDS WITHOUT REASON, MUCH
OF THE LANGUAGE OF THE LAW NEED NOT BE
PECULIAR AT ALL. AND BETTER FOR IT."

THE LANGUAGE OF THE LAW
BY DAVID MELLINKOFF



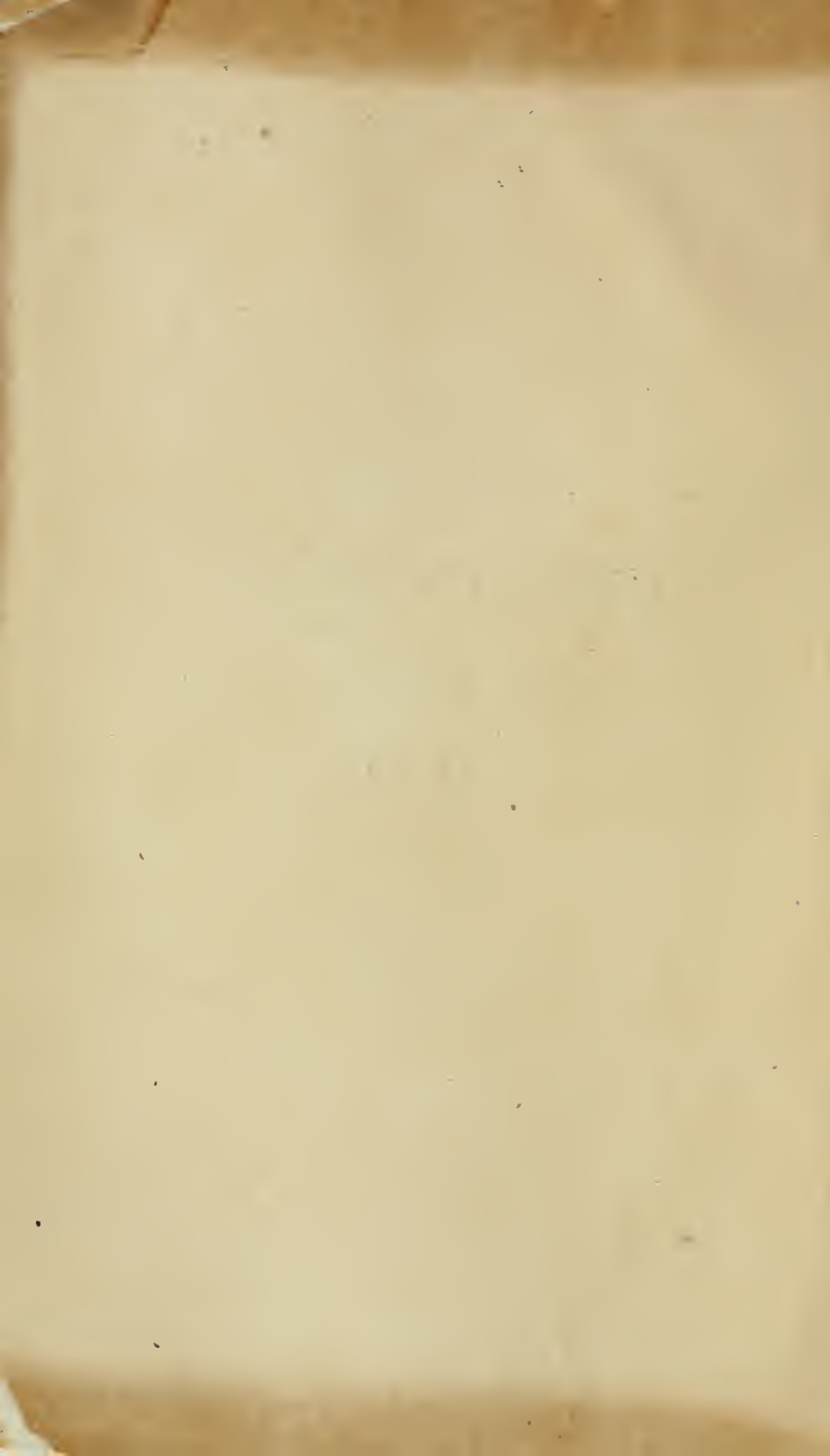
7 B3P4

B A C O N's
ABRIDGMENT.

By GWILLIM.

VOL. III.

14937/3



A

Swi House

No. 49.

N E W
Chas. Marvins
A B R I D G M E N T

OF THE

L A W.

BY MATTHEW BACON,

OF THE MIDDLE TEMPLE, ESQ.

THE FIFTH EDITION, CORRECTED;
WITH CONSIDERABLE ADDITIONS,
INCLUDING THE LATEST AUTHORITIES;
BY HENRY GWILLIM,
OF THE MIDDLE TEMPLE, ESQ. BARRISTER AT LAW.

IN SEVEN VOLUMES.

VOL. III.

L O N D O N :

PRINTED BY A. STRAHAN,

LAW PRINTER TO THE KING'S MOST EXCELLENT MAJESTY,

For T. Cadell, C. Dilly, G. G. and J. Robinson, J. Johnson, R. Baldwin,
A. Strahan, W. Otridge, E. and R. Brooke, F. and C. Rivington,
J. Butterworth, E. Newbery, W. Clarke and Son, J. Stockdale,
T. Payne, J. Walker, R. Banister, R. Pheney, T. N. Longman,
R. Bickerstaff, and J. White.

1798.

18

This image shows a blank, aged, cream-colored page, possibly a flyleaf or separator page from an old book. The paper has a slightly textured appearance with some dark spots and stains, particularly along the right edge and bottom. There is no text or other markings on the page.

Executors and Administrators.

ACCORDING to the civil and canon law there are three persons who are called executors, and who have to do with the execution of a person's goods after his decease; the first is the ordinary, or bishop of the diocese, and is called *executor a lege constitutus*. 2dly, *Executor a testatore constitutus*, being appointed by the last testament of the party. 3dly, *Executor ab episcopo constitutus*, who in the civil law is called *executor dativus*, and in our law an *administrator*. Godolph.
75.
Swinb. 360.

As the manner of appointing executors and administrators, and the nature and duty of their offices, have been matters of great debate and controversy in our law, it will be necessary to branch out this head into several divisions; and therefore we shall consider,

(A) What Persons may be Executors: And herein,

1. Of appointing the King Executor.
2. Whether Corporations may be Executors.
3. Who, in respect of their Crimes, are disabled from being Executors.
4. Who in respect of their Country.
5. Who in respect of their Want of Understanding.
6. Who in respect of their Fortune and Circumstances; and therein of obliging an Executor to give Security.
7. Of making Infants Executors.
8. Of a Feme Covert Executrix.
9. Of making Creditors Executors.
10. Of making Debtors Executors.

(B) Of the different Kinds of Executors and Administrators: And herein,

1. Of an Administrator *durante minori etate* of an Infant Executor or Administrator: And,

Executors and Administrators.

1. *Who may be such an Administrator.*
2. *What Acts he may do.*
3. *When his Authority determines.*
2. Of an Administrator *de bonis non*, where the first Administrator dies, or the Executor dies intestate, or without Probate of the Will: And,
 1. *In what Cases Administration de bonis non shall be granted, and to whom.*
 2. *What Things unadministered such an one is entitled to.*
 3. *In what Actions commenced before his Time, may an Administrator de bonis non proceed.*
3. Of an Executor *de son tort*: And,
 1. *What Acts or Degree of Intermeddling will make an Executor de son tort.*
 2. *What Acts of his are as valid, as if done by a lawful one.*
 3. *How he is to be charged, and how far a subsequent Administration purges the first Wrong.*

(C) Of the Manner of appointing an Executor.

1. By what Words an Executor is constituted.
2. Of appointing an Executor absolutely, or on Condition.
3. Of appointing a temporary Executor.
4. Of appointing an Executor with a limited Power, as to administer such a Part of the Estate, &c.

(D) Of appointing Co-Executors: And herein,

1. What Acts done by any one of them shall be as valid as if done by them all.
2. Where they must answer for each other's Acts; and what Remedy the one has against the other.
3. Where they must jointly sue and be sued; and therein of Summons and Severance.

(E) Of the Probate of Wills, and granting Administration: And herein,

1. To whom the Probate of Wills and the granting of Administration did originally belong.
2. Of the King's Jurisdiction herein.
3. Of the Archbishop's Jurisdiction; and therein of *bona notabilia*: And,
 1. *Of what Value the Goods and Effects must be, that will make bona notabilia.*
 2. *Of*

2. *Of*

2. *Of the Nature of such Goods as will make bona notabilia; and how far it is necessary that they should be in several Dioceſes.*
4. Of the Probate of Wills, and granting Adminiſtration by the Biſhop of the Dioceſe.
5. Of the Probate of Wills, and granting Adminiſtration, where the Party dies within ſome peculiar Jurisdiction.
6. Of the Jurisdiction of ſome Lords of Manors in the Probate of Wills.
7. Of the Jurisdiction of ſome Mayors in reſpect of the Burgeſſes within ſuch a Place.
8. The Form of proving a Will and taking out Adminiſtration; and therein of entering a Caveat.
9. Of the Executor's Refuſal.
10. What Acts amount to an Adminiſtration, ſo that the Party cannot afterwards reſuſe.
11. Of bringing in an Inventory.
12. Where Adminiſtration unduly obtained may be revoked or repealed.
13. How far a Repeal makes all meſne Acts void.
14. What Things an Executor may do before Probate of the Will.

(F) What Perſons are entitled to Adminiſtration.

(G) In what Manner the Ordinary may grant it: And herein of granting it to one or more, or for a particular Thing.

(H) What ſhall be deemed the Teſtator's Perſonal Eſtate, or Aſſets in the Hands of the Executor: And herein,

1. What ſhall be ſuch an Intereſt veſted in the Teſtator, as ſhall go to his Executors.
2. How far Debts due to the Teſtator are Aſſets.
3. What ſhall be deemed his Perſonal Eſtate; and therein what Things ſhall go to the Heir, and not to the Executor.
4. What Things ſhall go to the Wife of the Deceaſed, and not go to the Executor.
5. Where, after Debts and Legacies paid, the Executors ſhall have the Surplus to themſelves, or are to be Truſtees for the next of Kin.

(I) How the Perſonal Eſtate, after Debts paid, is to be diſtributed when the Party dies Inteſtate: And

Executors and Administrators.

herein, of the Share the Husband or Wife are entitled to ; of the ascending, descending, and collateral Line, and Admission of the Half-Blood ; and where the Distribution shall be *per Stirpes*, and not *per Capita*.

(K) Of Advancement, and bringing into *Hotchpot*.

(L) What shall be a *Devastavit*, either in Executors or Administrators : And herein of the Order of paying Debts and Legacies : And therein,

1. What Manner of Wasting will amount to a *Devastavit*.
2. Where it will be a *Devastavit* to pay Debts of an inferior Nature before those of a superior ; and the Order in which Debts are to be paid.
3. Of paying Legacies before Debts ; and therein of the Executor's Assent to a Legacy.
4. What shall be allowed on account of Funeral Expences.

[(L 2.) Where the Personal Estate only shall be applied in Discharge of Debts, &c. And therein of marshalling the Assets.]

(M) In what Cases an Executor may make himself liable *de bonis propriis* : And herein,

1. Where he shall be liable *de bonis propriis* by his false Pleading.
2. Where by his Promise to pay or discharge the Testator's Debts or Legacies.

(N) What Actions Executors or Administrators may bring in Right of those they represent.

(O) How such Actions must be laid : And herein of joining a Matter in Right of the Testator, and in their own Right, in the same Action.

(P) Of Actions and Remedies against Executors and Administrators : And herein,

1. Upon what Contracts or Engagements of their Testators or Intestates Executors or Administrators are liable.
2. Of Personal Torts which are said to die with the Party.
3. Of Remedies against Executors, or Administrators of Executors.
4. Where they shall be excused from Costs.
5. Where excused from putting in Special Bail.

(A) What Persons may be Executors: And herein,

1. Of appointing the King Executor.

IT seems to be admitted, that the king may be (a) appointed executor; but as he is presumed to be so far engaged and taken up with the publick and arduous affairs of the kingdom, as not to have leisure to attend to the private concerns of any particular person, so the law allows him to nominate such persons as he shall think proper, to take upon them the execution of the trust, against whom all persons may bring their actions; also, the king may appoint others to take the accounts of such executors.

his testament, and appoint executors, but he does not tell us of what.

4 Inst. 335.
Godolph.
76.
(a) Also my
Lord Coke
says, that it
was assented
in parliament,
that the king
might make
4 Inst. 335.

Accordingly we find, that *Katherine* queen dowager of *England*, mother of *Henry VI.*, who died *June 2, 1436*, made her will, and thereof appointed *Henry VI.* sole executor, and that the king appointed *Robert Rolleston* keeper of the wardrobe, *John Merslon* and *Richard Alreed* to execute the said will, by the oversight of the *Cardinal*, the duke of *Gloucester*, and the bishop of *Lincoln*, or any two of them, to whom such executors should account.

4 Inst. 335.

2. Whether Corporations may be Executors.

It seems by (b) *Wentworth*, that (c) aggregate corporations consisting of divers persons cannot be executors. 1st, Because they cannot be feoffees in trust for the use of others. 2^{dly}, Because they are a body framed for a special purpose. 3^{dly}, Because they cannot come to prove a will, or at least to take an oath, as others do.

[there is an instance of a mayor and commonalty suing as executors, and no objection taken. Roll. Abr. 919. And it seems now, that any corporation aggregate may be executors, Swinb. p. 5. § 1.; they may appoint certain individuals to be syndics, and to receive administration with the will annexed. 1 Bl. Comm. 28. n.] (c) But such corporations, as may duly prove the will and take the oath of an executor, may be executors. Godolph. 85.

(b) Office
of Executor,
17. vide id.
25. 1 Bl.
Comm. 477.
But in the
Year-book,
12 E. 4. 9. b.

3. Who, in respect of their Crimes, are disabled from being Executors.

There are few or none, who, by our (d) law, are disabled, on account of their crimes, from being executors; and therefore it hath been always (e) holden, that persons attainted or outlawed may sue as executors or administrators, because they sue in *auter droit*, and for the benefit of the party deceased.

persons outlawed, incestuous bastards, famous libellers, manifest usurers, sodomites, uncertain persons, &c. are excluded from being executors, vide Godolph. 85. Off. of Exec. 17. Swinb. 346. (e) As in Co. Lit. 123. Cro. Car. 8, 9. Roll. Abr. 914, 5. Vern. 184. Outlawry no plea in bar.

(d) How far
by the civil
and canon
law, here-
ticks, apos-
tates, trai-
tors, felons,

Also, a villein (f) may be an executor, and the lord cannot seize those goods which he has to the use of the deceased; nay, where

(f) 18H. 6.
4. Roll.
Abr. 915.

(a) 21 E. 4. 50. (a) where a villein was made executor, he might sue his lord for a debt due to the testator.

Co. Lit. 134. But an (b) excommunicated person cannot be an executor or administrator; for by the excommunication he is excluded from the body of the church, and is incapable to lay out the goods of the deceased to pious uses.

43 E. 3. 13. Theol. 11. Swinh. 349. Godolph. 85. (b) Whether the statute 3 Jac. 1. c. 5., which enacts, that every popish recusant convict shall stand to all intents and purposes disabled, as a person lawfully excommunicated, extends to disable such person from being an executor, *vide* 1 Hawk. P. C. c. 12. § 1. and Off. of Ex. 17., where it is said, that recusants convicted at the time of the death of any testator, are disabled to be his executors; and 1 Show. 293., where the probate of a will was refused to an executrix, she being a papist convict, and the conviction exhibited into the spiritual court.

[By the 9 & 10 W. 3. c. 32. Persons denying the Trinity, or asserting that there are more Gods than one, or denying the christian religion to be true, or the holy scriptures to be of divine authority, shall, for the second offence, be disabled to be executors.

And by the acts for the qualifications for offices, persons not having taken the oaths, and performed the other requisites for qualifying, who shall execute their respective offices after the time limited for their qualifications shall be expired, shall be disabled to be executors.]

4. Who, in respect of their Country, may be Executors.

(c) Off. of Exec. 17. — But by the civil law, aliens cannot be executors, unless they are so appointed in military testaments; and the reason hereof is, that in such testaments respect is had only to the *jus gentium*. Godolph. 86. Cro. Car. 8, 9. Sir Upwell Caroon's case. Vent. 417. S. C. cited.

(d) Cro. Eliz. 142. Owen, 45. *Vide tit. Abatement*, B. 3. (e) Cro. Eliz. 683. Moor, 431. Carter, 49. 191. Skin. 370. But it hath been long (d) doubted, whether an alien enemy should maintain an action as executor; for on the one hand it is said, that by the policy of the law alien enemies shall not be admitted to actions to recover effects, which may be carried out of the kingdom to weaken ourselves and enrich the enemy, and therefore publick utility must be preferred to private convenience: (e) but on the other hand it is said, that those effects of the testator are not forfeited to the king by way of reprisal, because they are not the alien enemy's, for he is to recover them for others; and if the law allows such alien enemies to possess the effects as well as an alien friend, it must allow them power to recover, since in that there is no difference, and, by consequence, he must not be disabled to sue for them; if it were otherwise, it would be a prejudice to the king's subjects, who could not recover their debts from the alien executor, by his not being able to get in the assets of the testator.

5. Who

5. Who, in respect of their Want of Understanding, are disabled from being Executors:

By our law, as well as by the civil law, idiots and lunaticks are incapable of being executors or administrators; for these disabilities render them not only incapable of executing the trust reposed in them; but also by their insanity and want of understanding they are incapable of determining whether they will take upon them the execution of the trust, or not. Godolph. 86.

Therefore it hath been agreed, that if an executor become *non compos*, the spiritual court may, on account of this natural disability, commit administration to another. Salk. 36. pl. 1.

6. Who, in respect of their Fortune and Circumstances, may be Executors; and therein of obliging an Executor to give Security.

It seems to be now agreed, that the spiritual court cannot refuse to grant the probate of a will to a person appointed executor, on account of his poverty or insolvency; for, as he is but a trustee for the deceased, and such a person as the testator thought proper to appoint for that office, without any previous qualification, the refusing to admit him executor would be attended with these inconveniencies: *1st*, That though he has a temporal interest, yet he cannot sue for the debts of the testator before probate, which may be a considerable detriment to the testator's estate, and consequently to creditors and legatees. *2^{dly}*, That whilst this affair is in controversy, there will be neither executor nor administrator against whom an action may be brought to recover debts or legacies. *3^{dly}*, That if administration should be granted to another, it would be a good plea at law to an action brought by such a one, that there was a will and an executor appointed. Salk. 36. pl. 1. 239. pl. 11. Carth. 457. Show. 293. Ld. Raym. 361.

Therefore, where to a *mandamus* to the judge of the prerogative court, to grant the probate of a will to a person named executor therein, the ordinary returned, that he was an absconding person and insolvent, and that he refused to give caution to pay legacies bequeathed to some of the testator's infant relations; a peremptory *mandamus* was granted; for the ordinary has no authority to interpose and demand caution of the executor, when the testator himself required none. Carth. 457. The King v. Sir Richard Raines, Salk. 299. and there said, that there had been no precedents of this nature.

nor practice of

So, where after probate of the will the executor became a bankrupt, and there being a suit commenced in the ecclesiastical court to revoke the probate, and grant administration to another, the court of King's Bench granted a prohibition. Show. 293. Hill and Mills, Salk. 36. pl. 1. S. C. Skin. 299.

But an executor is considered but as a bare trustee in equity: so, if he be insolvent, the court of (a) Chancery will oblige him, as they will any other trustee, to give security before he enters upon the trust. Carth. 458. Show. 294. (a) Where, during the litigation of a will as executor under

in the spiritual court, the court of Chancery, on suggestion that the person who claimed as executor

under the will was insolvent, ordered that the debtors to the deceased's estate should forbear to pay any money till the matter was settled in the spiritual court. Chan. Ca. 75.

Chan. Ca. 121. As where the testator bequeathed a legacy to J. S., payable at the age of twenty-one years; on a bill, suggesting that the executor wasted the estate, and praying that he might give security to pay the legacy when due, it was decreed accordingly.

2 Vern. 249. So, where the testator bequeathed a legacy to his child, an infant, payable at the age of twenty-three, and made his wife executrix and residuary legatee, and she married a second husband and died, and he took out administration *de bonis non* with the will annexed, (his wife being residuary legatee); upon a suggestion of insolvency, the court decreed him to give security to pay the legacy when it should become payable.

Utterton v. Mair, 4 Br. Ch. Ca. 270. 2 Vez. jun. 95. [The court of Chancery too will restrain an insolvent executor, and appoint a receiver, who may bring actions in the name of the executor for the recovery of the testator's effects. In like manner, it will restrain the assignees of a bankrupt executor from paying over the fund to him, and this, upon petition in the bankruptcy, from the peculiar authority it hath over them.]

7. Of making Infants Executors.

Godolph. 103. Off. of Exec. 208. An infant may be appointed executor, but he cannot administer till he is of the age of seventeen, (a) during which time administration is to be granted to some friend of his.

(a) For this *vide postea* letter (B).

Godolph. 102. Off. of Exec. 213. So, a child *in ventre sa mere* may be appointed, and if the mother is delivered of two or more children at the birth, they shall be all executors.

Off. of Exec. 213. As to acts done by an infant in execution of the office of an executor, it seems agreed, that regularly all acts done by him in this respect, before the age of seventeen, are not binding, as if he (b) sells the testator's goods, (c) assents to a legacy, (d) receives debts due to the testator, &c.

the age of seventeen cannot sell a lease for years, which he has in right of the testator, with an intent to pay the debts of the testator, and discharge the debts of the infant himself. Roll. Abr. 730.—But in Cro. Eliz. 254. it is holden, that an infant executor, at the age of thirteen, or other person by his order, may sell goods to pay debts.—And though sold for less than worth, yet the sale is good. 3 Leon. 143. & *vide* Keilw. 51. a. (c) That an infant executor cannot assent to a legacy unless he hath assents to pay debts. Chan. Ca. 257. (d) Especially before the age of fourteen. Off. of Ex. 217.

Off. of Exec. 215, 216. Cro. Car. 490. Jon. 400. Moor, 852. And. 177. 5 Co. 27. But all things that an infant executor doth after he attains the age of seventeen, though before the age of twenty-one, if done according to the office and duty of an executor, will hold good and shall bind him, as paying debts, suing for and recovering debts, selling the testator's goods, &c.

Moore, 146.

5 Co. 27. But if an infant executor, after the age of seventeen, but before the age of twenty-one, gives an acquittance or release for a debt or duty owing to the testator, such a release, without an actual

actual payment to the infant, is (a) void; for if this should be construed good, it would be taking away the privilege which the law allows infants to avoid their acts, when they are apparently to their disadvantage; and this, which is in prejudice both to the infant and to the estate of the testator, cannot be said to be done according to his office as an executor.

at seventeen, yet he cannot commit a *devastavit* till he is twenty-one. Vern. 328.—And the author of the Off. of Exec. 213-14. inclines to think, that an infant's assent to a legacy, though after the age of seventeen, is not good, especially if it may subject him to a *devastavit*, as it may do when there are not assets sufficient to pay debts. (a) So, if a bond be forfeited, and the infant executor receive only the principal sum without the penalty, and give a general release of all the debt, this release at law is no bar of the penalty. Cro. Car. 490. Kniveton and Latham.—[The court of Chancery will not direct money to be paid to an infant executor, though above the age of seventeen; but will refer it to a master to inquire whether there are any debts or legacies, and to consider of a maintenance. Campart v. Campart, 3 Br. Ch. Rep. 195]

S. P. Off. of Exec. 285. S. C. Hence it is said, that though an infant may administer

If an infant executor sues or is sued, he must regularly appear by his guardian, and not by attorney, for by law he is disabled to make an attorney; for if he suffers by the neglect or false pleading of his attorney, he has no remedy against him.

But for this *vide tit. In-fancy and Age*, and where he may appear

by attorney, being joined with others, who are of full age, *vide* Cro. Eliz. 541. Poph. 130. Cro. Jac. 441. Mod. 47. 298. 3 Bull. 180. Vent. 102. Sid. 449. Lev. 299. 2 Saund. 212. Yelv. 130. Lev. 181. Cro. Eliz. 378. Carth. 122. Salk. 205. pl. 1. 4 Mod. 7.

8. Of a Feme Covert Executrix.

A feme covert may be appointed executrix, and in the spiritual courts she is considered as a feme sole, capable of suing and being sued without her husband; and therefore it seems, that according to their law she may take upon her the probate of the will without the assent of the husband, who hath no right to interfere or meddle in the affair.

Off. of Exec. 202. Godolph. 110.

But by our law, husband and wife are considered but as one person, and as having one mind; which is placed in the husband, as most capable to rule and govern the affairs of the family, and therefore the wife can do no act, which may prejudice the husband, without his consent and concurrence: hence the husband must be joined (b) in all actions by or against his wife; and consequently a wife cannot, by our law, take upon her the office of executorship, without the consent of her husband.

Keilw. 122. And. 117. Off. of Exec. 203. [(b) If, therefore, the husband be abroad, the court of Chancery will restrain the execu-

trix from getting in the assets of her testator, and appoint a receiver for that purpose, with power to commence suits for the recovery of debts due to the testator's estate. Taylor v. Allen, 2 Atk. 213.]

Therefore, it seems, that if a wife, who is made executrix, is cited in the spiritual court to take upon her the executorship, and the husband appears and refuses his consent thereto, if afterwards they proceed to compel her, a prohibition will be granted.

Off. of Exec. 203.

Also, a wife cannot, against her consent, though her husband is willing, be compelled to take upon her an executorship; but if the husband administers, she will be bound by it during the coverture.

Godolph. 109, 110.

So, if a wife administers, though against the consent of the husband, and an action is brought against them, they are estopped to say, that the wife was not executrix,

Godolph. 110.

So,

Bro. Ex-
ecutor.
Godolph.
110.

So, if a feme sole be made executrix, and she marries before she intermeddles with the estate, and her husband administers; this is such an acceptance as will bind her, and she can never afterwards refuse it.

Off. of
Exec. 198-
9. but how
far the hus-
band's con-
sent is ne-

It is said, that a feme covert executrix may, without the consent of her husband, make a will, and appoint an (a) executor as for those things which she hath as executrix, for she has them *in auter droit*.

cessary to make the will of a feme covert good, *vide tit. Devises*, letter (A). (a) May make her husband such executor. Godolph. 110.

9. Of making Creditors Executors.

12 H. 4. 21.
Plow. 185.
Hdt. 128.
Off. of
Exec. 31.
Godolph.
115.

A debtor may make his creditor executor, and in such case the executor may retain so much of the testator's assets, as will satisfy himself: but this must be understood where the debt is in an equal degree (b) with those of the other creditors; for if he be a simple contract creditor, he cannot retain against a creditor by specialty, or any other of a superior nature.

Salk. 304. Godb. 216. Hob. 10. Cro. Car. 372. Jon. 345. Keilw. 59. [(b) Sir William Blackstone founds the executor's right of retaining upon this; that he cannot, without an apparent absurdity, commence a suit against himself as representative of the deceased, to recover that which is due to him in his own private capacity. 3 Bl. Com. 18. But one executor shall not be allowed to retain his own debt, in prejudice to that of his co-executor in equal degree; but both debts shall be discharged in proportion. Vin. Abr. tit. Executors (D 2).]

Godolph.

So, if administration be (c) granted to a creditor, he may retain so much of the intestate's assets, as will satisfy himself; but this also must be understood as to creditors in equal degree.

(c) But an executor *de son tort*, who is a creditor, cannot retain, because this would be allowing him to take advantage of his own wrong. 5 Co. 30. Cauter's case. [2 Bl. Comm. 511. Yet if he afterwards takes out administration, he may shew it, and then retain, 2 Ventr. 180.; though the administration be granted *pendente lite*. Stil. 337. Andr. 328.]

Roll. Abr.
949. Ashby
and Child,
Stile, 384.

Also, such an administrator, who is a creditor by specialty, may bring an action of debt against one who possesses himself of the intestate's goods as executor *de son tort*, with an averment, that none of the goods came to his hands to satisfy the debt; for though he may bring trover or trespass against him as administrator, yet as against a stranger he is not deprived of this other remedy; for the reason why the debtor's making the creditor executor, or his taking out administration, is said to suspend or extinguish the action, is on supposition of assets.

Salk. 304.
Roll. Abr.
940.

So, if there are no assets, he may sue the (d) heir of the obligor, where the heir is bound.

(d) So, if a creditor is made executor with others, he may sue the others, especially if he hath not administered. Off. of Exec. 32. Godolph. 125. & *vide* Cro. Car. 372. Jon. 345.

3 Keb. Rep.
116.
2 Lev. 73.
Cock and
Crofs.

So, if A. and B. be jointly and severally bound to C., and A. makes C. his executor, (or as the case was,) makes D. his executor, who makes C. his executor; in this case, if C. has not received satisfaction of the assets of A., he may sue B.; for, being jointly and severally bound, he may sue which of them he pleases, and though debt be one, yet obligations are several, and no assets appear of the value of the debt to retain, and there might be a judgment against which he could not retain.

[The

[The bare appointment of a creditor to be executor, if he refuse to act, will not extinguish his legal remedy for the recovery of his debt.]

Rawlinson
v. Shaw,
3 Term
Rep. 557.

10. Of making Debtors Executors.

It is laid down as a general rule, that if a creditor makes his debtor executor it is an (a) extinguishment of the debt, for he cannot sue himself.

Roll. Abr.
920-21.
5 Co. 30. in
Needham's

case. Off. of Exec. 30. Godolph. 113. (a) For being a personal action, and once suspended, it cannot be revived again. Hob. 10. — But though it is a discharge of the action, yet the debt is assets, and the making him executor does not amount to a legacy, but to payment and a release. Salk. 306. per Holt, Ch. Just.

But if a person dies intestate, and the ordinary commits administration to a debtor, the debt is not thereby (b) extinguished, for he comes into the administration by the act of law, whereas the other is the act of the party.

5 Co. 126.
Salk. 306.
Off. of
Exec. 31.
(b) And
therefore if

an obligor administers to the obligee, and makes his executor, and dies, the creditor of the obligee may well bring an action against him. Sid. 79.

If the debtee makes the debtor and another co-executors, and one of them makes his executor, and dies, the surviving co-executor shall not have an action to recover the debt against the executor of the debtor, because the debt was once extinct; for it could not be brought but in the names of both the co-executors, notwithstanding (c) one alone administered; and it could not be brought in both their names, because the debtor could not sue himself.

8 E. 4. 3.
20 E. 4. 17.
Plow. 264.
Leon. 320.
(c) If the ob-
ligee makes
the obligor
and others
his execu-
tors, and the
obligor re-

fuses, but the others administer, and the obligor dies first, yet the debt is released; for the obligor, notwithstanding the refusal, might have come in and administered, and the probate by the others was for his benefit. Salk. 308. per Holt.

So, where *A.* being bound in an obligation to *B.*, *B.* makes *A.* his executor, who administers several of the goods, but dies before probate of the will, and administration to *B.* being granted to *J. S.*, he brought his action against the heir of *A.*, but it was holden, that the debt was released in this case, though *A.* never proved the will; for by administering as executor he was complete executor for this and several other purposes.

Salk. 299.
pl. 12.
Wankford
and Wank-
ford.

But all these cases of extinguishment by making debtors executors, must be understood where there are assets sufficient to discharge and satisfy the testator's debts and legacies.

Cro. Car.
373. Off.
of Exec. 30.
2 Bl. Comm. 511-12.

Therefore, where a debtor and another were made executors by the debtee, who by his will appointed, that out of the debt due to him they should pay a certain legacy, it was adjudged, that as to that legatee this debt was not extinct, but that it remained assets to pay legacies as well as debts; and this being a legacy, and properly recoverable in the spiritual court, the court of *B. R.* refused to grant a prohibition to a suit for it there, and the rather in this case, because it was expressly devised to be paid out of the debt.

Yelv. 160.
Flud. and
Rumcey.

So,

Selwin and Brown, decreed and affirmed in the House of Lords, 21 March 1734. Caf. Temp. Talb. 240. S. C.

So, in a late case, where the testator devised several legacies, and amongst the rest gave considerable legacies to his two executors, to whom also he devised the surplus of his estate; and there being a debt of 3000*l.* due by bond to the testator from one of the executors, he insisted, that, there being sufficient assets to satisfy all the legacies, this 3000*l.* should not be brought into the surplus of the testator's estate, but that the same was extinguished for his benefit by his being made co-executor; and that though the surplus of the estate was devised to them both, yet that this debt could not be taken to be part of that surplus, being before extinguished; it was decreed, that the 3000*l.* (a) should be taken as part of the surplus of the testator's personal estate, and both executors equally entitled to the same; for though in some books the testator's making a debtor executor is said to be an extinguishment of the debt, because an executor cannot sue himself; yet it was never doubted, but that such a debt remained assets to satisfy creditors, and was also resolved to be assets to satisfy legacies; and this devise of the surplus and residue of the testator's estate being as much a legacy, and as well recoverable in the spiritual court, as any particular legacy, it was but fitting, that, since the courts of equity claim now a concurrent jurisdiction with the ecclesiastical courts in matters of this nature, there should be the same measure of justice in both these courts.

(a) Chan. Ca. 292. S. P. decreed.

Carey v. Goodinge, 3 Br. Ch. Rep. 110.

[A testator gave legacies to his brother and nephew, who were indebted to him in different sums, and made no disposition of the residue. Lord *Thurlow* said, he thought it had been a settled point in the court of Chancery, that the appointment of the debtor executor, was no more than parting with the action; and declared it a trust for the next of kin.]

11 H. 4. 83. Cro. Car. 372. Jon. 345. (b) But if the obligee

If the debtee make the executrix of the debtor his executrix, and die, this is no extinguishment of the debt, because the executrix is entitled to the same, not in her (b) own right, but in the right of another.

takes the obligor to husband; this is an extinguishment of the debt, because it would be a vain thing for the husband to pay the wife money in her own right. Co. Lit. 264. Salk. 306. — But if the executrix of the obligee takes the obligor to husband, this is no extinguishment of the debt, for he may pay money to her as executrix; because, if she lays the money so paid to her by itself, the administrator *de bonis non* of her testator (if she dies intestate) shall have that money as well as any other goods that were her testator's. Leon. 320. Moor, 236. Salk. 306.

2 Mod. 315. Joan Bailie's case. See 12 Mod. 9. 205.

Under this head of making debtors executors, it may be proper to observe, that if a debtor be in execution, and the plaintiff die, by which the right of administration descends upon the debtor; in this case he cannot be discharged upon a *habeas corpus*, because *non constat de personâ*; neither can he give a warrant of attorney to acknowledge satisfaction; and therefore it seems most advisable to renounce the administration, and get it granted to another, and then he may be discharged by a letter of attorney from such administrator.

(B) Of the different Kinds of Executors and Administrators: And herein,

1. Of an Administrator *durante minoritate* of an Infant Executor or Administrator.

1. *Who may be such an Administrator.*

IF one makes an infant his executor, or dies intestate, and the right of administration devolves upon an infant, in these cases, the ordinary is to grant administration during the minority of the infant, *i. e.* in the first case, till he arrives at the age of seventeen, when by the civil law he may be executor, and in the latter till he arrives at the age of twenty-one, when only he is fit to be a trustee, because an infant cannot, before his full age, by the common law, give bond to administer faithfully.

Godolph. 102.
5 Co. 29.
[Freke v. Thomas,
1 Salk. 39.
1 Ld. Raym. 667. S. C. Id. 338.
S. C. cited. Com. Rep. 159. S. P.]

And as such an administrator is but in nature of a curator for the infant in civil law, and has no interest or benefit in the testator's or intestate's estate, but in right of the infant; it has been always holden discretionary in the ordinary to whom to grant it, and therefore it hath been frequently (*a*) adjudged, that he is not obliged within the statute 21 H. 8. c. 5. to grant it to the next of kin either of the deceased, or the infant.

If *A.* makes *B.* his executor, and *B.* makes *C.* an infant executor, and letters of administration are granted to *J. S.* during the minority of *C.*, *J. S.* cannot bring an action against a debtor of the first testator by virtue of this administration, nor hath he authority to meddle with his goods.

If an infant, and one of full age, are made executors, he who is of full age may take out administration *durante minoritate* of the infant, and may declare his executor or administrator *durante minoritate*, and there is no absurdity in this case, that there should be an executor and administrator to the same party, and this is only to enable him to sue alone.

[In suits by executors, some of whom are under age, they must all join, and may sue by attorney; but in suits *against* them, the infants cannot appear by attorney.

Tremain, 2 Saund. 212. 1 Mod. 47. 72. 296. S. C. 1 Sid. 449. S. C. 1 Lev. 299. S. C. 1 Vent. 102. S. C. Raym. 198. S. C. Frecebaldis v. Kinaaston, 2 Str. 783.]

Cro. Eliz. 211. Linnier and Every.
2 Lev. 239, 240.
Smith v. Smith, Yelv. 150.
Foxwith v.

2. *What Acts he may do.*

It seems to be agreed, that though an administrator *durante minoritate* hath but a limited and special property in the estate of the deceased, yet he may do all acts which are incumbent on an executor, and which are for the advantage of the infant and estate of the deceased; and therefore he may sell *bona peritura*, as a bailiff may, such as fat cattle, grain, or any thing else which

Roll. Abr. 910.
Owen, 35.
5 Co. 29.
Cro. Eliz. 718. Godb. 104.

(a) But not unless there are assets to pay debts. 5 Co. 29. a.

may be the worse for keeping : so, he may (a) assent to a legacy, and may sue and be sued.

5 Co. 29.

S. C.

2 And. 132.

Prince's

case. Cro.

Eliz. 217.

2 And. 132.

3 Leon. 278.

S. C. &

vide 6 Co.

But he cannot do any thing to the prejudice of the infant ; and therefore he cannot sell the goods of the deceased any farther than they are necessary for payment of the debts, nor can he otherwise sell a term for years during the minority of the infant, for the words of his authority are, *administrationem omnium & singulorum bonorum ad opus, commodum & utilitatem executoris durante sua minori etate, & non aliter nec alio modo committimus, &c.*

67. b. in Sir Mowl Finch's case, a diversity taken, where administration is granted *durante minori etate executoris*, in such *special* manner as this case of Prince's is ; and when such administration is granted in a *general* manner ; for in the first case such administrator cannot make leases of any term vested in the executor, but in the other case he may, and they shall be good till the executor attain the age of seventeen, and until he enter.

Roll. Abr.

910, 911.

If administration *durante minoritate* be granted to *A.*, and afterwards repealed and granted to *B.*, who obliges *A.* to account to him, and afterwards gives him a release ; this release will not bind the infant, for this does not appear to be for the benefit or advantage of the infant.

Latch. 267.

And. 34.

Mod. 174.

Sid. 57.

6 Co. 18. b.

If an administrator *durante minoritate* wastes the assets, the more proper way to charge him is by action on the case by the infant when he comes of age : also, by some opinions he may bring detinue against him for those goods which he still continues in his possession, or he may oblige him to account in the spiritual court, but cannot bring a writ of account against him at law ; neither is he chargeable in any action at the suit of a creditor, after the infant comes of age ; but such creditor may sue the infant, who has his remedy against the administrator.

Hob. 250.

Briers and

Goddard ;

but a *quare*

is added,

How the

case would

be if the wife died, by which the husband would be no longer chargeable ; & vide Raym. 484.

If an administratrix *durante minori etate* of her infant daughter executrix, gives several bonds to the testator's creditors for their debts, and takes a second husband, the husband may retain, as his own, so much of the goods of the testator as amounted to the value of the debts paid and undertaken by the wife.

Comb. 465.

resolved per

Holt. See

Carth. 432.

Ld. Raym.

265.

So, if an action be brought against a special administrator, and the administration determine pending the action, he ought to retain assets to satisfy the debt which is attached on him by the action.

3. At what Time the Authority of an Administrator durante minoritate determines.

5 Co. 29.

Hob. 251.

Cro. Eliz.

602. Cro.

Car. 516.

Carth. 446.

Comb. 475.

Salk. 39.

It has been already observed, that there is an established difference, where administration is granted to one as guardian to an infant, who hath a right to administer, but is incapable to take it by reason of his minority, and where an administration is granted during the minority of an infant executor ; that in the last case the administration determines as soon as the executor at-

tains

tains the age of seventeen years; but in the other case it continues till the infant attains his full age. pl. 1. Ld. Raym. 338.

667. Comy. Rep. 112. 159.

Also, it seems agreed, that, if administration be granted during the minority of several infants, it determines upon the coming of age of any one of them; and it is laid (a) down by my Lord Coke, that administration granted during the minority of an infant executrix ceases upon her marriage.

(a) In Prince's case, 5 Co. 29.

But as this matter was fully debated in a late case, I shall here insert so much thereof as relates to this point.

One made his will, and thereby, after several specifick and pecuniary legacies, gave and devised the residue and remainder of his personal estate to his four nieces, and made J. S. his executor, and died. The executor proved the will, and afterwards died intestate; and thereupon administration *de bonis non, & cum testamento annexo*, was granted to the plaintiff during the minority of the four nieces. The residuary legatee, one of the nieces, married a person who was of full age; but she herself was an infant under the age of twenty-one years, though above seventeen; and Sir Henry Johnson, in the year 1696, having given the testator a promissory note for the payment of 800*l.* and upwards, by his will in 1719, gave and devised all his real and personal estate to William Guidott, Esq. for the payment of his debts, legacies, and subject thereto, in trust for such child or children as the defendant, the Lord Strafford, should have by his lady, who was the only daughter and heir of Sir Henry Johnson, to whom he had been married about six or seven years; and in the same year 1719, Sir Henry Johnson died, Mr. Guidott, the executor, renounced, and the Lord Strafford's children being infants of tender years, the Lord Strafford took out letters of administration *cum testamento annexo*, during the minority of his children, to Sir Henry Johnson; and there being likewise a bond given by Sir Henry Johnson to the same person, for payment of a further sum of money, the plaintiff Jones brought an action of debt upon the bond in the court of Exchequer, to which the defendant, the Lord Strafford, pleaded *solvit ad diem*; and also by leave of the court pleaded further as a double plea, pursuant to the act for amendment of the law, that he had fully administered, *preterquam* such and such judgments, to several persons, and that he had not assets *ultra* sufficient to pay and satisfy those judgments; upon this plea the plaintiff Jones brings his bill for a discovery and account of assets, and the three nieces, who were infants and unmarried, and likewise the married niece, who was also an infant, and her husband, were co-plaintiffs in the bill. To this bill, which was not only for a discovery of assets of Sir Henry Johnson, but likewise for payment and satisfaction both of the bond-debt, and likewise of the simple contract debt due on the note, the defendant, the Lord Strafford, put in a demurrer, which was, that by the plaintiffs' own shewing in their bill it appeared, that one of the nieces was married, and therefore having a husband capable of acting for her, the administration granted

Jones v. Lord Strafford, Hil. 1730. Lord Chancellor, assisted by Lord Ch. J. Raymond, on pleas and demurrers. 3 P. Wms. 79. S. C.

to

to the plaintiff *Jones*, during the minority of the four infants, was determined: The question, therefore, was, Whether, one of the four nieces being married, and her husband of full age, the administration granted to the plaintiff *Jones*, during the minority of the four nieces, determined, though she herself was still under the age of twenty-one years? It was agreed on all hands, that where an infant is made executor, and administration is granted during his minority, that such administration ceases *ipso facto*, when the infant attains the age of seventeen years; and the opinion of Lord *Coke*, 5 Co. 29. in *Prince's* case, was cited, that so it would likewise, if such infant executrix, being under seventeen, should marry, because her husband was capable of acting for her; and it was argued for the defendant, that if this were so in case of an infant executrix, there was the same reason for it in the present case, where one of the four nieces, during whose minority administration *cum testamento annexo* was granted, was married; that it was agreed on the other hand, that, whenever any one of the four nieces attained the age of twenty-one years, the administration ceased, and there was the same reason when one of them married and had a husband capable of acting for her; that this was to be resembled to the case of a guardian at common law, and that if an infant feme married, the guardianship was determined, because the husband was immediately on the marriage become her guardian; and it would be inconsistent that she should at the same time be under the power of another guardian; so here she, from her marriage, became under the care and guardianship of her husband, and he was capable of acting for her, and consequently the administration granted during the minority of the four was then determined in the same manner as if she had attained her age of twenty-one years; and then the plaintiff *Jones*, during the minority of the four, had no right to bring this bill, and that the demurrer was good; and for this were cited 5 Co. 29. *Prince's* case, 6 Co. Sir *Moyle Finch's* case, 1 Salk. 39., and that the only case against it was 2 Jon. 48.; and they also cited the opinion of Just. *Twissden*, 1 Vent. 103. But on the other side it was argued, and the court was clear of opinion, that the administration in this case did not determine by the marriage of one of the four nieces; they said, that it was by no means clear, even in the case of the infant executrix, that, if she married under the age of seventeen, the administration granted during her minority was thereby determined; that this was not the principal point in *Prince's* case, but only the opinion of, or an *obiter* case put by, my Lord *Coke*; that the same case was reported in *Cro. Eliz.* 718. and 1 *And.* and there nothing said of it; that in the Office of Executors, supposed to be written by Justice *Doddridge*, the author much marvels at this opinion of the Lord *Coke*; that in the spiritual courts, where these administrations are granted, they take no notice of the husband, nor will in such case grant probate of the will or administration to him, but look upon the wife as to this purpose as a feme sole, and that the only power, which the husband hath in these cases,

is derived to him from the common law, by which he is in many cases enabled to pay and receive, and to act for his wife; but the property of none of the goods or chattels, which the wife hath as executrix or administratrix, is vested in him; for if she survive, they likewise survive to her, and if she die first, there must be an administration *de bonis non* of her testator granted to another; and if this be so in the case of an infant feme executrix, that the administration granted during her minority does not cease by her marriage, much less in the present case; for here the administration is granted to the plaintiff Jones, *donec una earum quatuor vigesimum primum ann. etatis attigerit*; so that, by the express words of the administration, it is not to determine sooner; and though it does then determine, when any one of the four attains her age of twenty-one years, that is not the present case; for here, though she is married, yet she is still under twenty-one, and the husband has nothing to do with it: he, by his marriage, is not become next of kin to the testator, nor will the spiritual court grant administration to him; and if the marriage were to be a determination of the first administration, he could not succeed to it, for in that case the administration could only be granted to the wife; nay, they would not grant it to the husband and wife jointly: that the wife, in this case, was not entitled to the whole personal estate, as an infant executrix is, but only to her own undivided fourth part; and though the spiritual court may grant administration as to a particular thing, or in a particular place, yet they never grant administration as to an undivided third or fourth part of the same thing; for then who should bring the action for it, as of a horse, or other entire thing? The husband in this case would be entitled but to a fourth part of it in right of his wife; and must there be several administrations granted for one and the same thing? This would be absurd, as well as to actions to be brought by them, as to actions brought against them; that if the administration is determined by the marriage, it will be to no manner of purpose to make an application to the spiritual court; they will not grant it to the husband, and the wife being still under age, they must grant it to some other person during the minority of her and her three sisters, as it was before; and then it would be doing a vain thing to determine it: that the spiritual court by 31 E. 3. *st. 1. c. 11.* is to grant administration to the next of kin, which the husband is not in this case: that the law takes notice of an executor before probate, and he may do several things before probate; but the power of an administrator is derived to him only by the letters of administration; that if the husband has no right to claim the administration in this case, no more has the wife; for she being still under age as well as the other nieces, the court will grant administration to none of them; or, if they would, might grant it to any of the others as well as to her, it being in the discretion of the ordinary; and if the spiritual court should grant administration to the husband, that is not *de jure*, that he is entitled to it, but they may grant it to him as they would to any

other person. The court, therefore, was of opinion, that *Jones* still continued administrator during the minority of the four nieces, notwithstanding the marriage of one of them, and that such administration did not determine till one of them came to the age of twenty-one years, and accordingly over-ruled the demurrer.

Hob. 251. Although it seems clear, that the authority of an administrator
Cro. Jac. *durante minoritate* of an infant executor determines at seventeen,
590. 2 Roll. and that of an administrator *durante minoritate* of an infant,
Rep. 207. who is entitled to administration, at the age of twenty-one, yet
5 Co. 25. a. if an action be brought against such an administrator, the plain-
Roll. Abr. tiff in his declaration need not aver, that the infant is still
910. under those ages, for this is a matter more properly within the
Yelv. 128. conuizance of the defendant, and if his power be determined,
he ought to shew it; but he cannot object it, after he has taken
issue on another point, which is an admission that his authority
still continues.

(a) Hob. 51. But it is (a) said, that if such an administrator brings an ac-
Cro. Jac. tion, he must aver, that the infant is still under age, because
590. 2 Roll. it is a matter within his conuizance, and the thing that entitles
Rep. 209. him to the action; but in this case also it hath been (b) adjudged,
Roll. Rep. that the defendant must take advantage of this omission, by way
400. of plea or demurrer, and cannot object it after he has joined
(b) Cro. issue with him on another point, which admits the continuance of
Car. 240. his authority.

Comb. 465. But if an action of debt be brought against an administrator
Ld. Raym. generally, and the defendant pleads in abatement, that administra-
255. tion was granted to him during the minority of his wife, he must
Carth. 422. aver, that the wife is still living; for though he was a special ad-
Sparks and ministrator at first, yet if his wife were dead, he might be ad-
Cotes, ministrator generally, as the declaration supposeth.

Roll. Abr. It seems to be clearly settled, that if an administrator *du-*
888-9. *rante minoritate* brings an action and recovers, and then his time
Cro. Car. determines, that the executor may have *scire facias* upon that
227. judgment.
2 Brownl.
83. Gubb. 104. Lev. 181. Keb. 750. Vern. 25.

2 Lev. 37. Also, it hath been holden, that if such an administrator ob-
Enbrin and tains judgment, he may bring a *scire facias* against the bail, and
Mompesson; they cannot object that the infant is of full age; for the recog-
but per Hale, nizance being to the administrator himself by name, though he
in this case, be administrator *durante minori atate tantum*; yet he may have a
if after the *scire facias* against the bail.
infant came
of age he

had sued out execution upon the principal judgment, it might have been a question, whether that ought
to be sued out by him, or by the infant.

2. Of an Administrator *de bonis non*, where the first Administrator dies, or the Executor dies intestate, or without Probate of the Will. And herein :

1. In what Cases Administration *de bonis non* shall be granted, and to whom.

These kind of administrations are granted in the following instances :

1. If a person dies intestate, and administration is granted to *J. S.*, who dies without having administered all the intestate's goods, in this case the ordinary must grant administration of the goods unadministered to another ; for the first administrator cannot continue the trust reposed in him to his executor or administrator, because he has no interest but what he derives from the act of the ordinary.

Swinb. 395.
Roll. Abr.
907.
Vaugh. 182.

2. So, if an executor dies intestate, administration *de bonis non cum testamento annexo* of the testator must be granted by the ordinary, for they are not devolved on the administrator of the intestate, because he had them *in autre droit*, in order to discharge the trust reposed in him ; but if the executor makes his executor, then the trust is devolved on him ; and after payment of the debts and legacies of the first testator, he has an absolute property in the goods.

Roll. Abr.
907.
Vaugh. 182.

3. If the executor dies before probate, though he (*a*) administered in part by disposing of the testator's goods, &c., yet his executor cannot be executor to the first testator ; but in this case there is not an administration *de bonis non administrat.* granted, but an immediate administration, because the executor died *ante omnes executionis testamenti super se susceptum*, which is the foundation the spiritual courts proceed upon.

Roll. Abr.
907.
Salk. 305.
Dyer, 372.
(*a*) Because the administering is an act *in pais*, of which the spiritual court cannot take notice ; yet the acts done by the executor are good. 1 Salk. 308. *per Holt.*

4. So, if an executor (*b*) refuses administration with the will annexed, it is to be granted to another.

2 Co. 37.
Hensloe's case.

(*b*) An executor may renounce, but cannot assign over the executorship, because it is a personal trust. Vaugh. 182.—Also, where an executor before probate possessed himself of the goods, paid a debt, and converted some of the goods, and after, before the ordinary, refused ; and upon such refusal the ordinary granted administration to the widow of the deceased ; it was adjudged such administration was void, there being a rightful executor that had administered. Mod. 213-14. Parten and Esfeden.

In these cases administration is to be granted to the next of kin to the first testator or intestate ; but if the testator appoints a residuary legatee, such legatee is entitled to administration.

Dyer, 372.
2. Ifield and Stanley.
Show. 25.
3 Mod. 59.
Vern. 200.

2. To what Things unadministered an Administrator *de bonis non* is entitled.

An administrator *de bonis non* is entitled to all the goods and personal estate, such as terms for (*c*) years, household goods, &c., which

Salk. 306.
Skin. 143.
pl. 15.
(*c*) Whe-

ther an administrator *de bonis non* be entitled to an estate *per autre vie*, within the letter and meaning of the statute 29 Car. 2. c. 3. Carth. 376. 2. By stat. 14 Geo. 2. c. 20. § 9. distribution shall be made of estates *per autre vie*, whereof there is no special occupant, and which are undivided.

Salk. 306. Also it is holden, that if an executor receives money in right of the testator, and lays it up by itself, and dies intestate, that this money shall go to the administrator *de bonis non*, being as easily distinguished to be part of the testator's effects, as goods *in specie*.

Vern. 473. But if *A.* dies intestate, and his son takes out administration to him, and receives part of a debt, being rent arrear to the intestate, and accepts a promissory note for the residue, and then dies intestate; this acceptance of the note is such an alteration of the property as vests it in the son, and therefore on his death it shall go to his administrator, and not to the administrator *de bonis non*.

3. In what Actions commenced before his Time, may an Administrator *de bonis non* proceed.

Roll. Abr. 889. W. Jones, 243. If a feme executrix to *J. S.* takes a husband, and the husband and wife bring an action of debt upon an obligation in right of the wife, as executrix to *J. S.*, and they have judgment to recover the debt with damages and costs; if the wife dies, the husband cannot take out execution, for he is not entitled to the thing recovered, but it shall go to the succeeding administrator of *J. S.*, as the intestate's effects.

Yelv. 33. But yet in these cases, though the administrator *de bonis non* was entitled, yet he could not sue out execution, because he was not privy to the judgment, and therefore was driven to a new action; but this being very inconvenient,

By the (a) 17 Car. 2. cap. 8. it is enacted, "That where any judgment after (b) a verdict shall be had by or in the name of any executor or administrator, in such case an administrator *de bonis non* may sue forth a *scire facias*, and take execution upon such judgment."

(a) Made perpetual by 1 Jac. 2. c. 17. (b) He may also, it seems, perfect an execution thus begun. 6 Mod. 290. Salk. 322. pl. 10. Ld. Raym. 1072. S. C. 11 Mod. 34. pl. 6. Administrator *de bonis non* entitled to the rent recovered by the executor of the executor, or a lease made by such first executor.

3. Of an Executor *de son tort*: And herein,

1. What Acts or Degree of Intermeddling will make an Executor *de son tort*.

Swinb. 443. An executor *de son tort* is a person who, without any authority from the deceased or the ordinary, does such acts as belong to the office of an executor or administrator.

Godolph. 90. [What acts make a person so liable, is a question of law: whether proved or not, is for the consideration of the jury. 2 Term Rep. 97.]

There are various acts which will make a man executor *de son tort*; such as possessing and converting the deceased's goods to a man's own use; paying the deceased's debts out of his assets; suing for and receiving debts due to him; and it is said, in general, that all acts of acquisition, transferring, or possessing of the deceased's estate, will make an executor *de son tort*, because these are the only *indicia* by which creditors can know against whom to bring their actions; and an administrator is not liable for the goods converted by such executor till he has recovered them in damages.

Also, a person may be executor *de son tort*, by releasing debts due to the testator; by paying legacies with the deceased's effects; by entering on a specific legacy without the executor's assent; by paying and discharging the deceased's mortgages with his money or goods; by delivering to the deceased's (a) wife more apparel than is suitable for her; or by answering as executor to any action brought against him; or by pleading any other plea than *ne unques executor*.

to her degree, this makes her an executrix *de son tort*. Roll. Abr. 918.

So, if a person is appointed by the ordinary *ad colligendum bona defuncti*, though his acting in obedience to such authority will not make him an executor *de son tort*; yet if he proceeds further, and sells *bona peritura*, &c., he becomes executor *de son tort*: so, if the ordinary had given him express authority to sell the goods, yet this would not free him from being executor *de son tort*, for the ordinary himself cannot give any such authority.

[So, if the servant of B. sell the goods of C., an intestate, as well after his death as before, though originally by the orders of C., and pay the money arising therefrom to B., B. may be sued as an executor *de son tort*.

So, if a person having intermeddled in the intestate's affairs, has money belonging to him in his hands at the time when an action is brought against him for a debt due from the intestate, he is liable as an executor *de son tort*.

So, if a creditor take an absolute bill of sale of the goods of his debtor, but agree to leave them in his possession for a limited time, and in the meanwhile the debtor die, whereupon the creditor takes and sells the goods, he will be liable to be sued for the debts of the deceased as executor *de son tort*; for the debtor's continuing in possession is inconsistent with the deed, and fraudulent against creditors.]

And by the 43 *Eliz. cap. 8.* it is enacted, "That all and every person and persons that hereafter shall obtain, receive, and have any goods or debts of any person dying intestate, or a release or other discharge of any debt or duty that belonged to the intestate, upon any fraud, or without such valuable consideration as shall amount to the value of the same goods or debts, or near thereabouts, (except it be in or towards satisfaction of some just and principal debt of the value of the same goods or debts, to him owing by the intestate at the time of his decease,) shall

5 Co. 33. b.
Read' caie.
Off. of
Exec. 171.
Godolph.
171. Dyer,
105. 157.
Keilw. 59.
Roll. Abr.
918.
2 Leon. 224.
3 Leon. 57.
Hob. 49.
Godolph.
91. 92.
Off. of
Exec. 174.
Roll. Abr.
918.
(a) So, if
the wife
takes more
apparel than
is suitable

Roll. Abr. 918.

10 H. 7.
27. Roll.
Abr. 918.
Dyer, 256.

Paget v.
Priest,
2 Term
Rep. 97.
Id. ibid.

Edwards v.
Harben,
2 Term
Rep. 587.

"be charged and chargeable as executor of his own wrong, and
 "so far only as all such goods and debts coming to his hands, or
 "whereof he is released or discharged by such administrator,
 "will satisfy, deducting nevertheless to and for himself allow-
 "ance of all just, due, and principal debts, upon good considera-
 "tion, without fraud, owing to him by the intestate at the time
 "of his decease, and of all other payments made by him, which
 "lawful executors or administrators may and ought to have and
 "pay by the laws and statutes of this realm."

Godolph.

95.

(a) That the expenses herein must be suitable to the deceased's estate and quality. Off. of

Exec. 174.

But it seems, that if the expenses of the funeral are defrayed out of the deceased's effects, the person who meddles herein is an executor *de son tort*. Skin. 274. pl. 2. Carth. 104.

5 Co. 33.

Chan. Ca.
33. Salk.
313. pl. 19.

Also, here we must observe, that regularly there cannot be an executor *de son tort* when there is a rightful executor, or when administration has been duly granted; for if after probate of the will, or administration granted, a stranger gets possession of the deceased's goods, he is a trespasser to such executor or administrator, and may be sued as such.

5 Co. 33. b.

Read's case.
(b) So, if before administration granted, a

stranger gets possession of the deceased's goods, he may be charged as executor *de son tort*, unless he delivers the goods over to the administrator before the action brought; and then he may plead *plene administravit*. Salk. 313. pl. 19.

5 Co. 34. a.

So, although there be a rightful executor who administered, yet if a stranger takes the deceased's goods, and, claiming to be executor, pays or receives debts, or pays legacies, or otherwise intermeddles as an executor, he becomes an executor *de son tort*.

Moor, 126.

Kenrick and Burges.

Style, 407.

2 Mod. 174.

Swinb. 390.

(c) So, if a

stranger enters into an

estate *par*

auter vie,

this makes

him an ex-

ecutor *de son*

tort; because by the 29 Car. 2. c. 3. such estate is made assets. Carth. 166.

As to those things on which a stranger enters and takes possession, and which will make him an executor *de son tort*, it is now clearly agreed, that a person may be an executor *de son tort*, by entering on a lease or term for (c) years, especially if according to the old books he enters in right of the deceased, and does acts upon the land, which belong to the office of an executor or administrator; as ordering the deceased's cattle to be fed on the land, &c.; but if he enters generally, and does not act as an executor, by meddling with the intestate's goods, &c., he is then a disseisor, and not an executor *de son tort*.

But

But this matter will be best explained by inserting the two following modern resolutions.

In an action of debt in the *debet* and *detinet* against an executor upon a lease for years, it was found by special verdict, that the plaintiff leased to *Simon Taylor*, father of the defendant, for years, rendering 180*l.* *per annum* rent; that *Simon* died intestate, and the defendant entered and used the intestate's cattle, and fed them upon the land for three months, and that he fed the cattle with the intestate's hay upon the ground, and, three days before the rent became due, the defendant drove the cattle off the land, and afterwards took out administration of all but this lease; and whether he should be chargeable, or not, for the rent, was the question; and all the court were of opinion, and so gave judgment, that he should be charged; and in this case these points were resolved: 1st, (a) That the action was well enough laid in the *debet* and *detinet*. 2^{dly}, (b) That an executor cannot waive a term, but shall be charged as far as he hath assets, though the rent be greater than the value of the land. 3^{dly}, That administration may be granted by the ordinary for part, as in this case, administration granted, excepting the lease. 4^{thly}, (c) That if an executor *de son tort* takes out administration, this does not purge the wrong so, but that a creditor may charge him as executor *de son tort*. 5^{thly}, An executor *de son tort* of a term shall be chargeable for the receipt of the profits till there be a rightful executor or administrator to charge, as in *Read's* case, 5 Co. 34. a after administration or probate, the stranger that meddles with goods shall not be chargeable as executor *de son tort*, (d) unless he, pretending and claiming to be administrator, pays debts and does other things as executor: now there being no rightful administrator of this term, it being excepted out of the grant of administration, the defendant, by his meddling, has charged himself as executor *de son tort* thereof.

Stubs and Rightwile. (d) And so is Hob. 49.

In an action of waste, the plaintiffs declared that they made a lease to *J. S.* of a barn for thirty-one years, who died intestate, and that the defendant entered claiming *terminum pradii* as executor, and committed waste by pulling down the said barn; and on demurrer it was urged for the defendant, 1st, That there could not be an executor *de son tort* of a term, for no man can qualify his own wrong, by alleging, when he enters generally, that he took only a particular estate, and therefore must be a disseisor in fee. 2. Admitting there may be an executor *de son tort* of a term, yet there is no privity between the lessor and him, to charge him in an action of waste; for at common law, and also by the statute of *Gloucester*, waste lies only against tenant by curtesy, dower, for life or years, neither of which is this tenant; besides, in this action the place wasted is to be recovered with treble damages, which will be an injury to the rightful administrator, as also to the creditors of the deceased. As to the first objection, the court was of opinion, that there might be an executor *de son tort* of a term; and as to a wrong-doer's qualifying his

Pasch. 31
Car. 2. in
C. B. be-
tween Garth
and Taylor.
(a) Accord-
ing to the
resolutions
5 Co. 31.
Cro. Jac.
238.
Bull. 22-3.
Lord Rich-
ard and Frank.
Cro. Jac.
546. 549-
cont. C. O.
Car. 225.
Smith and
Norfolk.
(b) Accord-
ing to Yelv.
103. Hawle
and Web-
ster. Cro.
Jac. 549-
- Though
it is said in
Err. tir.
Waiver, 10.
in such a
case, perad-
venture, he
may waive;
and so is 21
H. 6. 24. b.
Bull. 22.
(c) Accord-
ing to Cro.
Eliz. 102.
3 Lev. 31.
35. Mayor
and Com-
monalty of
Norwich
v. John.
3 Mod. 90.
S. C. ad-
judged for
the plaintiff
in C. B. and
affirmed in
B. R.
2 Show.
Rep. 457.

his own wrong, the difference in these cases they said was, that where a person enters generally upon lands of which there is no term in being, there he cannot qualify his wrong, by saying that he claims only a particular estate, but must be a disseisor in fee: so, where there is a term in being, as in this case, he cannot enlarge his estate by claiming a fee, and it is no objection, that the lessor did not charge him as a disseisor, when he had it in his election to charge him either way; which is the distinction taken in the (a) books. As to the second objection, it was holden, that the want of privity was not material, and that since the statute of *Gloucester*, which is rather a remedial than a penal law, privity is not requisite, for waste will lie against the lord of a villein, who enters upon the land leased to the villein for life, or years: it will lie also against an occupant, who is a mere stranger, as well as against a special occupant, who comes in by the limitation of the lessor. So, if tenant for life commits treason, and the king grants over the estate, waste will lie against the grantee: so, if a reversion escheats, waste will lie for the lord; in all which cases there is no privity: and it would be a manifest injury to the lessor in this case, if he should be delayed of his action till administration is taken out: and as to the objection, that this will be an injury to the rightful administrator, the court held, that the rightful administrator might falsify the recovery; for a recovery against one, that has not right, shall not bind him that has; and after administration granted he is paramount the recovery, *viz.* from the death of the intestate.

(a) As in
9 H. 6. 20.
b.
Dyer, 134.
pl. 6. 14.
114. pl. 18.

Noy, 69.
Goulst. 116.

As to the value of the things taken by a stranger, so as to make him an executor *de son tort*, it seems not to be material; and therefore where an action was brought against such an one, who pleaded *ne unques executor*, and it was found that a bedstead only came to his possession, he was charged with a debt of 60*l.*

Noy, 69.
Offley's case
cited to have
been 39 or 40 Eliz.

So, where on a like plea it was found, that the defendant took only a bible, he was charged with a debt of a hundred pounds.

Cro. Eliz.
472.

So, where the jury found, that the defendant detained *bonam partem bonorum*, and sold them, though it was objected, that *bona pars* was very uncertain; yet the court held, that he should be chargeable, for he cannot detain any part; and if he does, let it be of ever so small value, he is liable as an executor *de son tort*.

2 Vern. 147,
148.

But in these cases, where the things are of a very inconsiderable value, it is said that there may be relief in equity, as where on a plea of *ne unques executor*, the plaintiff proved that a chimney-back came to the defendant's hands, or that the defendant took money for a pot of ale sold by the testator; in these cases the defendant was relieved in equity.

2. *What Acts of an Executor de son tort are as valid as if done by a lawful one.*

An executor *de son tort* may do several acts which a lawful executor may do, and which shall be as binding as if done by a rightful executor. Off. of Exec. 179.

Therefore, if he pays (a) just debts, and an action is brought against him by a creditor, he may plead *plene administravit*. 3 Co. 30.
Off. of Exec. 180.

Carth. 104. Sid. 76. (a) An executor *de son tort* shall be allowed, in equity, all such payments as were incumbent on the executor, according to the course of law; but as to payments made out of order and rule, which the law left the executor liable to, he shall not be allowed them, because to the prejudice of the executor. Chan. Ca. 33. — So, where a widow possessed herself of the personal estate as executrix, under a revoked will, and paid debts and legacies, but had no notice of the revocation; it was holden in equity, that she should be allowed those payments. Chan. Ca. 126. & *vide* Roll. Abr. 919.

But if an action of trover be brought by a rightful executor or administrator against an executor *de son tort*, he cannot plead payment of debts to the value (b), &c., or that he hath given the goods, &c. in satisfaction of the debts, (c) because no man ought to obtrude himself upon the office of another; but yet upon the general issue pleaded, such payments shall be recouped in damages, [and if they amount to the full value, the plaintiff shall be nonsuited.] Carth. 104.
Skin. 274.
pl. 2. [Bull.
Ni. Pri. 48.
(b) He may,
perhaps, of
such goods
as he hath
sold. Bull.
Ni. Pri.
ibid. If the

action be trespass, instead of trover, payment of debts to the value, will go only in mitigation of damages. *Id. ibid.*] (c) For this would take from the rightful executor the liberty which the law gives him of preferring one creditor to another; nay, of preferring himself to other creditors who are in equal degree with him. Off. of Exec. 181.

Also, it is clearly agreed, and hath been solemnly adjudged, that an executor *de son tort* cannot retain any part of the deceased's effects, in satisfaction of a debt due to himself, either against a creditor whose debt may be inferior to his, or against the rightful executor or administrator; for if it were permitted every man to be his own carver, it would occasion endless strife and confusion, and would in effect be allowing him to take advantage of his own wrong. 5 Co. 30.
Coulter's
case. Cro.
Eliz. 639.
Roll. Abr.
922.
Moor, 527.
Brownl. 103.
Yelv. 137.
Mod. 208.
Carth. 104.
2 H. Bl. 26.

2 Stra. 1106. Andr. 328. 356. 3 Term Rep. 590.

3. *How an Executor de son tort shall be charged, and how far a subsequent Administration purges the first Wrong.*

(d) An executor *de son tort* makes himself liable, as far as he hath assets, to all the debts due by the deceased, as also to his (e) legacies, and subjects himself to the action of the rightful executor or administrator, and may by his false plea (as if an action is brought against him by a creditor, and he pleads *ne unques executor*, which is found against him) subject himself to the payment of the whole debt, though the goods which came to his hands be of ever so small value. (d) 5 Co. 30.
Hob. 49.
Off. of Ex-
ec. (e) Roll.
Abr. 919.

And though an executor *de son tort* does afterwards take out letters of administration, yet it is still in the election of a creditor to Godb. 217.
3 Leon. 198.
Cro. Eliz.

102. 365. to charge him as executor or administrator; for having (a) once made himself liable to the action as executor *de son tort*, he 565. 810.
(a) So, if (b) shall never after discharge himself by a matter *ex post facto*. goods come to the possession of an administrator, and his administration is repealed, he shall be charged as executor of his own wrong. Mod. 63. (b) And there an executor *de son tort* cannot plead, that he is an administrator, though administration was actually taken out before the action brought. 2 Vent. 180. & vide 5 Mod. 145.

Roll. Abr. But this it is said must be so understood, that the defendant cannot by this plea abate the plaintiff's writ, by alleging himself administrator; but that yet to other purposes a subsequent administration purges the first wrong, and hath relation to the death of the party; as if one possesseth himself of the goods of an intestate, and pays as much money as the goods are worth, and then takes out letters of administration; in this case he may plead *plene administravit*, and shall retain the goods in satisfaction of what he paid.

pendente lite, being sued as executor, he pleads a retainer for a debt due to himself; to which the plaintiff replies, that the defendant is executor *de son tort*; the defendant rejoins, that letters of administration were granted to him *puis darrein continuance*; this plea was holden good on demurrer, and judgment for the defendant. Vaughan v. Browne, 2 Str. 1106. Andr. 328. S. C. 3 Term. Rep. 588. S. C. cited. If H. get the goods of an intestate into his hands, and administration be granted afterwards, he still remains chargeable as a wrongful executor, unless he deliver over the goods to the administrator before the action is brought, and then he may plead *plene administravit*. Per Holt, C. J. 1 Salk. 313. And he cannot avail himself of a delivery over of the effects to the rightful administrator after the action brought, though in fact no administration was granted at the time of its commencement; nor of the assent of the administrator to his retainer, so as to defeat the action of the creditor. Curtis v. Vernon, K. B. 3 Term Rep. 587. Affirmed in the Exchequer-chamber, 2 H. Bl. 18.— But, an executor *de son tort* is not liable, it seems, *de bonis propriis*, but only so far as he hath wrongfully administered the effects of the deceased. Harris's Justin. 87. n. cites 1 Mod. 213-4. Swinb. 337. ed. 1743.]

Moor, 126. So, where an executor *de son tort* enters and takes possession of the goods, and sells them, and afterwards takes out administration, yet the sale is good by relation: but if the intestate was entitled to a lease for years in reversion, and such an executor *de son tort* had sold the term, and afterwards had taken out administration, and then had sold it again to another, the second vendee must have enjoyed it, because there can be no executor *de son tort* of a reversion: besides, no entry can be made on a term in reversion.

Cro. Car. If a widow takes possession of her husband's goods, and with 88. the assent and direction of her son sells thereof to the value of Whytmere 400*l.*, and afterwards the son takes out administration and dis- Porter. charges all the debts of the intestate, not only to the value of this (c) Where, in trover, against an executor *de son tort*, at nisi prius, before North, Ch. Just. the question was, Whether goods having been taken in execution upon a judgment obtained against the defendant, by a creditor of the deceased, should discharge him against the plaintiff, who brought his action as administrator; and the opinion of the Chief Justice was, that this execution was a good discharge against another creditor that should sue him, to whom he might plead *riens enses mains*; but it was no discharge against an administrator; for men must not be encouraged to meddle with a personal estate without right; but to prevent this mischief, where the party dies intestate, and there is contest about the administration, a man may procure from the ordinary letters *ad colligend.* Vent. 349, 350.

(C) Of the Manner of appointing an Executor: And herein,

1. By what Words an Executor is constituted.

HERE we must first observe, that the appointing of an executor is an essential part of a will; for if a man makes several devises, &c., and appoints no executor, he dies intestate as to his (a) goods and chattels: but though such a signification of the testator's mind as to the disposition of his goods, &c. be no more properly to be called a testament, than any deed, wherein he expresses his mind to grant such and such things, may be called a testament; yet it is not altogether of no force and validity; for since there is an expression of the testator's mind for the disposition of his goods in this or that manner; so far it shall be of effect, that the disposition shall be made according as he hath expressed his mind, and therefore shall administration be granted to the next of kin *cum codicillo annexo*, as it is when a perfect will is made, and an executor refuses.

Godolph. 76. Off. of Exec. 3. Noy, 12. (a) But as to land, a will is good, though there be no executor named, for an executor hath nothing to do with lands and tenements which were not originally testa-

mentary, but are made devisable by act of parliament. Off. of Exec. 3, 4.

On the contrary, the bare naming of an executor in the will, without giving any legacy, or appointing any thing to be done, is sufficient to make it a will, and as a will it is to be proved, for the naming of executors is by implication a gift or donation to them of all the goods, chattels, credits, and personal estate of the testator, and the laying upon them an obligation to satisfy the testator's debts to the just value of his goods and chattels.

Godolph. 82. Off. of Exec. 3.

But although the appointing of an executor be an essential part of a will; yet it is not at all necessary, that the testator should make use of the word *executor* in constituting him; for any words which shew his intention, that such an one should be executor, are sufficient; for a man's will, being supposed his last act, and made when he is *inops concilii*, is to receive a favourable interpretation.

Off. of Exec. 8. Godolph. 82-3. Dyer, 90. [A testator desired certain persons to act as his executors,

and gave one of them a legacy; the Master of the Rolls held, that the legatee, so appointed executor, could not claim his legacy without acting, or at least proving the will. Read v. Devaynes, 3 Br. Ch. Rep. 95.]

Therefore, if the testator says, that he commits all his goods to the administration, or to the disposition of *A. B.*, in this case *A. B.* is as effectually made executor as if the testator had made use of the word *executor*: so, if the testator appoints that *A. B.* should dispose of the goods in his custody, he is thereby made executor of those goods; or if he says, *I make A. B. lord of all my goods*, or *I leave all my goods to him*, or *I make A. B. legatary of all my goods*, or *I leave the residue of my goods to him*.

Godolph. 83.

[So, if after giving several legacies, the testator appoint *A.* and *B.* to receive and pay the contents.]

Pickering v. Towers, Amb. 364.

So,

Godolph. 83. So, if the testator saith, *I will that A. B. be my executor if C. D. will not*; in this case *C. D.* is appointed executor, and may if he pleases be admitted to the executorship, and exclude *A. B.* *
 * *Sed qd.* if *A. B.* should not be first cited, and refuse?

Godolph. 83. So, if the testator, supposing his child, his brother, or his kinsman to be dead, says thus in his will; *forasmuch as my child, my brother, &c. is dead, I make A. B. my executor*; in this case, if the person, whom the testator thought dead, be alive, he shall be executor.

Godolph. 83. Also, if the testator, being asked by another, whether he doth make *A. B.* his executor, doth answer, *yea, I do, or what else, or why not?* or, *whom else should I make executor?* or, *I cannot deny it*, or other words to that purpose, *animo testandi*, this amounts to an assignation of *A. B.* executor.

Godolph. 84. So, if the testator doth make *A. B.* or *C. D.* his executors; in this case they shall both of them be executors, for or shall be here construed *and*, rather than the party for this incertainty should be said to die intestate.

21 H. 6. 6. Off. of Exec. 9. Roll. Abr. 914. But if *A.* be made an executor, and *B.* a co-adjutor, without more, he is not by this an executor with *A.*, nor hath such co-adjutor or overseer any power to administer, or to intermeddle otherwise than to counsel, persuade, and advise.

Godolph. 76. It is said, that appointing him executor, who is named in such a note left with *C. D.*, is not a sufficient making of him an executor at all: but according to *Godolph.*, this must be understood, that it is no sufficient appointing of an executor to make it a written will, because the appointing of an executor is left out of the will; but surely it will be a good nuncupative will, if not a good written will; for why should not such an appointment be good in case where the testator had made a disposition by writing, as well as if he appoint an executor by word of mouth, where he hath made disposition by writing of his goods and chattels?

Godolph. 78. If one appoint my executor to be his executor, and die; if the will be not void for incertainty, yet he is dead intestate until I die, and die testate; but if I die intestate, then he is dead intestate also.

Godolph. 85. If there be demonstration in a will, that is only added as *descriptio persone*, and that be false; yet if the person be well enough known with it, that is sufficient; as if the testator appoints his son *Thomas*, who was lately married, to be his executor, that is well enough, though he be not married.

2. Of appointing an Executor absolutely, or upon Condition.

Off. of Exec. 10. Godolph. 40. Any word in a will, that suspends the assignation of an executor in expectation of some future events, makes the executorship conditional: but if the condition be contrary to the former part of the will, it is void; as if one makes his two executors, provided that one shall not administer, this is (a) void.
 (a) But a proviso that one shall not meddle during the other's life, is good; and by this they shall be executors successively, and not jointly.
 Off. of Exec. 13.

A condition ought properly to relate to something in contingency, that may, or may not be; for if it be subject to no contingency either in substance or circumstance, it is no condition; as, if *A.* makes *B.* his executor, upon condition the sun rise ten days after his death, he is executor absolutely, for there is no contingency to suspend his being so. So, if the testator make *A.* his executor, upon condition the testator's wife and daughter be alive at the time of the death of the testator, and he never had any daughter, the will is absolute, for there is nothing possibly to overthrow it; and in such case, where there is nothing to be a contingency, the adding of a condition can be interpreted nothing but the making an illicit grant. So, captious conditions, that are contrary to the dispositions made, are void, because they cannot be suppose to be made with any other design than that a man should avoid his own grant.

Godolph.
43.

Necessary conditions, either in respect of fact or law, are of no manner of force; for it is in vain to require that which must necessarily be. Impossible conditions in respect of law, persons, nature, or contrariety, are in themselves void, and therefore hinder not an executorship.

Godolph.
44.

If an executor is appointed upon condition that he gives security before such a day to perform the will, or before he takes upon him the administration, he must in those cases perform the condition before he is complete executor.

Off. of
Exec. 11.

But in case of arbitrary conditions, the executor hath time, during his life, to perform the condition, and may enjoy the executorship in the mean time, unless the judge appoints a time for him to perform the condition in; but if the judge appoint time and place, and the executor do it not, then is the condition (a) broken, and the person intestate, and so administration is to be granted to the next of kin.

Godolph.
43. 78.
(a) But tho' the executorship be determined, yet all acts done by such an executor in pursuance

of his office, before such condition broken, are good. Godolph. 77.

3. Of appointing a temporary Executor, as for a limited Time, during the Absence of *J. S.*, &c.

The time may be limited when the executorship shall begin, and that either certainly or with reference to contingency; for by our laws it is lawful for a testator to appoint his executor, either from a certain time, or until a certain time, and in the mean time administration may be committed to the next of kin, or to the widow; and the acts done by such administrator cannot be (b) avoided by the executor afterwards; and in this sense the same person may be said to die partly testate, and partly intestate, which by the strictness of the civil law is not allowable.

Godolph.
77.

(b) Hob.
265-6.

So, a person may appoint, that *J. S.* shall be executor till his son comes of age, or for any limited time he pleases.

Off. of
Exec. 10.
So, 3 Ark. 182

4. Of

4. Of appointing an Executor with a limited Power, as to administer Part of the Estate.

Off. of
Exec. 12.
Godolph.
78. Roll.
Abr. 914.
[(a) Yet
quoad creditors, they
are all executors, and
as one executor, and may be sued as one executor. 19 H. 8. 8. Dy. 3. 32 H. 8. Br. Exec. 155. Cro. Car. 293.]

The testator may limit and divide the power of his executors (a) in the following manner: 1st, He may make *A.* his executor for his plate and household-stuff, *B.* for his sheep and cattle, *C.* for his leases and estates by extent, and *D.* for the debts due to him; or, 2^{dly}, He may appoint *A.* executor for his goods in the county of *S.*, *B.* for his goods in the county of *N.*, and *C.* for his goods in the county of *H.*

Off. of
Exec. 13.

And though several executors are appointed with separate and distinct powers, yet is the will but one will, and needs only one probate.

Salk. 927.
pl. 6.

But if a person is made executor without any limitation or restriction, he cannot take out administration for part, but must renounce the executorship *in toto*, or not at all.

Yelv. 103.
Cro. Jac.
549. 5 Co.
Hargrave's
case. Mod.
185. Salk.
297. pl. 6.
Foss.

Therefore if an executor has a term, and the premises are of less value than the rent reserved thereon; in an action brought against him in the *debet* and *detinet*, he must plead specially, that he has no assets, and that the land is of less value than the rent, and demand judgment, if he ought not to be charged in the *detinet tantum*; and this will free him from being charged *de bonis propriis*; for otherwise the premises shall be presumed to be of greater value than the rent.

(D) Of appointing Co-Executors: And herein,

1. What Acts done by any one of them shall be as valid as if done by them all.

Godolph.
134. Off. of
Exec. 95.
Roll. Abr.
924.
(b) There-
fore all of
them shall
have but one effoin, either before appearance or after; because their testator himself, whose person they represent, could have no more. Godolph. 135. [(c) The law is otherwise, it hath been said, with respect to administrators. Lord Bacon's Tracts, 162. *Hudson v. Hudson*. But see *contr.* *Jacomb v. Harwood*, 2 Vez. 265. See too, *Touchst.* 434-5.]

If a man appoints several executors, they are esteemed in law but as (b) one person, representing the testator, and therefore the acts done by any one of them, which relate either to the delivery, gift, sale, payment, possession, or release of the testator's goods, are deemed the acts of all, for they have a joint and entire authority over the whole (c).

Dyer, 23. b.
pl. 146.
Cro. Eliz.
347.
(d) So, if
one executor releases

Hence it hath been adjudged, that if the testator dies possessed of a lease for years, and having made two executors, one of them grants all his interest to a stranger, that the whole term passes, for each had an (d) entire authority and interest different from other jointenants.

a debt, it is good, and shall bind the rest. 21 H. 7. 25. b. Dyer, 23. b. in margin.—So, if one executor surrenders a term. 28 H. 6. 3. Dyer, 23. b. in margin.—So, if one acknowledges a judgment on an action. 17 E. 3. 66. Dyer, 23. b. in margin.—So, if on a *quid juris clamat* one of them attorns, it shall bind them all.

And

And for this reason it is holden, that if one executor grants or releases his interest in the testator's estate to the other, nothing passeth thereby, because each was possessed of the whole before.

Also, it hath been adjudged, that if an obligee makes two executors, and dies, and one of them delivers the obligation to a stranger in satisfaction of a debt due from himself, and dies, though the debt does not pass by the assignment, being a chose in action, and not properly assignable; yet by this delivery the party hath such an interest in the paper and wax, that he may justify the detainer in an action of detinue brought against him by the surviving executor.

judged by three judges against one. — [Qu. As to this determination, for the obligation was only evidence of the debt; and as the debt was not assignable, being a chose in action, and only a mere delivery, what interest could pass?]

2. Where they must answer for each other's Acts, and what Remedy the one hath against the other.

It is clearly agreed, that one executor shall not be charged with the wrong or *devastavit* of his companion, and shall be no farther liable than for the assets which came to his hands; and therefore where an (a) action was brought against two executors, and the jury found that the two and another were made executors, and that the third wasted the assets to the amount of 600*l.*, and died, and that only 16*l.* came to the hands of the two others; the court held, that they should be chargeable for no more than the 16*l.*, for that it was the testator's folly to trust such a person, which must not turn to the prejudice of the other executors.

Also, it hath been holden in Chancery, that if there be two executors, and they join in a receipt, and one only receive the money, as to creditors, who are to have the utmost benefit of law, each is liable for the whole, though one executor alone might give a discharge, and the joining of the other was unnecessary; but as to legatees (b), and those claiming distribution, who have no remedy but in equity, the receipt of one executor shall not charge the other, for the joining in the receipt is only matter of form; the substantial part is the actual receiving, and this only is regarded in conscience.

been adopted in later cases. *Vide* Sadler v. Hobbs, 2 Br. Ch. Rep. 117., and the decree in 1 Cox's P. Wms. 243. But in the case of Gibbs v. Herring, Pr. Ch. 49., it is stated to have been taken and allowed; but the editor of the last edition of that work hath not been able to discover any such case in the Register-book. The distinction, therefore, is, in truth, without authority. — Taking it without the distinction, the rule laid down in the text, as to executors joining in receipts, hath been generally admitted as established law. *Fellows v. Mitchel*, 1 P. Wms. 81. *Aplyn v. Brewer*, Pr. Ch. 173. *Leigh v. Barry*, 3 Atk. 584. *Ex parte Belchier*, Amb. 219. *Sadler v. Hobbs*, 2 Br. Ch. Ca. 116. But it hath been broken in upon by Lord Harcourt in the case of *Churchill v. Hobbs*, *ubi supra*, and by Lord Northington in *Westley v. Clarke*, 25th June 1759, reported in 1 Cox's P. Wms. 83., and Finch's edition of Pr. Ch. 173.; and the Master of the Rolls (Sir R. P. Arden) hath expressly entered his dissent from it in its fullest extent, *viz.* that an executor, by joining in a receipt, shall in all cases be liable. *Scutfield v. Howes*, 3 Br. Ch. Rep. 94. This, however, is clear from all the cases, that where, by any act done by one executor, any part of the estate comes to the hands of another executor, the former will be answerable for his companion in the same manner as if he had enabled a stranger to receive it. *Sadler v. Hobbs*, *Scutfield v. Howes. ubi supra*, 1 Cox's P. Wms. 241. note, *Gill v. Attorney General*, Hardr. 314.]

Godolph.
134.

2 Roll. Abr.
46. Kelsick
and Nichol-
son, Dyer,
23. b. in
margin.
S. C. Cro.
Eliz. 478.
pl. 8. and
496. pl. 15.
S. C. ad-

Godolph.
134. Off.
of Exec. 100.
(a) Cro.
Eliz. 318.
Hargthorp
and Mill-
forth ad-
judged.

Churchill v.
Lady Hob-
son, Salk.
318. pl. 26.
per Har-
court, Chan.
[1 P. Wms.
241. S. C.
(b) This
distinction
is not made
by the de-
cree, nor
hath it

Chan. Ca. 57. If *A.* devises legacies, and makes *B.* and *C.* his executors, and *B.* makes *C.* and *D.* his executors, and dies, and they possess themselves of the estate of *A.*, they may be both charged in equity; for though in point of law the executorship survived to *C.*, and *D.* is not privy, yet the estate of *A.*, in (a) whose handssoever it comes, notwithstanding any assignment of it by the executor. 2 Vern. 75.

Off. of Exec. 99. Godolph. 135. One executor (*b*) cannot regularly sue another of his co-executors touching any thing relating to their testator's will, or that is within the power, interest, duty, or office of an executor. (b) But may in equity, and compel him to account for a moiety, &c.; yet *vide* Sid. 33.

Off. of Exec. 99. Godolph. 135. But if the residue of the personal estate, after debts and legacies, be devised to both the executors, one of them may sue the other in the spiritual court for a moiety, for this is in the nature of a gift or legacy to him, and he may bring trespass against the other executor, if he takes it out of his possession, or detinue * if he detains it from him. * *Q^uo*. As to detinue, if a partition has not been made, so as to distinguish the plaintiff's share?

3. Where they must jointly sue and be sued; and therein of Summons and Severance.

Godolph. 134. Off. of Exec. 95. As executors in representing the testator make but one person, they are all regularly to sue and be sued.

Lev. 161. But if debt be brought against an executor, and he pleads that *J. S.* is co-executor with him, and that he is not named in the writ, without averring that *J. S.* hath administered, the plea will be ill, for although, when an executor sues, the defendant may plead another executor not named, without shewing that the other hath administered, because he cannot know whether the other hath administered or not; yet, when an executor is sued, if he pleads another executor not named, he ought to go farther and say, that he has administered, for that lies in his own conscience.

Carth. 61. Also, if an action be brought against one executor, where there are more, if that one executor do not plead the matter in abatement, but plead to the action, he shall never have the advantage of such a plea afterwards.

Salk. 3. fl. 6. If two executors sue, and set forth themselves to be executors, and that they proved the will, † but upon the probate set forth it appears that one only proved the will, and the defendant pleads this in abatement, a *respondant ouster* will be awarded, for both have the right in them; and he that did not prove may come in when he pleases, but cannot refuse during the life of him that has proved.

Brookes and Stroud. † It is not necessary to say they prove the will; but it is sufficient for them to declare generally as executors, and make a protest of the letters testamentary, and the defendant must plead to the action: If the probate is called for on the trial, it will thereby appear that the plaintiffs are executors, named such by the testator himself.

If a man appoints two executors, there shall be summons and severance, because one of the executors may release; yet such a release is a *devastavit* in him; but if he will not proceed at law, it is no *devastavit* in him; and therefore, both executors being only trustees for the person deceased, they shall not be compelled to go on together: but if one refuses, the other may bring his action in the name of both, and have summons and severance; for otherwise a co-executor might, by collusion with the debtor, and not proceeding, keep the other from recovering assets, and not create a *devastavit* in himself; but after such summons and severance he does not proceed for a moiety, but as representative of the testator proceeds for the whole the testator was entitled to, and shall have judgment only in his own name.

Cro. Car.
420. 2 Roll.
Abr. 98.
Off. of Ex-
ec. 96. 104.

Therefore if there are two executors, and they bring an action of debt, and one of them is summoned and seivered, and the seivered person dies, the writ shall not (a) abate.

Cro. Eliz.
652. Co.
Lit. 139.
(a) Not be-
Off. of Exec. 105.

ing a party, he could not sue out execution if he was alive.

If debt be brought against several executors, and one appear, and the other make default upon the grand distress, the court may proceed against him that appears; and if the plaintiff recover, judgment shall be against all the executors for the goods of the testator; and the 25 E. 3. *ft.* 5. *cap.* 17., which gives a *capias* in debt, has been always construed within the equity of the 9 E. 3. *ft.* 1. *c.* 3., so that if there be several executors defendants, and a *cepi* is returned as to one, and a *non est inventus* as to the rest, the plaintiff shall proceed against him that appears, and shall have judgment against all; for the default upon a *capias* is the same as upon the grand distress. *Ergo*, error must be brought by all.

Salk. 312.
pl. 17. *per*
Holt, C. J.
2 Ld. Raym.
870.

If one executor hath the possession of the testator's goods, which are taken from him, (b) both must join in an action (c) of trespass; for the possession of one is the possession of the other; and if one only should bring the action, and the other should release it, such release would be good.

(b) 19 H. 6.
65.
16 H. 7. 4;
3 Leon. 209.
S. P. *per*
Coke; but
in Godolph.

134., and Off. of Exec. 104., it is said, that if goods be taken out of the possession of one executor, he alone may maintain an action for the same, and that without naming himself executor; for which is cited 38 E. 3. 9. (c) But if one executor alone sells the goods of the testator, he alone may maintain an action of debt for the money. Godolph. 135. Off. of Exec. 104.

It is said that executors, when sued, cannot plead distinct pleas, because they represent but one person, who could have but one plea, if he was living; but it is said to be holden by others, that executors may plead distinct pleas, and that shall be tried which is (d) best for the testator, and most peremptorily to settle the controversy.

Off. of Ex-
ec. 98. Go-
dolph. 136.
(d) So, if
two execu-
tors have
judgment,
and the one

prays a *capias*, and the other a *feri facias*, the *capias* shall be awarded as best for the testator. cited as the opinion of Cotildmore in 7 H. 6. 6.

Hob. 61.

(E) Of the Probate of Wills, and granting Administration: And herein,

1. To whom the Probate of Wills and granting of Administration did originally belong.

(a) Linwood, 174. *Verbo approprobatis* says, that the jurisdiction of the ecclesiastical courts touching

It appears to have been a matter of great controversy, to whom the probate of wills and granting of administration did originally belong, and whether these were matters entirely of ecclesiastical cognizance: (a) but it seems to be now the better opinion, that the probate of testaments did not originally belong to the ecclesiastical jurisdiction, but to the respective lords of manors where the testator died, as all other matters did.

testamentary matters, is by the custom of England, and not by the ecclesiastical law. — Wilkins, 78. Lamb. *Saxon Laws*, 64., make it appear, that the bishop and sheriff sat together in the county courts; and by the *Saxon laws*, which they give us, it plainly appears, that the probate of testaments was in the county courts. — *Seld. Eadmerus*, 197., gives us the charter of *William the Conqueror*, which first separated the ecclesiastical court from the civil; but this charter does not mention matters testamentary, or the probate of wills, to be of ecclesiastical consueance; but only says, that the crimes, that were to be prosecuted *pro salute animæ*, were to be of that consueance. — And therefore, according to *Seld. Eadmerus*, 168., the ecclesiastical jurisdiction did not prevail herein till the time of Rich. 2., at which time the clergy got the king to publish the law of *William the Conqueror*, and confirm the same, and that no matters of ecclesiastical consueance should be transacted in the county court; this is the charter of 2 Rich. 2. *Membrano*, 12. No. 5., and is mentioned in *Selden's Eadmerus*, 168. — Henceforward the clergy had the whole jurisdiction of wills, because the county court could not receive the probate, and the king's court could not intermeddle with it, because by a charter in Hen. 1.'s reign, the king's tenants, who owed suit to it, were enabled to dispose of their personal estate for the good of their souls, and of this the clergy were thought to be the properest persons to take care. Plow. 179. in the case of Greys and Fox. — Hence, in Fitz. Abr. tit. *Testament*, 148., it is said by Fairfax, that it was but of late the church had the probate of wills, and he supposes that it was given to them by some act of parliament. — And in the 11 H. 7. Fineux asserts, that the probate of wills did not belong to the spiritual court by the ecclesiastical law, but came to them by custom and usage: — and with these opinions my Lord Coke agrees in *Henslow's case*, 9 Co. 38., and on these foundations concludes, that when the will is proved in the ecclesiastical court, the court has executed its authority; but the executors are to sue in the temporal courts to get in the estate of the deceased.

Raym. 405, 406. Sid. 359. Noell and Wells, Lev. 235. Hard. 131. 2 Roll. Abr. 299.

[1 Str. 481. Hence also, payment of money to an executor who hath obtained probate of a forged will, is 2

But however it might have been formerly, it is now certain, that the spiritual court is the only court, except as herein after excepted, that has jurisdiction of the probate of wills, and, as incident to such jurisdiction, hath power to determine all those matters that are necessary to the authenticating of them. Hence it hath been adjudged, that if the seal of the ordinary appears to the probate, it cannot be suggested or given in evidence in the common law courts, that the will was forged*, or that the testator was *non compos*, or that another person was executor; but it may be given in evidence, that the seal was forged, or the will repealed, or that there were *bona notabilia*, because these are not in contradiction to the real seal of the court, but admit the seal and avoid it.

discharge to the debtor of the intestate, notwithstanding the probate be afterwards declared null, and administration be granted to the next of kin. *Allen v. Dundas*, 3 Term Rep. 125. As a prisoner cannot be convicted of forging a will during the existence of the probate, *R. v. Vincent*, 1 Str. 481., it is the practice to postpone the trial till the spiritual court hath determined upon its validity. *R. v. Goodrich*, O. B. 1784, cited in 3 Term Rep. 126. *R. v. Rhodes*, 1 Str. 703.]

* That is as to chattels, or personal estate; for with respect to real estate, if any question arises, the original will must be produced, and not the probate, which cannot authenticate the will as to real estate; and in such case the validity of the will may be called in question, and forgery, insanity of the testator, or any other matter that avoids the will, may be given in evidence.

But

But if the spiritual court do admit a will, but yet will not give the probate thereof to the executor, because he cannot give security for a just administration, the temporal courts will grant (a) a *mandamus*; for though they are to determine whether there be a will or not, yet if there be a will, the executor has a temporal right, and they cannot put any terms on him but what are mentioned in the will.

Skin. 299.
pl. 2. Salk.
36. pl. 1.
S. C. Comb.
185. S. C.
12 Mod. 9.
S. C. Holt.
305. S. C.
(a) So, if
they refuse

administration to the next of kin; 5 Mod. 374., unless it be controverted by will alleged in spiritual court. *Vide infra*, (G.)

As to the disposition of intestates' estates and granting of administration, it is plain, that by the (b) common law and before the statute of *Westm. 2. cap. 19.*, the ordinary had the absolute disposal of intestates' estates.

Roll. Abr.
906. Raym.
497. Salk.
37. pl. 3.
(b) But my
Lord Coke

thinks that this was granted them by some particular constitutions; and therefore says, that anciently the kings of *England*; by their proper officers, *solebant capere bona intestatorum in manus suas*, 9 Co. 36. &c. in *Henflow's case*. 3 Mod. 24.

And therefore, if a man died intestate, neither his wife, child, nor next of kin had any right to a share of his estate, but the ordinary was to distribute it according to his conscience to pious uses: and sometimes the wife and children might be amongst the number of those whom he appointed to receive it: however, the law trusted him with the sole disposition.

2 Inst. 399.
Plow. 277.
3 Mod. 59.

The first statute, that abridged the power of the ordinary herein, was the statute of *Westm. 2. or 13 E. 1. cap. 19.*, by which it is enacted, "That where a man dies intestate, and in debt, and the goods come to the ordinary to be disposed, he, *de cetero*, shall satisfy the debts, so far as the goods extend, in such sort as the executors of such persons should have done in case he had made a will."

Before this statute, no action lay against the ordinary at the suit of a creditor, where the party died intestate, nor could the ordinary maintain an action against the debtor of the intestate; but, if he had seized the goods, he might bring trespass against any one who took them out of his possession.

Roll. Abr.
906.
8 Co. 135.
Raym. 497.
but for the
alterations
herein by

several acts of parliament, *vide infra*, letter F.

2. Of the King's Jurisdiction in granting the Probate of Wills and Administration.

As all jurisdiction flows from the king, so he is said to be the supreme ordinary in this kingdom; and therefore where an action of debt was brought by an administrator, and the plaintiff declared of letters of administration granted to him *per Carolum regem*, without saying *debito modo*, yet this was holden good on demurrer, because the king hath universal jurisdiction here.

Allen, 53.
Hobson and
Wills; for
this *vide*
Prerogative.

But it is said, that if a person dies intestate, and without kindred, though the usual course is to procure the king's letters patent, and then the ordinary admits the patentee to administration; yet that this is not *de jure*, but rather out of respect; for

Salk. 37.
pl. 3. [if
the effects
of an intestate
vest in

the king by a forfeiture for felony, and the ordinary grant letters of administration to *A* in consequence of a warrant from the king, and they run in the usual form, viz. "to pay debts, &c." though with this additional clause, "to the use of his majesty," *A*. may be sued by the creditors, and shall not be permitted to impeach the letters of administration. *Megit v. Johnson*, Dougl. 542.]

3. Of the Archbishop's Jurisdiction; and therein of *bona notabilia*.

Off. of Ex-cc. 44.
Roll. Abr. 908.
Dyer, 305. If a person dies, having goods in several (*a*) dioceses, the probate of his will, as also the granting of administration to him, belongs to the archbishop of the province in which the goods are.

(*a*) So, where a man dies intestate, having lands in divers peculiars, the granting of administration does not belong to the ordinary of the diocese, but to the metropolitan of the province; for they are excepted out of the ordinary's jurisdiction. Lev. 78. *per* Twissden and Windham. [But where the deceased has goods within the diocese of York, and also within a peculiar in that diocese, two administrations shall be granted; for the archbishop shall not have his prerogative in such case, the peculiar being derived out of his jurisdiction. Cro. El. 718.]

Roll. Abr. 908. So, if a person dies intestate beyond sea, and hath goods here, though but in one diocese, yet the archbishop is to grant administration.

Roll. Abr. 909.
(*b*) By a canon, 1 Jac. 1. c. 92., if a man dies on a journey, the goods, which he had at that time with him, shall not cause his testament or administration to be liable to the prerogative court. Godolph. 71.
So, if a man dies in one diocese, not having any goods there, but having *bona notabilia* in another diocese, this is (*b*) sufficient to entitle the archbishop to grant administration, because the ordinary where he dies is by law to take as great care of the intestate and his goods, as the other ordinary where the goods are.

2 Lev. 36.
Hard. 216.
Salk. 39.
pl. 8. So, if a man dies having *bona notabilia* in the several provinces of *Canterbury* and *York*, the archbishop of each province shall grant administration according to the *bona notabilia* in their respective provinces; for they are two supreme jurisdictions, and neither can act in the other.

Dyer, 305.
S. P. per Hale. So, if a man dies intestate, having *bona notabilia* in *England* and *Ireland*, several administrations shall be granted, viz. by the archbishop of *Canterbury*, for the goods in his province, and by the archbishop of *Dublin*, for the goods in his; but this by (*c*) *Roll* must be understood, where the party hath goods in divers dioceses in each of their provinces, or in the diocese of the archbishop; for otherwise it ought to be granted by the ordinary where the goods are, and not by the archbishop.

5 Co. 30.
Hob. 185.
3 Co. 135.
Cro. Eliz. If the archbishop commits administration, though there be no *bona notabilia*, yet such administration is not void, but only voidable, and shall stand till it is remedied by complaint of the inferior ordinary: but if the inferior ordinary commits administration, and the superior also, supposing that there are *bona notabilia*, if there are none, then the first by the inferior is good; if there are, it is absolutely void.

6 283. 456.
Lev. 305.
7 Mod. 146.
Godolph. because the metropolitan hath jurisdiction in all places within his province.

The probate of every bishop's will, though he had goods but in his own jurisdiction, belongs to the archbishop of the same province. 4 Inst. 335.

1. Of what Value the Goods and Effects must be, that will make *bona notabilia*.

There appears to have been formerly diversity of opinions as to the value of the goods, which was necessary to make *bona notabilia*; some holding 10*l.* necessary, some 5*l.*, others 40*s.*, and by others even a penny was thought sufficient to make *bona notabilia*. For these vide Roll. Abr. 909. Off. of Ex. ec. 41. Godolph. 70.

But it is now settled as established by the 92 canon of Fac. 1. Roll. Abr. 909. 4 Inst. 335. Off. of Exec. 45.

But by the said canon it is provided, that this shall not prejudice the jurisdiction of those dioceses where, by composition or custom, *bona notabilia* are valued at a greater sum, as, in London, where by composition *bona notabilia* are to be to the value of 10*l.* 4 Inst. 335.

It is not necessary that the deceased should have goods to the value of 5*l.* in each of the several dioceses where his goods are dispersed; but if he hath goods in any one diocese amounting to 5*l.*, besides that in which he died, these make *bona notabilia*. Godolph. 69.

But if his goods in the diocese where he died amount to 10*l.* or more, yet if he hath not goods to the value of 5*l.* in some other diocese, these will not be *bona notabilia*. Godolph. 69.

2. Of the Nature of such Goods as will make *bona notabilia*, and how far it is necessary they should be in several Dioceses.

If a man hath goods in one diocese to the value of 5*l.*, and a lease for years of that value in another, these make *bona notabilia*; for though a lease or term for years, according to the civil law, is not properly *bonum*, nor a thing (a) moveable; yet it is a chattel, and as such must be pleaded. Roll. Abr. 909. Godolph. 71. (a) But in case lands be devised to executors

for payment of debts and legacies, these, though they become assets, will not make *bona notabilia*. Off. of Exec. 46.

Debts due to the deceased make *bona notabilia*, as well as goods in possession; but if there be a bond of the penalty of 5*l.* for payment of a less sum, and the same be forfeited; though according to the strict rules of law the whole penalty is forfeited, yet this does not make *bona notabilia*. Godolph. 70. Off. of Exec. 46.

Debts due to the deceased make *bona notabilia*, be they ever so desperate or difficult to be recovered; and, therefore, it (b) seems that a debt due from the king, for which there is no remedy but by petition, makes *bona notabilia*. (b) Off. of Exec. 46. Iett a *quare*.

As to debts making *bona notabilia*, we must further observe a distinction the law makes between debts by bond or specialty, and debts by simple contract, viz. (c) that debts by specialty are esteemed the deceased's goods in that diocese where the securities Godolph. 70. 71. Off. of Exec. 46. Roll. Abr. 909.

Dyer, 305. happen to be at the time of his death, though they were entered
(c) Therefore where a into in another, or though the debtor or creditor, at the time of
man died in entering into them, lived in a different diocese.
Lancashire, which is in the diocese of the bishop of *Chester*, and had a bond in *London*, it was adjudged
that administration as to this bond, ought not to be granted by the bishop of *Chester*, but by the bishop
of the diocese where the bond was. Cro. Eliz. 472. Byron and Byron.

Godolph. But, as to debts by simple contract, they, by our law, follow
70. Off. of the person of the debtor, and are esteemed the deceased's goods
Exec. 46. in that diocese where the debtor resided at the time of the cre-
ditor's death.

Carth. 149. On this distinction it hath been holden, that a judgment ob-
3 Mod. 324. tained in any of the courts of *Westminster* made *bona notabilia*,
S. C. Gold though the action upon which it was obtained was laid in *Dorset-*
and Strode, *shire*, because the record was at *Westminster*.
Salk. 40.,
Pl. 9.,

2 Salk. 679., pl. 7., 2 Ld. Raym. 854., and 6 Mod. 134., Adams and Savege, S. P., adjudged,
where an administrator brought a *scire facias* against the tenants of Savage, on a judgment obtained
by his intestate in B. R., and shewed as his title, that administration was granted to him by the arch-
deacon of *Dorset*, though the defendant, without taking advantage hereof, pleaded over; yet the court
abated the writ *ex officio*; for they held, that they were obliged to take notice, that the place where they
sat was not within the jurisdiction of the archdeacon of *Dorset*; but that if the plaintiff had not been
thus particular, but had declared on an administration generally, and the defendant taken no advan-
tage of it, it had been well enough.

Carth. 148. But if an administrator takes out administration by an inferior
3 Mod. 324. ordinary, and on a *scire facias* has judgment to have execution on
the above a judgment obtained by his intestate in B. R., and thereupon
authorities. a *capias ad satisfaciendum* issues, on which the defendant is taken,
Gold and and the sheriff suffers him to escape; the sheriff, in an action
Strode ad- against him, cannot take advantage of this error, for the court
judged. had jurisdiction over the cause, and the judgment was only erro-
neous, but not void.

Carth. 373. If a merchant in *London* draws a bill of exchange on his cor-
Yeomans respondent in *Newcastle* in favour of J. S., and the bill is re-
and Brad- fused, and J. S. dies intestate, his administrator, on letters of
shaw, Comb. administration taken out in *Durham*, cannot bring an action on
392. S. C. the custom of merchants against the drawer, and lay the same in
adjudged, *London*, for a bill of exchange is not equal to bond or specialty,
and the which are the deceased's goods, where they happen to be at his
plaintiff's death, but is a simple contract debt which follows the person of
writ should the debtor, and makes *bona notabilia* where he resides.
abate. &c.

With regard to the following persons, the law is altered by the
4 Ann. c. 16. s. 26., by which, reciting, "That great trouble is
" frequently occasioned to the widows and orphans of persons
" dying intestate to monies, or wages due for work done in her
" majesty's yards and docks, by disputes happening about the
" authority of granting probate of the wills and letters of admi-
" nistration of the goods and chattels of such persons; it is
" enacted, for the preventing of such unnecessary trouble and ex-
" pence, That the power of granting probates of the wills and
" letters of administration of the goods and chattels of such per-
" son and persons respectively is, and is hereby declared to be,
" in the ordinary of the diocese, or such other persons to whom

“ the ordinary power of probate of wills, or granting letters
 “ of administration, doth belong, where such person or persons
 “ shall respectively die; and that the salary, wages, or pay due
 “ to such person or persons from the queen’s majesty, her heirs
 “ or successors, for work done in any of the yards or docks, shall
 “ not be taken or deemed to be *bona notabilia*, whereby to found
 “ the jurisdiction of the prerogative court.”

4. Of the Probate of Wills, and granting of Administration by the Bishop of the Diocese.

The ordinary hath regularly the probate of wills and granting of administration of every person dying within his diocese: this jurisdiction he may either exercise himself, or it may be done by his official, for it is but a ministerial act, and no ways concerns the bishop, as bishop in his spiritual capacity, and, therefore, he may do the thing by another; for originally the probate of wills did not belong to the ecclesiastical judges.

Godolph.
58. See
Gilb. Eq.
Rep. 203.

This power of granting administration is annexed to the person of the bishop, and, therefore, if a bishop of Ireland happens to be in England, he may grant administration here of any thing within his diocese in Ireland.

Godb. 33.
Carter and
Crofs.
6 Mod. 145.
S. P. per
Holt, C. J.

If a bishoprick be vacant, the dean and chapter are to grant administration.

Roll. Abr.
908.

5. Of the Probate of Wills, and granting of Administration, where the Party dies within some peculiar Jurisdiction.

If a person dies within some peculiar jurisdiction, the probate of his will, as also the granting of administration, belongs to the judge of such peculiar, which is founded upon a supposition of an original composition between him and the ordinary of the diocese for that purpose.

4 Inst. 338.
Salk. 40.
pl. 10.

These peculiars are either regal, archiepiscopal, episcopal, or archidiaconal, in each of which the owner of (a) common right hath power to grant administration.

Salk. 41.
6 Mod. 241.
(a) Where
administra-

tion was granted by a rural dean, the goods of the deceased not amounting to more than 40*l*.
5 Mod. 424.

6. Of the Jurisdiction of some Lords of Manors in the Probate of Wills.

Although it be regularly true, that at present the spiritual court is the only court that hath jurisdiction in the probate of wills and granting of administration; yet from this general rule must be excepted all (b) courts-baron that have had probate of wills time out of mind, and have always continued that usage.

(b) Such as
that in the
manor of
Mansfield,
and those in
Croft and
Caversham

in *Oxfordshire*, which the author of *Off. of Exec.* 43. says, he himself kept.

This jurisdiction can only be claimed by prescription, and therefore a person who has administration granted to him by a lord of a manor declares, that *per A. B. dominum manerii cui administrationis commissio de jure pertinet per consuetudinem infra maner.*

Thom. Entr.
342.
Salk. 41.
6 Mod. 242.

præd. a tempore cujus contrarii memoria hominum non existit usitat. & approbat. debito modo commissæ fuit.

7. Of the Jurisdiction of some Mayors in respect of the Burgeſſes within such a Place.

Off. of Ex-
ec. 45.
Godolph.
58. For the
custom of
London in
relation to orphans, &c. *vide tit. Custom of London.*

By custom the probate of wills belongs to the mayors of some boroughs in respect of the burgesſes, as to lands devisable in such boroughs; but as to goods the same will may also be proved before the ordinary.

8. The Form of proving a Will and taking out Administration, and therein of entering a *Caveat*.

Godolph.
60.

The judge may, *ex officio*, or at the instance of the party interested, call the executor to prove the will: some say, he may be cited at the instance of any person, to know whether the party instancing hath any legacy left him, or not.

Godolph.
58, 59.

If the executor appears not to prove the will upon the ordinary's process, but stands in contempt, he is excommunicable; but if he appears and makes oath, that the testator had *bona notabilia* in divers dioceses, or within some peculiar jurisdiction than that wherein he died, he is to be dismissed to prove the will in the archbishop's court, and to exhibit the same under seal within forty days next after.

Godolph.
63.

Also, the ordinary or metropolitan, as the case shall require, may sequester the testator's goods until the executor proves the will.

Godolph.
61, 62.

If it be uncertain whether the testator be dead or alive, it must be left to the discretion of the judge, whether he thinks him so or not; and if there be good presumptive evidence in law to think him dead, then he must prove the will; as if he be beyond sea in remote parts, and it is common and constant fame, that he is dead; especially, if the executor of such person be honest, and the goods are *bona peritura*, and the testament itself in favour of children, or *ad pios usus*.

Godolph.
61.

The time of proving a will is left to the discretion of the judge, according as the circumstance of the case shall require or admit; but regularly it ought to be insinuated within four months after the testator's death.

Godolph.
62.

Testaments may be proved either in common form, as where there is no contest about the will; but the executor presenting the will before the judge, without citing the parties interested, doth depose the same to be the true, whole, and last will of the testator, and thereupon the judge does allow the will, and fix his seal and probate to it.

Godolph.
62.

Or, a will may be proved in form of law, as when it is exhibited before the judge in presence of the parties interested, as the widow and next of kin, and then the proof examined and fully heard, and at last allowed.

The

The difference between the two probates is this; where a will is proved in common form, it was, at any time afterwards within thirty years, to be questioned and called in debate, which it cannot be in case it be proved in form of law.

Godolph.
62.

If the executor refuse to prove the will, or if there be a will and no executor named, the ordinary is to commit administration *cum testamento annexo* to some proper person, from whom he may take bond for a faithful administration; but in case there be no will, then he is to grant administration to the next of kin * of the deceased; and in case of their refusal, he may grant it to a creditor, or any other person desiring the same; and if nobody will take administration, the ordinary may grant letters *ad colligend. bona defuncti*.

Godolph.
61.
* See the
statutes 31
Ed. 3. st. 1.
c. 11. and
21 H. 8.
c. 5. § 3, 4.
See also the
stat. 4 Ann.
c. 16. § 26.
ante. and post.

If there be a testamentary disposition without an executor, the party, in whose favour the disposition was made, must cite the next of kin before he can have administration.

It is usual when there is a contest about a will, or when the right of administration comes in question, to enter a *caveat* in the spiritual court, which by their law is said to stand in force for (a) three months.

Godolph.
258.
Goldsb. 119.
(a) As said
by Dr. Tal-
bot in his

argument of the case of Hutchins and Glover. 2 Roll. Rep. 6. Cro. Jac. 463-4.

But it is said that our law takes no notice of a *caveat*, and that it is but a mere cautionary act done by a stranger, to prevent the ordinary from doing any wrong, and that, therefore, if administration be granted pending a *caveat*, this is valid in our law, though by the law in the spiritual court, it may be such an irregularity as will be sufficient to repeal it.

Roll. Rep.
191. Cro.
Jac. 463.
2 Roll.
Rep. 6.

In the case of one *Offley*, administration was granted to him pending a *caveat*, and no notice taken of it, or of the party that entered it, and for this cause there was citation to have this administration repealed; and on a motion for a prohibition in behalf of *Offley*, it was urged, that the spiritual court having once granted administration, they had executed their authority, and had no power over the administrator afterwards, and a *caveat* is only for private information of the judge, but does not suspend their jurisdiction; it is *concilium*, but not *præceptum*; no countenance was ever given to it by the law: that to give them liberty to repeal administration for this cause, were to give it them in all cases, and then all the inconveniences of compelling distribution will follow, for they may leave out some formality on purpose to preserve a power over the administrator, or they may make it cause of repeal, because administration is granted to a child already preferred, or the like; and by the 21 H. 8. c. 5. they have an election, which when it is once made, no man can complain; for none have any right or title precedent: and for these reasons a prohibition was granted: but on another day, on motion for a consultation, the court said, that to take from the spiritual court all power of examining the formality of granting letters of administration, would occasion undue catching of ad-
ministra-

Lev. 186.
Offley and
Best, Sid.
293. and
2 Keb. 63.
72. S. C.

ministrations, and confound and destroy all their forms and course of proceedings, which are in some cases necessary; and it was not the intention of the statute to alter the course of granting administrations, and to establish irregular administrations, but only to direct the ordinary, and to straighten the liberty they took upon them before; and for the matter of the *caveat*, we know not what weight and regard it may have in their law; it may be essentially necessary, that where there is a contest and competition, both parties should be heard before any thing be done, or the *caveat* dismissed: they have a rule, that no administration should be granted within fourteen days, that no party may be surprized, and we have known an administration granted against this rule repealed, though nobody else could pretend any right; but the same day a new administration has been granted to the same party: and in these kind of questions creditors are concerned; and it may be very mischievous to throw off and slight all their forms; wherefore the court would advise, and according to the report of this case, in *1 Lev. Meriton and Windham*, at another day, were for discharging the rule for a prohibition; and they held, that granting administration, pending a *caveat*, was sufficient cause to revoke, and that it was like a *superfedeas* in our law, which made a judgment given afterwards erroneous: but *Kelynge and Twisden* held, that the *caveat* was of no force to hinder the grant of the administration; for it is not a judicial act of the court, but only an entry of a *memorandum* by a clerk in court, for the giving of caution; and being no judgment or record of the court, the court of *B. R.* are as proper judges of the force and effect of it as the spiritual courts, and are likewise to see that they grant administration according as they are empowered by the statutes; and the court being thus divided, there could be no rule for discharging the prohibition.

9. Of the Executor's Refusal.

This being a private office of trust named by the testator, and not the law, he may refuse, but cannot assign the office.

Off. of
Exec. 36-7.
Godolph.
140.
Vaugh. 144.
Roll. Abr.
907.
P'low. 281.
Vent. 535.

If the executor refuses to appear upon the ordinary's summons, he is punishable for a contempt; but yet he cannot be compelled to accept the executorship, whether he will or not.

And, therefore, if an executor refuses before the ordinary to take upon him the executorship, the ordinary may grant administration *cum testamento annexo* to another person; and he can never afterwards be permitted to prove the will.

But if the executor appears and takes the usual oath before the surrogate, and afterwards refuses before the ordinary, yet administration cannot be granted to another; for having once taken the oath, he has made his election, and cannot afterwards refuse the executorship; and if the ordinary will not admit him, a *mandamus* will lie, though on oath taken before a surrogate, the ecclesiastical court have no further authority.

In case the ordinary himself is made executor, he may refuse before the commissary.

Off. of
Exec. 37.

But an executor cannot refuse by any act *in pais*, as by declaring that he would not accept the executorship, but it must be done by some (a) act entered and recorded in the spiritual court, and before the ordinary.

Off. of
Exec. 37.
(a) But
where Bacon
Lord Keeper,
Caitlin

Ch. Just. and the Master of the Rolls, were made executors, and they wrote a letter to the ordinary, signifying that they could not attend the executorship, and desiring him to commit administration to the next of kin of the deceased; which being recorded, it was holden a sufficient refusal. Cro. Eliz. 92. Off. of Ex. 37. Owen, 44. Moor, 272. Leon. 135. S. C.; and that no executor named could act after; but an executor may pray time to consider if he will act, and ordinary may give and grant letters *ad colligendum* in the *interim*, but not administration.

When an executor hath once administered, he cannot afterwards refuse to prove the will, because by the administration he accepts the executorship upon him, and so hath made his choice; therefore, in that case, the ordinary ought to compel him to accept the executorship, and prove the will.

Godolph.
141.
2 Jon. 72.
2 Mod. 146.
Vent. 303.
2 Lev. 182.

Yet it is said, that if the judge, knowing that one hath administered, will, notwithstanding, accept his refusal, and commits administration, that is good, for the spiritual judge is the proper judge of the matter; but after refusal and administration granted to another, the executor may not recede from it, and go back to prove the will and assume the executorship.

Roll. Abr.
907. Off.
of Exec. 40.
41. [Sed.
Vide 1 Mod.
213. that the admi-
nistration in such case is void.]

But if administration be committed only because the executor did not upon process or summons appear to prove the will, the executor may at any time after come in and prove the will.

Off. of
Exec. 40,
41.

If after the executor hath refused, and the ordinary hath committed administration, it appears to the ordinary that the executor had administered before, and so determined his election, he may revoke the letters of administration, and enforce the executor to prove the will.

Off. of
Exec. 40,
41.

If an executor hath once administered, though he afterwards refuse before the ordinary, yet it seems he still continues liable to the creditors, for the plea is *ne unq. executor, ne unq. administrator. come executor.*

Leon. 154-
5. Off. of
Exec. 40,
41.

If there are several executors, and they all refuse before the ordinary, he may grant administration with the will annexed.

Roll. Abr.
907.

But if there are several executors, and some of them renounce before the ordinary, and the rest prove the will, by (b) our law they who renounced may, at any time afterwards, come in and administer, having the right in them; and though they never acted during the life of their companions, yet may they come in and take upon them the execution of the will after their death, and shall be preferred before any executor made by their companions, because, as the will is proved, the ordinary has no authority to take the refusal; and probate by one executor entitles all the executors to sue.

5 Co. 28.
9 Co. 36.
Moor, 373.
Dyer, 160.
Hard. 111.
7 Mod. 39.
(b) Salk.
311. pl. 15.
S. P. where
it is said,
that the ci-
vilians held,
that by their
law a re-

nunciation was peremptory. [So, Robinson v. Pett, 3 P. Wms. 251. Arnold v. Blencowe, at the Rolls, Jan. 31, 1788. Et vide R. v. Simpson, 3 Burr. 1463. and 1 Bl. Rep. 456.]

10. What Acts amount to an Administration, so that the Party cannot afterwards refuse.

Off. of
Exec. 38.
Mod. 213.
[If there are
two execu-
tors, and one

administers, he alone will be charged with the receipts in equity, though he afterwards renounce, and pay over the money to the other executor, who proved the will. *Read v. Truelove*, Ambl. 417.]

Roll. Abr.
917.

Therefore, it is necessary to consider what acts will amount to an administration, and here we may lay down two general rules: *1st*, That whatever the executor does with relation to the goods and effects of the testator, which shews an intention in him to take upon him the executorship, will regularly amount to an administration. *2dly*, That whatever acts will make a man liable as an executor *de son tort*, will be deemed an election of the executorship.

Roll. Abr.
917. Dyer,
166. Off. of
Exec. 39.

Hence, it hath been adjudged, that if the executor takes possession of the testator's goods, and converts them to his own use, or disposes of them to others, that this is an administration.

Roll. Abr.
917.

So, if he takes the goods of a stranger, under an apprehension that they belonged to the testator, and administers them, this amounts to an administration.

Roll. Abr.
917.

As, where the testator being tenant at will of certain goods, his executor seized the goods, supposing them to belong to the testator, with an intent to administer; it was holden, that his intention appearing, this made him executor in law.

But if an executor seizes the testator's goods, claiming a property in them himself; though afterwards it appears that he had no right, yet this will not make him executor; for the claim of property shews a different view and intention in him, than that of administering as executor.

Moor, 14.
And. 11.
Roll. Abr.
917.

If an executor receives debts due to the testator, and, especially, if he gives acquittances for such debts, this amounts to an election of the executorship.

Roll. Abr.
918.

So, if he releases a debt due to the testator.

Roll. Abr.
917.

So, if there are two executors, and one of them hath a specific legacy devised to him, and he takes possession of it, without the consent of his co-executor, this amounts to an administration; for a devisee cannot take a personal chattel devised to him without the assent of the executor.

11. Of bringing in an Inventory, and accounting.

Gedolph.
150.
Swinb. 401.

An inventory is a full and just description of all the personal estate and effects which belonged to the deceased, and which by the civil law, and also by the statutes of this realm, executors and administrators

administrators are obliged to make, and present the same to the proper ecclesiastical judge.

The practice of exhibiting an inventory was introduced from a rule in the civil law, subjecting the heir to the payment of his ancestor's debts; which proving very prejudicial to him, as such debts often amounted to more than the value of the inheritance which descended to him, it was ordained, that if the heir would exhibit a true inventory of all the goods and chattels of the deceased, he should be no farther chargeable than to the value of the inventory; and so much strictness was required by that law in making an inventory, that if the heir neglected it for a year or more, he was obliged to pay all the debts and legacies, though he had not sufficient of the testator's estate to do it. Godolph. 150.

The reason of an inventory with us at this day, is for the benefit of creditors and legatees; and, therefore, every executor is compellable to bring in an inventory, at the discretion of the ordinary; and if he presumes to administer without bringing in such inventory, he is punishable in the spiritual court. Swinb. 401. Godolph. 151.

But as this matter of bringing in an inventory and accounting is enjoined and directed by several acts of parliament, we shall here take notice, and in the first place insert those clauses of the statutes which are relative to this matter. By the 31 E. 3. cap. 9. "Administrators shall be accountable to the ordinaries as executors be in the case of testaments."

By the 21 H. 8. cap. 5. § 4. it is enacted, "That the executor and executors named by the testator or person deceased, or such other person or persons to whom administration shall be committed, where any person dieth intestate, or by way of intestate, calling or taking to him or them such person or persons two at the least, to whom the said person so dying was indebted, or made any legacy; and upon their refusal or absence, two other honest persons, being next of kin to the person so dying, and in their default or absence, two other honest persons; and in their presence, and by their discretions, shall make or cause to be made a true and perfect inventory of all the goods, wares, merchandizes, as well moveable as not moveable, whatsoever, that were of the person so deceased, and the same shall cause to be indented; whereof the one part shall be by the said executor or executors, administrator or administrators, upon his or their oath or oaths, to be taken before the bishops, ordinaries, their officials or commissaries, or other persons, having power to take probate of testaments, upon the *holy evangelists*, to be good and true, and the same one part indented shall present and deliver into the keeping of the said bishop, ordinary or ordinaries, or other person having power to take probate of testaments; and the other part thereof to remain with the said executor or executors, administrator or administrators; and that no bishop, ordinary, or other whatsoever person having authority to take probate of testaments

* See the part of this statute which directs distribution. *Post.*

[(a) The next of kin, or a creditor, have a right *ex debito justitiæ* to put this bond in suit in the name of the ordinary, Archbishop of Canterbury v. House, Cowp. 140. and, therefore, the ordinary, or his personal representative, may be compelled by *mandamus* to deliver up the bond for this purpose. *Rex v. Johnson*, Executrix of the Bishop of Worcester, and others, East. 29 Geo. 3.]

"ment or testaments, refuse to take any such inventory or inventories to him or them presented or tendered, to be delivered as aforesaid, under the penalty of 10*l*."

By the 22 & 23 Car. 2. cap. 10. * it is enacted, "That all persons empowered to grant administration, shall, of the respective person or persons to whom any administration is to be committed, take sufficient bonds, with two or more able sureties, respect being had to the value of the estate, in the name of the ordinary, with the condition in form and manner following: *The condition of this obligation is such (a), that if the within bounden A. B., administrator of all and singular the goods, chattels, and credits of C. D., deceased, do make, or cause to be made, a true and perfect inventory of all and singular the goods, chattels, and credits of the said deceased, which have or shall come to the hands, possession, or knowledge of him the said A. B., or into the hands and possession of any other person or persons for him, and the same so made do exhibit, or cause to be exhibited, into the registry of court, at or before the day of next ensuing, and the same goods, chattels, and credits, and all other the goods, chattels, and credits of the said deceased, at the time of his death, which at any time after shall come to the hands or possession of the said A. B., or into the hands and possession of any other person or persons for him, do well and truly administer according to law; and further, do make, or cause to be made, a true and just account of his said administration, at or before the day of* And all the rest and residue of the said goods, chattels, and credits, which shall be found remaining upon the said administrator's account, the same being first examined and allowed of by the judge or judges for the time being, by his or their decree or sentence, pursuant to the true intent and meaning of this act, shall limit and appoint; and if it shall hereafter appear, that any last will or testament was made by the said deceased, and the executor or executors therein named do exhibit the same into the said court, making request to have it allowed and approved accordingly, if the said A. B. within bounden, being thereunto required, do render and deliver the said letters of administration (approbation of such testament being first had and made) in the said court, then this obligation to be void and of none effect, or else to remain in full force and virtue; which bonds are hereby declared and enacted to be good to all intents and purposes, and pleadable in any courts of justice; and also that the said ordinaries and judges respectively shall and may, and are enabled to proceed to call such administrators to account, for and touching the goods of any person dying intestate; and upon hearing and due consideration thereof, to order and make just and equal distribution, &c."

Per Holt, C. J. even before this statute, the ordinary could not *ex officio* cite

But by the 1 Jac. 2. cap. 17. it is provided, "That no administrator shall be cited to any of the courts to render an account of the personal estate of his intestate, (otherwise than by an inventory or inventories thereof,) unless it be at the instance or prosecution of some person or persons, in behalf of a minor,

"or

“or having a demand out of such personal estate, as a creditor
“or next of kin.” an admin-
trator to ac-
count; so
that really this statute has no effect at all, for the law was so before. Salk. 316.

The inventory is to contain, in separate and distinct articles, Godolph.
all the (a) goods, chattels, and credits, or (b) debts due to the 152.
deceased, and the prices at which they were valued. (a) And by
Swinb. 407.
the order heretofore used, was first to inventory and appraise the moveable goods, such as household stuff,
corn, cattle, &c.; then the immoveable, as chattels real, or leases of lands, and after, the debts due to
the testator; which order, he says, is observed to this day. (b) That, on a plea of *plene administravit*,
all separate debts mentioned in the inventory shall be accounted assets in the executors hands; for it is as
much as to say, that they may be had for demanding, unless the demand and refusal be proved. Salk.
296. pl. 3. ruled upon evidence by Holt, C. J. [And if the inventory does not distinguish between the
separate and *desperate* debts, it will charge the executor with the whole as assets, and put him to
prove if any of them were desperate. Bull. N. P. 140. 2. Upon the issue of *plene administravit*, the
plaintiff cannot give in evidence a copy of the inventory delivered by the defendant to the spiritual court,
unless it be signed by him, though it be signed by the appraisers: but if he can give an inventory in evi-
dence, he may shew that the goods were under-valued. *Id. ibid.*]

But such things as are fixed to the freehold, and belong to the Godolph.
heir, as glass-windows, wainscot, fish in a pond, and doves in a 152.
pigeon-house, are not to be put into the inventory.

So, the wife's *paraphernalia*, or such apparel as is suitable to Godolph.
her degree and quality need not be put in the inventory, for they 153. 403.
survive to her, and are not esteemed part of the husband's per-
sonal estate.

By the ecclesiastical law, the time of making and exhibiting Swinb. 405.
an inventory is left to the discretion of the ordinary, who may (c) And ac-
require it to be done (c) sooner or later, according to the distance cording to
the goods lie from the executor, and other circumstances. Godolph.
150., the
making an

inventory is to be begun within thirty days after opening the testament, and notice thereof to the execu-
tor, and is to be finished within sixty days after, unless the executor and the testator's goods, or the
greatest part thereof, be far remote and distant from each other, in which case the law doth allow one
year from the time of the testator's death for the making thereof; and during this time no suit is to be
commenced against the executor in the ecclesiastical court; and in Godolph. 225. it is said, that an
executor is to have a competent time to account, which time is a twelve-month.

And as an explanation to the manner of bringing in an inven-
tory and accounting, and the necessity thereof, and how these are
construed and required by the common law courts, I shall here
insert the following case:

In debt upon an administration-bond, and *oyer* prayed of the Hill. 6 Ann.
condition, defendant pleads, 1st, That he did exhibit an inven- Archbishop
tory by the time. 2^{dly}, That he had administered all according of Canterbu-
to law. 3^{dly}, That he was not cited to bring in his accounts, so ry v. Willis,
that no decree was made concerning them. Plaintiff replies, Salk. 257.
that the intestate was bound in a bond of so much, &c. to J. S. pl. 3. S. C.
for payment of such a sum, and that J. S. had brought an action
of debt upon that bond against the defendant, and had got judg-
ment; and though divers goods to the value of that debt came to
the defendant's hands, yet he had not paid it, but had converted
them. Defendant makes a frivolous rejoinder, and upon that the
plaintiff demurs; and the question made upon the case is, if the
defendant the administrator is bound to bring in his accounts
before the ordinary in the ecclesiastical court, by the time speci-
fied

For the ordinary could not dispute the item, or require proof of their trust, as in Noy was attempted; but the creditor may sue at common law, and then payment will be tried by common law proof, even by one witness.

fied in the condition of the bond, not being cited or summoned thereto; and *Holt*, Ch. Just. in pronouncing the opinion of the court said, that they were all unanimous, that he was obliged to account though not cited or summoned; and he said first, that an executor or administrator is obliged to account is very plain, by the 31 *E. 3. st. 1. c. 11.*, at the end of the statute, where they are made accountable to the ordinary, as executors be in case of testament; and though the ordinary had no power to oblige them to account upon oath, yet if they were sued in Chancery by any creditor for the discovery of assets, there they were obliged to account upon oath, and the ordinary could not relieve them, *Noy*, 78. 2 *Inst.* 600. but that the account given in before the ordinary should be looked into, and unravelled. 2dly, If a legatee comes to sue for his legacy, he may unravel the account given in before the ordinary, because he cited them into the spiritual court, and has no remedy elsewhere for his legacy; but if the executor or administrator will pay the legacy, then he cannot unravel their accounts, because when the legacy is paid, this is the end of their suit; as in *Raym.* 470. *Boon's* case. As to the principal point, this statute 22 & 23 *Car. 2. c. 10.* was made to make the wife and next of kin as legatees, after all debts paid, and they are to sue for their legacies or shares in the ecclesiastical court; for the law was defective before, in that the ordinary had no power to compel a distribution, because the administrator had the same power as the executor; and after administration committed, the ordinary's power was at an end, and he had nothing more to do with the goods of the intestate; but now this statute was made to ascertain and settle a distribution; and the wife and next of kin may compel the administrator to make such division and distribution, and he is bound at his peril to account by the time limited; and if not done, he must shew some reasons wherefore it was not done; as that no court was then holden, &c., or some other matter which rendered it impossible to account by that time; and it appears by *Co. Ent.* 128. that the condition of administration-bonds before this statute was, that he should account when thereunto required; not *ex officio*; but now the act of parliament enjoins him to account peremptorily before such a time, and therefore he is bound at his peril to do it: and in all cases where a man is bound in a bond to do a thing, he is bound at his peril to do it; as if a man is bound in a bond, with condition to pay money at such a time and place, although the obligee does not come there at the time, so as that he cannot pay it; yet if the obligor is not there ready to pay it, and does not stay there till the last instant or sun-set, he forfeits his bond, and he must plead that he was there and staid till sun-set, and had the money ready, and that nobody came there to receive it; and if a request be to be made, he must be there ready to be requested: and he took a difference between rent payable by reservation only, and when a bond is given for it; for in case of the bond he forfeits it, if he be not there ready to pay it, though no demand be made, *Hob.* 8. *Baker* and *Spain*. Suppose one is bound in a

bond conditioned to do a thing, which without the concurrence of the obligee cannot be done, as to levy a fine in *C. B.* in *Ort. Hill.* if no writ of covenant be sued out, yet he is bound to be there at the time ready to levy it, and must plead so, and that no writ of covenant was sued out; so here, if he could not account, because no court was holden, he ought to have pleaded it, for he ought to have done all in his power; but it is most certain the ecclesiastical courts are always open, and the statute makes no alteration as to the accounts. But then he made another point of the case, and ordered counsel to speak to it the next term; the point was this, the bar, which says, he was never cited to account, is ill, because he ought to have accounted at his peril, without any citation; but then this leaves room for an implication, that he may have accounted, though not cited; for he only says, he was not cited to account, and then the replication, which assigns for breach, non-payment of such a debt, is ill, and does not maintain the declaration as to the not accounting; and the meaning of the statute was not, that he should pay all debts *ex officio*, but as the creditors called him to pay them; and then whether the plaintiff shall have judgment upon the insufficient bar of the defendant, or whether by his replication it appears he has no cause of action, and so cannot have judgment, is a point fit to be argued, and cited 1 *Lutw.* 182. 8 *Co.* 120. *Dr. Bonham's* case, and 130 *Turner's* case.

[If the executor enter to the testator's goods, and will make no inventory thereof, then may every legatory recover his whole legacy at his hands; for, in this case, the law presumeth, that there are sufficient goods to pay all the legacies, and that the executor doth secretly and fraudulently subtract the same; whereas otherwise, the executor is presumed not to have any more goods which were the testator's, than are described in the inventory (a), the same being lawfully made.

deficiency of the assets.

Swin. 228.
(a) Nor shall the inventory be conclusive on him, if there should be afterwards an unexpected 2 *Ve.* 194.

If the executor make no inventory, but pay interest on a legacy, or pay all the legacies but one, this shall be received as evidence of assets.]

v. Swainson, 1 *Ve.* 75. *Orr v. Kaines*, 2 *Ve.* 154.

Corporation of Clergymen's Sons

12. Where Administration unduly obtained may be revoked or repealed.

It seems to have been formerly holden in some cases, that if the ordinary once granted administration, he could not afterwards revoke or repeal it; for having once executed his power, he had nothing further to do in the affair.

10. 6 *Co.* 18. *Cro. Eliz.* 459.

Cro. Car. 62. *Fotherbie's* case. *Roll. Abr.* 303. *Style*, *Moor*, 396.

Hence in *Sir George Sands's* case, where a prohibition was prayed, because *Sir George* had the administration of his son's goods granted to him; and since that a woman, pretending she was his wife, sued to have the administration repealed; a prohibition was granted; for though the statute says, the ordinary may grant administration to the wife or next of kin; yet when

Sid. 179. *Sir George Sands's* case. *Keb.* 683. and *Raym.* 93. *S. C.* in which last book a fur-

the reason seems to be given, viz. that our law he has granted it to the next of kin, as the father is, he has executed his power, and his hands are closed, and he cannot repeal it.

is to determine who is the next of kin within this statute; and that by our law the father is next of kin to his child, *vide* 3 Co. in Ratcliff's case, and Bro. tit. *Administration*, 47. But 3 Salk. 22. *feme covert* died intestate; administration granted to her next of kin; husband sues for a repeal; prohibition denied, for ordinary could not grant administration to any but the husband.

Latch. 67. But notwithstanding these opinions, it is now agreed, that the ordinary may revoke or set aside an administration granted to the next of kin, and that for several causes; as if they forge or suppress a will; if they come too hastily to take out administration within the fourteen days; if they go beyond sea; become *non compos*; or if they take out administration without security to account and exhibit inventories; or, if there be a residuary legatee; and may in general, for any fraud used in obtaining it; for it would be absurd to allow a court jurisdiction herein, and at the same time deprive them of the liberty of vacating and setting aside an act of their own, which was obtained from them by deceit and imposition.

13. How far a Repeal makes all mesne Acts void.

Plow. 277. If the testator makes a will and appoints an executor, and the ordinary, without taking notice of any such will, grants administration to J. S., and afterwards the executor comes in and proves the will, such executor shall regularly avoid all mesne acts done by the administrator; for the executor, by being made such, had an (a) interest, which the ordinary could not deprive him of. Greybrook and Fox. 2 Lev. 182. 2 Jon. 72. Vent. 303. (a) And therefore if an executor sells a term, and afterwards refuses before the ordinary, and administration is granted to J. S., who likewise sells this term to another, the first vendee shall have it. 2 Lev. 183. *said arguendo*.

Plow. 279. But if the ordinary grants administration, and after there appears to be an executor, if the administrator pays debts, legacies, or funerals, which the executor ought to have paid, in trespasses against him by the executor, he shall (b) recoup so much in damages. Peckham's case. 4 Eliz. cited in Greybrook and Fox. (b) So, it

was holden in equity, where a widow possessed herself of the personal estate as executrix under a revoked will, and paid debts and legacies, but had no notice of the revocation, that she should be allowed those payments. Chan. Ca. 126.; but ordered the leases she had made to be set aside.

Roll. Abr. 919. If the testator makes a will, and thereof appoints A. executor, and afterwards makes a second will, and thereof appoints B. executor, and A. has the probate of the first will granted to him, by virtue of which a debtor to the testator pays him a debt without notice of any second will, and has a release from him; yet, upon B.'s proving the second will, and repeal of the probate of the first, he may compel the debtor to pay the money over again; for though this be a particular hardship, yet the inconvenience would be much greater, to allow the ordinary to make any other executor than whom the testator had made. 16 Car. 1. in B. R. between Graves and Weigham, said to be adjudged by the advice of all the judges in Serjeant's Inn, in an action

brought by B. against such creditor. [Comyns, 150. But see 3 Term Rep. 125. *contra*—where the authority of the cases, both in Rolle and Comyns, is denied.]

But

But in a case where the plaintiffs, as executors, had a judgment against the defendant, and then there was a suit in the spiritual court before the same judge, who granted letters of administration to the plaintiff to repeal them; and the defendant therefore prayed that execution might not go out against him till the matters in the spiritual court should be determined; the court denied it, for this reason, that if a debtor pay money on a judgment and execution to one who is executor *de facto*, having a probate under the seal of a prerogative court, he shall never be forced to pay it again; and here the suit to repeal the administration being before the same judge who granted it, can have no influence only from the time of the judgment of repeal; but (a) if it had been before the delegates by way of appeal, it might be otherwise.

Hill. 25 &
26 Car. 2.
between
Digby and
Hollis v.
Wray in
B. R.
(a) That an
appeal sus-
pends the
former sen-
tence; but
a citation is
in nature of
a new suit,
and has no
effect till
there be

judgment on it. 6 Co. 18. b. Lev. 158. Raym. 224. 2 Lev. 90. S. P.

It is clear, that if the ordinary grants administration to (b) a stranger, and he is cited by the next of kin to have it repealed, pending which suit the administrator (c) sells the goods, and then the administration is repealed; that in this case the sale is good, for the administrator acted under a lawful authority, which vested the absolute property of the goods in him; and though the sale had been fraudulent, yet it could not be avoided by the second administrator; but as to creditors it may, by the 13 Eliz. cap. 5.

6 Co. 18. b.
Packman's
case. Cro.
Eliz. 459.
Moor, 396.
S. C.
(b) So, if
administra-
tion be com-
mitted to a
a creditor,
and after re-

pealed at the suit of the next of kin, he shall retain against the rightful administrator; and his disposal of the goods, even pending the citation, till sentence of repeal, stands good. Salk 38. pl. 6. Ld. Raym. 684. Com. Rep. 96. pl. 65. per Holt, Ch. Just. (c) But where an administrator released to a creditor, and after the administration was revoked, the release was holden void. Brown 51.

So, in debt for rent, where on the pleadings the case was, lessee for years died intestate, and administration was granted of his goods to A., who assigns this term to B., who assigns to C., who surrenders to the reverfioner; afterwards a third person cites the administrator before the ordinary to repeal the administration, who confirms the same; then the third person appeals from that sentence to the dean of the arches, where the sentence is avoided, and administration granted to the appellant—whether this avoidance of the sentence should avoid all acts done by the administrator before the action was the question; and it was resolved, according to the above case, that it should not.

Raym. 224.
Syms and
Syms, 2 Lev.
90. S. C.
by the name
of Semaine
and Se-
maine.

But after the administration is repealed, the authority of the administrator is determined; and, therefore, if he obtains judgment in an action of debt on a bond due to the intestate, and then the administration is repealed, he cannot proceed to execute that judgment; if he doth, the party will be discharged upon a motion, because the execution *erroneè emanavit*, for he had no authority but by virtue of a commission from the ordinary, and when that was determined, his authority ceased.

Yelv. 83.
Barnehurst
and Sir
Charles
Yelverton,
Brown, 91.
S. C.

So, in an *audita querela*, the plaintiff says, that E. P. died intestate, and that Davies, the now defendant, had administered his goods, and that some of the money came to the plaintiff, and that Davies, as administrator, brought trover and conversion for

2 Saund.
137. Tur-
ner and
Davies.
Mod. 62.

2 Keb. 668. the money, and had judgment to recover, and before execution
S. C. sued, the administration was repealed and granted to another,
and that notwithstanding he threatens to take the now plaintiff in
execution, upon which there is a demurrer; and the question
was, Whether, seeing the trover was for a wrong done in the
administrator's time, and for which he might have declared in
his own name, without naming himself administrator, and shall
pay costs if it goes against him, whether he shall not take out
execution after the administration is repealed? and the whole
court held, that he could not; for though it be a wrong done to
the administrator, yet when the money is recovered, it is assets, and
the second administrator must be put to another action, to recover
it out of his hands, which is a circuitry the law will not allow.

14. What Things an Executor may do before Probate of the Will.

Off. of An executor derives all his interest from the (a) will; and as
Exec. 33- it is that which gives him a right, so there are several acts which
Godolph. he may do, and which will be valid, though done before probate;
144. for though the spiritual court may compel him to come in
Roll. Abr. and prove the will, or renounce the executorship; yet this is
917. only looked upon as (b) a ceremony, which he may comply with
5 Co. 27. after several acts done by him.
Co. Lit. 292.

(a) But an administrator derives his whole authority from the ordinary, and therefore can do no act, unless he has letters of administration granted to him. Salk. 303. Skin. 87. pl. 5. (b) That, however, proving the will is necessary, because thereupon an inventory is to be exhibited, and other acts to be done, which are for the benefit of executors and legatees. Hut. 30.

Off. of Therefore, an executor, before probate, may possess himself of
Exec. 33- the testator's goods, and may enter into the house of the heir (if
Godolph. not locked) and take specialties and other securities for money
144. due to the testator.
2 And. 151.
Plow. 277.

Off. of So, an executor, before probate, may pay debts and legacies,
Exec. 33-4- receive debts, make acquittances and (c) releases of debts due to
5 Co. 28. the testator, and take releases and acquittances of debts owing by
(c) Where a the testator.
release given by an executor for a particular purpose, though it contained general words, yet was holden to extend only to the things intended to be released, vide 2 Lev. 214. Morris and Wilford, 2 Mod. 108. 2 Jon. 104. 2 Show. 46. pl. 32. 3 Keb. 814. 840. S. C.

Off. of Also, an executor, before probate, may sell, give away, or dis-
Exec. 34- pose, as he thinks proper, of the goods and chattels of the testator.

Off. of So, an executor, before probate, may assent to a legacy, and
Exec. 34- such assent shall vest the interest in the legatee.

Off. of So, if a bond be made payable to the testator, with a certain
Exec. 34- penalty, that it shall be paid by such a day, and the testator dies
* But now before the day, the principal sum must be paid his executor by
the day, although he did not prove the will by that day; other-
wise the penalty is forfeited*.
interest, and costs, into court, by 4 Ann. c. 16. § 13.

Upon

Upon this foundation, that it is the will which vests an interest in the executor, it is clearly agreed, that an executor may, before probate, commence an action in right of the testator, but he cannot declare before probate; for without producing his letters testamentary he cannot assert his right in court; but as soon as he has these, the impediment is (a) removed *ab initio*.

A. be arrested at the suit of an executor, before probate of the will, and after pay money to a stranger, and continue two months in prison, the arrest *quoad* the stranger is illegal, and *A.* shall not be adjudged a bankrupt from that time, so as to avoid the payment made to the stranger; for though the arrest, as to the executor and party, is lawful; yet it is good only by relation; but no such relation shall prejudice a third person. 3 Lev. 57. Duncomb and Walter, Raym. 479. Vent. 370. S. C. Skin. 22. pl. 22. 87. pl. 5. S. C.

[So, it hath been holden, that an executor may file a bill in equity before probate, and that the subsequent probate makes the bill a good one. And it was said in a late case (b) in the Exchequer *arguendo*, that it had been determined by that court about three years ago, that it was sufficient if the probate were obtained at any time before hearing.]

In this case of Patten v. Panton, to a bill by the plaintiff as executrix, for an account of money which the defendant was charged with having embezzled; and that certain annuities purchased by the plaintiff in the 5 per cents. might be transferred to the plaintiff; the defendant pleaded that no probate had been granted, and that a suit was depending between the plaintiff and defendant touching the right of the plaintiff to probate. The court gave no judgment upon the argument, and the case was never afterwards moved.

Also, an executor, before probate of the will, may maintain trespass, (c) trover, or detinue for the goods of the testator, and declare as of his own possession.

83. 125. Cro. Car. 208. 227. Salk. 302. (c) May maintain trover in his own name before the seizure of the goods or probate of the will. Carth. 154. *per Curiam*.

So, an executor may avow for rent, where a reversion for years comes to him from his testator.

So, if an executor be entitled to the next presentation to a church which becomes void, and he grant it to another, the grantee may maintain a *quare impedit* for it, without producing the probate of the will; for the executor himself, before probate, might have maintained this action on his own possession.

(F) What Persons are entitled to Administration.

BEFORE the statute of *West. 2. cap. 19.* the ordinary had the absolute disposal of intestates' estates; and as that statute first subjected them to an action at the suit of creditors; so from thence they found, as my Lord North observes, that what was before very beneficial to them began to be very troublesome, which obliged them to put the administration into other hands, taking security to save them harmless from suits.

But this method did not entirely free them from the trouble they had before; for such persons, being looked upon as servants or attorneys to the ordinaries, could not sue for, nor gather in the intestate's estate.

Roll. Abr. 917.
Raym. 481.
Salk. 302.
S. P. admitted,
Comb. 371.
(a) But if
Humphreys v. Humphreys, 3 P. Wms. 351.
(b) Patten, Executrix, v. Panton, 1793. In this case of Patten v. Panton, to a bill by the plaintiff as executrix, for an account of money which the defendant was charged with having embezzled; and that certain annuities purchased by the plaintiff in the 5 per cents. might be transferred to the plaintiff; the defendant pleaded that no probate had been granted, and that a suit was depending between the plaintiff and defendant touching the right of the plaintiff to probate. The court gave no judgment upon the argument, and the case was never afterwards moved.
Off. of Exec. 35.
8 Co. 144.
Yelv. 33.
Salk. 302.
Off. of Exec. 35.
Raym. 497.
2 Inst. 397.
Co. Lit. 133.
Roll. Abr. 906.

But they were eased herein by the statute 31 *E. 3. cap. 11.*, which enacts, "In case where a man dieth intestate, the ordinaries shall depute the next and most lawful friends of the dead person intestate to administer his goods, which deputies shall have an action to demand and recover, as executors, the debts due to the said person intestate in the king's court, for to administer and dispend for the soul of the dead, and shall answer also in the king's court to others to whom the said dead person was holden and bound, in the same manner as executors shall answer, and they shall be accountable to the ordinaries, as executors be in case of testament."

And by the 21 *H. 8. cap. 5.* it is enacted, "That the ordinary shall grant administration to the widow, or next of kin to the person deceased, or to both."

Raym. 498. Hereupon the common law was to judge who were the best friends; and therefore if there were husband or wife; in default of them, son or daughter; in default of them, or their children, father or mother; in default of them, brothers or sisters; in default of them, or their children, uncles or aunts, the ordinary was compellable to grant administration to them in their several orders.

Raym. 498. But as they had a liberty by the statute of granting administration to the wife or next of kin, so also had they a liberty, where there were several in an equal degree of kindred, to prefer whom they pleased, which liberty they made use of on pretence of avoiding confusion, and was a matter of great advantage to their jurisdiction; for hereby they chose him that was most obsequious to them; and when they called him to account, upon pretence of bestowing the overplus for the good of the deceased's soul, (a device in those popish times to make profit for the clergy,) they disposed of the overplus as their own.

(a) *Hob. 191. Cro. Car. 62. Jon. 228. Hob. 83. Sid. 179.* But it came afterwards to be solemnly (a) resolved, that the ordinary, after administration granted by him, could not compel the administrator to make distribution; and it being very unreasonable that one person should run away with the whole personal estate, though there were several others in equal degree of kindred with him; this mischief was remedied by the 22 & 23 *Car. 2. c. 10.*, which allows all those who are in equal degree to come in for a distributive share, though one only, or though a creditor or stranger takes out administration.

4 *Co. 51. b. Oguel's case. Roll. Abr. 910. Cro. Car. 106. Mod. 231. Show. 351. Raym. 93. Sid. 409.* It seems to have been always holden, that the husband was entitled to administration as best friend to his wife, within the words of the statute 31 *E. 3. st. 1. c. 11.*; but there being some doubt, whether since the statute of 22 & 23 *Car. 2. c. 10.* he was not obliged to make distribution amongst the rest of her kindred, it was thought proper to settle this matter by a subsequent law.

And accordingly by the 29 *Car. 2. cap. 3. § 25.* it is enacted, "That neither the said statute 22 & 23 *Car. 2. c. 10.*, nor any thing therein contained, shall be construed to extend to the
"estates

"estates of feme covert that shall die intestate (a), but that their husbands may demand and have administration of their rights, credits, and other personal estates, and recover and enjoy the same as they might have done before the making of the said act."

[(a) For a feme covert may make a will with the consent of her husband, and in

such case, he cannot be entitled to administration. *R. v. Bettsworth*, 2 Str. 1112. He may, indeed, administer to her notwithstanding a will, if she have power to dispose only of part of her property. *R. v. Bettsworth*, 2 Str. 891.—In case of the husband's death after the wife, the administration must be granted to his next of kin. *Squib v. Wynn*, P. Wms. 378. *Bacon v. Bryant*, 11 Vin. Abr. tit. *Executors*, K. pl. 25. *Humphrey v. Bullen*, *id.* pl. 26. *Elliott v. Collier*, 3 Atk. 526. 1 Vez. 15. 1 Wilf. 168. *Bouchier v. Taylor*, Hargr. Law Tracts, 473. 7 Br. P. C. 414.]

Also, since the statute 22 & 23 Car. 2. c. 10. the ordinary may grant administration to the wife or next of kin, at his election, but then she must have her distributive share: also, the ordinary may grant administration *quoad* part to the wife, and as to the other part to the next of kin; in which case neither can complain, since the ordinary need not have granted any part of the administration to the party complaining.

If there be grandfather, father, and son, and the father die intestate, the son shall have the administration, and not the grandfather, though they be both in equal degree (b), as to nearness of kindred. mity of degree is reckoned according to the civilians. *Pr. Ch.* 593.

Sid. 179.
Raym. 93.
Show. 351.
Salk. 36.
pl. 2.
3 Danv. 407.
pl. 1.
Holt, 42.
pl. 1.
2 Vern. 125.
said *arguen- do*. [(b) For the proxi-
2 Vez. 215.]

[If there be neither father nor son of the intestate, the next in succession are (c) brothers and grandfathers: these are followed by (d) uncles, or nephews, and the females of each class respectively, who must, as equally near, take *per capita*, and not *per stirpis*; and lastly, cousins.

(c) Black-
borough v.
Davis, 1 P.
Wms. 40.
Woodroffe
v. Wick-
worth, Pr.
2 Vez. 215.]

Ch. 527. (d) *Durant v. Prestwood*, 1 Atk. 454. *Loyd v. Tench*, 2 Vez. 215.

A brother of the half blood shall exclude an uncle of the whole blood, for the half blood are of the kindred of the intestate; and the ordinary may grant administration to the sister of the half, or brother of the whole blood at his discretion.

If none of the kindred will take the administration, it may be granted to a creditor.

If the executor refuse, or die intestate, the administration is to be granted to the residuary legatee, in exclusion of the next of kin.

Croke v.
Watt,
2 Vern. 124.
Show. P. C.
108.
Bac. Elm.
80.
1 Salk. 38.
Pierce v.
Parks,
1 Sid. 281.
Thomas v. Butler, 1 Vent. 219.

In defect of all these, the ordinary may commit administration, as he might have done before the statute of *Edw.* 3., to such discreet person as he approves of, or may grant letters *ad colligendum bona defuncti*.

Plowd. 278.
a.

If a bastard, (who hath no kindred, being *nullius filius*,) or any one else that hath no kindred, die intestate, and without wife or child, it hath been formerly holden, that the ordinary could seize his goods, and dispose of them to pious uses: but the usual course now is, for some one to procure letters patent, or other authority from the king, and then the ordinary of course grants administration to such appointee of the crown.]

Manning
v. Napp.
1 Salk. 37.
Jones v.
Goodchild,
3 P. Wms.
33 See
Doug. 542.

(a) Whether a person's giving security and an entry in the registry of the administration, *vide* Show. 406. &c.

(G) In what (a) Manner the Ordinary may grant Administration; and herein of granting it to one or more, or for a particular Thing.

(b) 4 Mod. 14, 15.

(c) 5 Co. 9. Sid. 183.

Keb. 682.

and by 1

Roll. Abr.

908. if the

person en-

titled to ad-

ministration

be outlawed,

in prison, or

beyond sea,

the ordinary

may grant

administration

THERE hath been some (b) doubt whether the ordinary could grant administration to one during the absence of the person appointed executor. The reasons offered against it were, that his authority herein was entirely regulated by the statutes, which mention no such administrator; that creditors would be put to great hardships, in being obliged at their peril to take notice of the return of such absent person, which determining the authority of the administrator would put them under a necessity of commencing their actions a-new, which would be great delay and expence to them: but notwithstanding these reasons, it is now clearly (c) agreed, that the ordinary may grant administration during the absence of another, and that for the same reasons for which he may grant administration during the nonage of an infant executor, or one entitled to administration; for without this power the inconveniency to creditors would be much greater, in that there would be no person against whom they could commence their actions, nor any one to take care of the deceased's estate or effects.

may grant administration to another, for which is cited 34 H. 6. 14. & *vide* Salk. 42. pl. 11. See 3 Salk. 23. 2 Ld. Raym. 1071. 6 Mod. 304. Lutw. 342. S. P. admitted.

Moor, 606,

Robin's

case; but in

2 Show. 69.,

it seems to be

taken for granted,

that there may

be an administrator

pendente lite of a will; for there

the question was,

whether such an administrator

was liable to an action; and there

was said to be clearly

agreed, that he was,

for that he was fully

administrator for the time. *Vide infra*.

Also, there appears to have been some doubt whether the ordinary could grant administration *pendente lite* of a will; and in *Moor* it is said *semble per Cur.* that he could not.

Carth. 153.

Frederick

Hook.

And in *Carth.* it is reported as the opinion of the court, that administration *pendente lite* concerning a will, is utterly void, and a difference there taken, where there is a controversy in the spiritual court concerning the right of administration, and where it is concerning a will; for in the first case an administration granted *pendente lite* is good; but it is otherwise where the controversy is concerning a will, for he who comes in under a will shall avoid all that which an administrator can do.

Mich. 1731.

between

Wollaston

and Walker.

2 P. Wms.

576. pl. 183.

Fitzgib.

But this matter came fully to be considered in a late case, in which it was determined, that the ordinary may grant administration *pendente lite* of a will, and that it depended on the same reasons by which he is enabled to grant administration *durante minoritate* or *absentia*.

202.

Barnard.

K. B. 423.

2 Str. 917.

[But *lis pendens* about the will is a good return to a man-

damus to grant a probate, Andr. 366. or administration. 4 Burr. 2295. 1 Bl. Rep. 640.]

2 Vern 514.

Adams and

Buckland.

The ordinary may grant administration to two, or more, and if one of them dies, yet the administration does not cease; for it is

is not like a letter of attorney to two, where by the death of one the authority ceases; but it is rather an office, and administrators are enabled to bring actions in their own names, for they come in the place of executors, and therefore the office survives.

Also, the ordinary may grant administration as to a particular thing or place to one, and so of another part of the intestate's estate to another; but he cannot grant several administrations for one and the same thing; as, if the intestate leaves a bond-debt of 100*l.*, or a horse &c.; for these things being entire things, it would be absurd, that two persons should have a right to them.

Roll. Abr.
908.
Saik. 36.
pl. 2.

(H) What shall be deemed the Testator's Personal Estate, or Assets in the Hands of the Executor: And herein,

1. What shall be such an Interest vested in the Testator, as shall go to his Executors.

ALL the personal estate whereof the testator died possessed, whether it consists in chattels real, as leases for years, mortgages, &c., or chattels personal, as household goods, money, cattle, &c.; the first of which the civil law distinguisheth by the name of immoveable goods, the latter of moveable, belong to the executors, and are (a) assets in their hands for payment of the testator's debts and legacies.

Off. of
Exec. 52.
Godolph.
180.
(a) For assets
in the hands
of the heir,
vide tit.
Heir and Ancestor.

And as the executor represents the testator as to his personal estate, therefore, let the value of the thing be ever so inconsiderable, yet the executor shall have the same interest as the testator had in it; as if the testator had dogs, ferrets, &c., they belong to the executor; and if taken from him, the law gives him the same remedy which the testator had.

Off. of
Exec. 57.
58.

Also, he hath the same interest in an apprentice which the testator had, and shall be bound according to his testator's covenant, to provide for such apprentice, &c.

Off. of
Exec. 95.
vide tit.
Master and Servant.

So, of a debtor in execution at the suit of the testator, he has an interest in the body, which is a pledge for the debt, and the prisoner cannot be discharged without the concurrence of the executor.

Off. of
Exec 46.

[If an executor hath a lease for years of land, of the value of 20*l.* a year, rendering rent of 10*l.* a year; it is assets in his hands only for 10*l.* over and above the rent.]

Cro. Eliz.
712.

And as the law lays the burden of performing the testator's will on the executor, and for that purpose gives him the personal estate; so it supposes and vests the interest in him before he has actually reduced the goods to his possession, and therefore all the testator's personal estate, how remote soever situated, is (b) assets in the hands of the executor.

Off. of
Exec. 65.
Roll. Abr.
921.
Hob. 265.
(b) And
therefore
where the

jury found assets in *Ireland*, it was holden surplusage; and that if the executor hath goods in any part of

of

of the world, he shall be charged with them. 6 Co. 47. a. [An estate in the plantations is testamentary, and assets to pay debts. Noell v. Robinson, 2 Vent. 358.]—But if an executor lives in *London*, and his testator hath goods in *Bristol*, though the executor hath such an immediate possession of those goods, that he may maintain trover for them in his own name, and the damages recovered shall be assets in his hands; yet if he doth not recover so much as the goods are really worth (if there be no default in him), he shall answer for no more than he recovers; and if the goods are perishable, and are impaired, without any default in him, either to preserve them, or to sell them at the full value, he shall not answer for the full value, but may give that matter in evidence to discharge himself; but if he neglects to sell the goods at a good price, and afterwards they are taken from him, there the value of the goods shall be assets in his hands. 6 Mod. 181. ruled in evidence by Holt, Ch. Just.

Off. of
Exec. 65.
Owen, 36.

But debts due to the testator, whether by bond, statute, judgment, the arrears of rent, &c., are not assets till they are recovered by the executor, but only choses in action; yet if executor releases the debt, he releases the action, and is answerable to the value.

Off. of
Exec. 60.

Also, as to chattels real, such as an interest for years in advowsons, commons, fairs, houses, lands, markets; these, though they go to the executor, yet is not the possession in him till he has actually entered; but a lease for years of tithes is deemed to be in the actual possession of the executor, because of this there can be no entry.

Dyer, 110.
5 Co. 88.
Off. of
Exec. 49.
Comb. 451.

And as the executor's interest vests immediately upon the death of the testator, so it hath been always holden, that an executor or administrator may bring trespass for goods taken away after the testator's death, though before probate or administration granted, and that their interest shall have relation to the time of his decease.

Salk. 79.
pl. 1.
Deering and
Torrington.
(a) Where
goods re-
main assets,
notwith-
standing a
fraudulent

But the absolute property of the goods must have been vested in the testator, so as to entitle the executors, or to make them assets in their hands; and, therefore, if the testator takes a bond for another in trust, and dies, this is not assets in the hands of his executor: so, if the obligee assigns over a bond, and (a) covenants not to revoke, and dies, that bond is not assets in the hands of the executor of the obligee.

bill of sale of them. Cro. Eliz. 405. [And as to creditors, see stat. 13 Eliz. c. 5. and ante.]

Cro. Eliz.
23.

So, where an executor pleaded, that he had *riens in ses mains*, but certain goods distrained and impounded; it was adjudged, that they were not assets to charge him.

Keilw. 63.

The testator pawned his goods, and the executor redeemed them with his own money, and retained them till he was satisfied; and it was adjudged, that he might retain them, the property being altered by payment to the value, and that they were not assets.

Anon.
2 Ch. Ca.
208.

[If an executor renew, he shall account for the new lease, as well as the old, for the benefit of the creditors.]

St. 21 H. 8.
c. 5. § 5.

If a man devise land to be sold, neither the money thereof coming, nor the profits thereof for any time to be taken, shall be accounted as any of the goods and chattels of such person deceased.

1 Roll. Abr.
220.

But if a man devise lands to be sold by one for payment of his debts and legacies, and make the same person his executor; the money

money made by such person upon the sale of the land shall be assets in his hands.

But otherwise it is, where the land is devised to be sold by the executor and *others*; for there the money shall not be assets; for they are not trusted with it as executors.

Id. ibid.

But it shall be assets in equity, tho'

not at law. 1 Eq. Caf. Abr. 141. Such assets as are liable to debts and legacies by the course of law, are called *legal* assets; such as are only liable by the help of a court of equity, are called *equitable* assets. 4 Burn. E. L. 288. Yet legal assets, although they cannot be come at without the assistance of equity, shall be applied in a course of administration. Therefore, if a mere trust estate depend on the heir at law, though it may be necessary to go into equity, to reduce it into possession, yet it will be considered as legal, and not as equitable assets, a trust estate being made assets by statute. But an equity of redemption of a mortgage in fee, being merely an equitable interest, and not made assets by any legislative provision, will, therefore, be considered as equitable assets. *Plunkett v. Penfon*, 2 Atk. 294. So, it hath been said, that if a termor for years mortgage his term, the equity of redemption will be equitable assets. Case of Sir Charles Cox's Creditors, 3 P. Wms. 342. *Hartwell v. Chitters*, Amb. 308. But this last point was not in fact determined in the case of Sir Charles Cox's Creditors; and yet the case of *Hartwell v. Chitters* rests entirely on the supposed authority of that case. And it hath been adjudged in several preceding cases, that chattels, whether real or personal, mortgaged or pledged by the testator, and redeemed by the executor, shall be assets *at law* in the hands of the executor for so much as they are worth beyond the sum paid for redemption, though recoverable only in equity. *Hawkins v. Lewes*, 1 Leon. 155. *Harcourt v. Wrenham*, or *Harwood v. Wrayman*, Moore, 858. 1 Roll. Rep. 156. 1 Brownl. 76. 1 Roll. Abr. 920. *Alexander v. Lady Graham*, 1 Leon. 225. Formerly it was holden, that whatever comes to the executor's hands, or he is entrusted with, as executor, is assets at law: therefore money arising from the sale of lands devised to an executor to sell, or which he is empowered to sell for the payment of debts and legacies, were considered as legal assets, and administrable as such. *Girling v. Lea*, 1 Vern. 63. *Greaves v. Powell*, 2 Vern. 248. *Anon. id.* 405. *Cutterback v. Smith*, Pre. Ch. 127. *Bickham v. Freeman*, *id.* 136. *Dethwicke v. Caravan*, 1 Lev. 224. *Burwell v. Corrant*, Hardr. 405. *Lord Masham v. Harding*, Bunb. 339. *Blatch v. Wilder*, 1 Atk. 420. But modern resolutions have taken a different turn; and courts of equity have considered the real estate in such case as merely a trust fund, and distributable among the creditors *pari passu*; *Anon.* 2 Vern. 133. *Challis v. Calborn*, Pr. Ch. 408. *Chambers v. Harvest*, Mosel. 123. *Hall v. Kendall*, *id.* 328. *Lewin v. Oakley*, 2 Atk. 50. *Bayson v. Lindegreen*, 2 Br. Ch. Rep. 94. And that, though the devise be not to the executor expressly upon trust, or in trust, or as a trustee, provided there be enough in the will to convert the executor into a trustee, as if the devise be to him and his heirs. *Silk v. Prime*, 1 Br. Ch. Rep. 138. n. *Newton v. Bennett*, *id.* 135. *Barker v. Boucher*, *id.* 140. But if the executor has merely a naked power to sell *quâ executor*, *quare*, whether the assets are legal or equitable? *Silk v. Prime*; *Newton v. Bennet*, *ubi supra*. It hath, however, been determined, that if an estate descend to the heir, charged with debts, it will be legal assets. *Freemoult v. Dedire*, 1 P. Wms. 430. *Plunkett v. Penfon*, 2 Atk. 290. It seems then, from the above cases, that assets are considered as equitable, either in respect of the intent of the testator, or of the nature of the testator's interest in the property. In the first case, the charge upon the real estate must be for the payment of debts generally, and the descent must also be broken: in the latter case, the interest of the party in the property must be purely an equitable interest, and not made legal assets by any statute, 2 Fonbl. Eq. Tr. 404. n. f.]

2. How far Debts due to the Testator are Assets.

All debts due to the testator, whether by judgment, statute, recognizance, mortgage, bond, &c., are assets, but the executor is not to be charged with them till he has received the money.

Off. of
Exec. 65.
Roll. Abr.
920.
Owen, 36.

So, if the executor, in right of the testator, recovers any (a) damages for any trespass done to the goods of the testator, or for the breach of any (b) covenant or contract made with the testator; all such damages thus recovered shall be assets in the hands of the executor.

Off. of
Exec. 65.
Roll. Abr.
920.
(a) So, money recovered by him,

by decree in a court of equity, shall be assets. Moor, 858. Brownl. 76. 2 Chan. Ca. 152. (b) Though the covenant founded in the reality, as for not assuring lands, &c. yet if it be broken in the testator's life-time, the executor shall have the action. Off. of Exec. 65.

* See 3 E. 3. c. 7. § 8.

Off. of
Exec. 71. So, if the executor, in right of the testator, is entitled to a writ of error, attain, deceit, *audita querela*, *identitate nominis*, whatsoever is regained by any of these ways, as unduly lost by the testator, shall be assets.

3 Ch. Ca.
89. [So, a debt due from an executor to his testator, is assets in equity to pay legacies.]

Hob. 66. But though debts, &c. due to the testator, are not assets till re-
Godb. 29. covered, yet if the executor gives (a) a release or acquittance for
And. 138. any such debt, he shall be charged in the same manner as if he
Cro. Eliz.
43. had received the money (b).

4 Leon. 102. (a) Where an executor lost a bond due to the testator, and a creditor having recovered judgment against him, the question came to be in equity, whether the executor was obliged to make good the debt to the testator's estate; and it being urged, that the loss of the bond was not a loss of the debt, because the same still subsisted, and might be recovered in equity, and that it would be hard in this case to charge the executor, when in truth the obligor was insolvent; the court directed the executor to prosecute a suit against the obligor, and respited the judgment obtained by the testator's creditor in the mean time.
2 Vern. 299. [(b) So, if he neglects to bring an action on a bond, he shall be charged with the amount of it. Lawson v. Copeland, 2 Br. Ch. Rep. 156.]

Off. of
Exec. 71. So, if the executor submits to arbitration the debts or da-
3 Leon. 51. mages which he is entitled to in right of his testator, and the ar-
[As to this, bitrators award a release or discharge thereof; this being his own
feetit. *Arbi- voluntary act, shall charge him in the same manner as if he had
trament and received the money.*
Award, C.]

Vent. 111. If the plaintiff, as executor, and the defendant submit all con-
Horsam and troversies relating to the testator's estate to arbitration, and the
Turgot. arbitrators award, that the defendant shall pay the executor 300*l.*,
Lev. 306. and there is a custom of foreign attachment in London, that if a
and 2 Keb. suit be commenced against the executor of any person, any debt,
716. 731. which was due to the testator *tempore mortis sue*, may be at-
741. S. C. tached; * yet this 300*l.*, although it be assets, and shall charge
* *Qu.* If this the executor, shall not be within the custom; for it was not the
is law? By testator's at the time of his death, and all customs are to be con-
such means, strued strictly.
if the cus-
tom was
good, cre-
ditors would
be their own
carvers, and simple contract creditors might be paid, when specialty and judgment creditors
would lose their debts. *Vide* Fisher, *Administratrix*, v. Lane and others, in C. P. 12 Geo. 3.
3 Wils. 297.

3. What shall be deemed the Testator's Personal Estate, and therein what Things shall go to the Heir, and not to the Executor.

Off. of
Exec. 53. The more general division of the testator's estate is into chat-
Gouldph. tels real and personal, or things immoveable and moveable, ac-
120. cording to the civil law: the moveable goods are again divided
Dyer, 383. into things animate and inanimate: of the first, are all the tes-
tator's horses, cows, sheep, fowls, &c., which clearly belong to
the executor; the inanimate things are all the testator's money,
household-stuff, implements and utensils, hay, carts, ploughs,
coaches, &c., and these also belong to the executor.

Off. of
Exec. 53. Chattels real, or things immoveable, are such as are annexed to
and favour of the freehold and inheritance, such as an interest
for

for years in houses, lands, advowsons, commons, fairs, markets, the interest in a ward, in an estate by statute staple, merchant, or *elegit*, and mortgages; and these also regularly go to the executor.

Godolph. 120.

But here it will be necessary to inquire more particularly into the nature of those things, which, from the different rules of law that govern real and personal property, will make some things belong to the heir, and others to the executor.

If the king by an attainder of felony is entitled to the *annum, diem & vastum*, which is a power of taking the profits of the offender's lands for a year, and also of committing waste in houses and cutting down trees, and he grants this to a man and his heirs; yet it shall go to the executors of the grantee, for this is but a (a) chattel.

Off. of Exec. 54. (a) So, if a man, possessed of a term for years, devises it to

another and his heirs, or heirs male of his body; this being but a chattel, shall go to his executors. 10 Co. 47. Yelv. 73. Fearn, 342., &c.

So, if a man, possessed of a term for one hundred years, makes a lease for fifty years, reserving rent to him and his heirs, this rent determines upon his death, for the heir cannot have it, because he cannot succeed in the estate, being a chattel interest, to which the rent, if it continues after the life of the lessor, must belong; and the executors cannot have it, because there are no (b) words to carry it to them.

Vent. 161. (b) But if a termor of 100 years leases for fifty years, reserving rent to him and his heirs, dur-

ing the term, the executors shall have the rent after the death of the lessor; for here the rent is made to continue during the term. Vent. 161.—So, if A. grants a rent-charge to B. for forty years, with a clause of distress to B. and his heirs, during the term; the executor of B. may distrain for it during the term; for the distress is expressly given during the term, and therefore must belong to the executor, who has a right to the rent-charge, being a chattel interest. Cro. Eliz. 644. Darrel and Wilton.

If a person were guardian in chivalry or knight's service, and died, the ward went to the executor; for this being an interest by reason of tenure did not determine by the guardian's death, and therefore went as a chattel to the executor; but if a guardian in (c) socage died, the ward went neither to the heir nor executor; but if the infant was of the age of fourteen, he was allowed to choose his guardian; and if under, the next of kin, to whom the inheritance could not come, was to be guardian.

Off. of Exec. 52. vide tit. Guardian. (c) That a guardianship pursuant to the statute 12 Car. 2. c. 24. cannot be assigned. Vaugh. 180.

signed, neither shall it go to the executors or administrators, being a personal trust.

If a person purchase the next presentation to a church, and die before it becomes void; this, as a chattel, shall go the executor, and not to the heir.

Godolph. 121. Off. of Exec. 54.

So, if there be tenant in tail, and the church happen to become vacant in his life-time, and he die before he hath presented, his executor, and not the issue in tail, shall present to this turn.

Godolph. 123. F.N.B. 33. P. acc.

But where the case was, that a parson of the church of D. purchased the inheritance of the advowson to him and his heirs, and died; and the question was, Whether the executors of the parson, or the heir should present? it was resolved, that the heir should present, and not the executors, and that it should descend

3 Lev. 47. Holt and the Bishop of Winchester.

(a) Where a parson, who had the inheritance of the advowson, devised the advowson in fee to a stranger; it was resolved, that the devisee should have the next avoidance. Cro. Jac. 371. Pinchon and Harris.

Co. Lit.

47. a. 143.
Roll. Abr.

447.

2 Saund.

369.

Hard. 95.

If a man *seised in fee* makes a gift in tail, lease for life or years, reserving rent, this rent, as incident to the reversion, shall go to the heir, and not to the executor; for since, during the continuance of the particular estate, the reversioner loses the profits of the land, the rent ought to be paid to him as a compensation for the loss.

Cro. Car.

207.

Drake and

Munday.

Therefore, if *A.* covenants and grants with *B.* that he shall have and enjoy Black-acre for six years, and *B.* covenants to pay to *A.*, his heirs, executors, and administrators, an annual rent during the term; this, being a good reservation of a rent, shall, upon the death of *A.*, be paid to his heir, who has the reversion as a retribution for the profits of the land, which he cannot enjoy during the term; and the executors of *A.* shall never have any thing by virtue of the covenant, though it is in express words granted to *A.* and his executors.

Co. Lit.

47. a.
2 Roll. Abr.

450.

So, if *A.*, being *seised in fee*, makes a lease, reserving rent to him and his executors and assigns, and dies, this rent is determined; for the executors cannot have it, being strangers to the reversion, which is an inheritance, and therefore, being never to enjoy the profits of the land after the expiration of the term, can never have a right to a retribution or compensation for them.

Latch. 99.

100. Sury

and Brown.

2 Roll. Abr.

451. S. C.

ill reported

to the con-

trary; but

Vent. 163.

S. C. cited,

and admitted

to be law.

But if a man *seised in fee* makes a lease for years, reserving rent to him and his assigns during the term, this reservation shall not determine by the death of the lessor, but the rent shall go to his heir; for though there be no mention of the heirs in the reservation, yet there are words that evidently declare the intention of the lessor, that the payment of the rent shall be of equal duration with the lease, the lessor having expressly provided, that it shall be paid during the term; consequently, the rent must be carried over to the heir, who comes into the inheritance after the death of the lessor, and would have succeeded in the possession of the estate, if no lease had been made: and if the lessor assigns over his reversion, the assignee shall have the rent as incident to it, because the rent is to continue during the term, and therefore must follow the reversion, since the lessor made no particular disposition of it separate from the reversion.

(b) Sache-

verel and

Frogate, re-

ported in

Vent. 161,

So, if a lease be made for years, reserving rent during the term to the lessor, his executors and assigns; this, by a late (b) resolution, shall not determine upon the death of the lessor, but shall go to the heir; because the reservation being to the lessor

lessor and his assigns, during the term, (for the words, executors and administrators, are void, the lessor having the inheritance,) such express words evidently discover the intent of the contract, and that the lessee agreed and bound himself to the payment of the rent during the continuance of the demise.

in Cro. Eliz. 217., Richmond and Butcher, to the contrary is not law; & vide 5 Co. 115. a.

But though rent, as incident to the reversion, shall go therewith, and be payable to the heir, yet the arrearages, which incurred and became payable in the life-time of the testator, shall go to the executor as part of his personal estate.

But if a lease be made, reserving rent at *Michaelmas*, or ten days after, if the rent is not paid at *Michaelmas*, and before the ten days are expired the lessor dies, the heir, and not the executor, shall have the rent; for though it was in the election of the lessee to pay the rent at *Michaelmas*, yet the ten days after are the true legal term, so that the rent was not legally due before that time, and therefore no chattel: so, if the lessor dies on the day on which the rent is to be paid after sun-set, and before mid-night, the heir, and not the executor, shall have the rent; for it is not due till the utmost limit of the day, which ends not till twelve o'clock, though the time for demanding it for convenience be a convenient time before the sun sets *. executors. 11 Geo. 2. c. 19. § 15;

As to *things fixed to the freehold or parcel thereof*, how they may become chattels, and go to the executor, or are to be considered as part of the inheritance, and to descend to the heir, it is necessary to observe,

That though the thing be a chattel in itself, yet if it cannot be removed or severed without prejudice to the inheritance, there it shall descend and belong to the heir, and not to the executor.

As if a man erects a furnace in the middle of a floor, though it doth not depend upon any wall; yet it goes to the heir with the land, and not to the executor as a chattel, for it is to be esteemed (b) parcel of the house, there placed on purpose by the ancestor, to descend as the law would carry it.

Interest in the house, doth annex any thing to the same for the benefit of his own trade, he may disunite during the continuance of that interest, if it may be done without any destruction or disadvantage to the freehold; and, therefore, if a dyer, being a termor for years, erects a furnace in the middle of the floor, not affixed to any wall, he may take it down during his term, because such trader erects for the use of his trade, and is owner both of the floor and the furnace, and it may be disunited and altered without prejudice to the landlord. 20 H. 7. 13. 21 H. 7. 27. Owen, 70, 71.—But if he doth not take it down during the term, it goes to him in reversion, because he is not master of both those things that are to receive alteration. 21 H. 7. 27. Owen, 70. Off. of Exec. 61.

The same law of coppers, leads, fats for dyers or brewers, pales, posts, rails, windows, whether of glass, or otherwise, benches, wainscots, doors, locks, keys, millstones, anvils, &c.; for these being fixed to the freehold are not chattels, but parcel of the freehold.

And though pictures and looking-glasses are esteemed part of the personal estate, yet if they are put up instead of wainscot, or where otherwise wainscot would have been put, they shall go to the

162.
2 Saund.
567.
Raym. 213.
2 Lev. 13.
and there-
fore the case
5 Co. 115. a.

Godolph.
121. Off.
of Exec. 53,
54

10 Co. 127.
Cro. Jac.
309-10.
Cro. Eliz.
575. Moor,
pl. 1012.
Yelv. 167.
* At the
death of
tenant for
life, a pro-
portionable
part of the
rent shall be
paid to the
executors. 11 Geo. 2. c. 19. § 15;

Roll. Abr.
919. Off. of
Exec. 62.

21 H. 7.
26. 27.
Keilw. 83.
(b) But if a
person, who
hath a par-
ticular in-

Off. of
Exec. 62.
4 Co. 63, 64.

2 Vern. 508.
so ruled in
equity.
[But this
the

doctrine, as to annexation to the freehold, hath been gradually relaxing for a long time; and if things of the kind above-mentioned can be taken away without prejudice to the fabrick of the house, the executor, it seemeth, shall have them. This relaxation hath been made upon reasons of publick benefit and convenience. *Lawton v. Lawton*, 3 Atk. 14. Lord Dudley v. Lord Warde, Ambler 113. *Harvey v. Harvey*, 2 Str. 1141.]

As to the timber-trees, they originally belong to the soil by right of accession; yet if a man sells the timber-trees on his soil, the executors of the vendor (a) shall have them, and not his heir: so, if a man sells his land reserving the timber-trees, they remain by particular contract as a chattel in him, distinct from the soil, and shall go to his executors.

4 Co. 62. Off. of Exec. 60. [(a) This must be understood of tenant in fee-simple; for such a sale by tenant in tail would not be effectual without docking the entail, unless they were actually sold in the lifetime of such tenant, for otherwise they descend with the land to the issue in tail. *Hob. 173. 11 Co. 50. a*]

Off. of Exec. 59. Godolph. 122. And as the trees, unless severed, belong to the heir, so does the fruit which they bear, as apples, pears, &c., belong to the heir: also, grass growing, though fit to be mowed down for hay, shall, with the land, descend to the heir.

Off. of Exec. 59. [If seisin for life of a But corn, though growing, as also every thing else of that kind which is produced annually by labour and cultivation, shall go to the executor, and not to the heir, as hops, saffron, hemp, &c.]

hop-ground dies in August before severance of the hops, the executor may maintain trover for them against the remainder-man, though growing on ancient roots. *Latham v. Atwood*, Cro. Car. 515. *Hargr. Co. Lit. 55. b. n. 1. Hal. MSS.*]

Off. of Exec. 60. Also, if an inheritor of tithes dies after the tithes are set out, they go to his executor, and not to his heir.

Knevit v. Poole, Gouldf. 143. [If disseisor sow the land of tenant for life, and tenant for life die before severance, his executors, and not the disseisor, or the reversioner, shall have the corn.]

Off. of Exec. 62, 63. But though the things which require labour and cultivation, and are of annual produce, regularly belong to the executor; yet roots of all kinds, such as parsnips, turnips, skerrets, &c., belong to the heir, for these cannot be come at without digging up the earth, which must necessarily be a spoil and injury to the inheritance.

Off. of Exec. 63. And therefore the *Office of Executors* says, that the executor must content himself with those things whose fruit is above ground, such as melons of all kinds; but as for artichokes, though the fruit be above the ground, yet he thinks that they have not such yearly setting and manurance as should sever them in interest from the soil, and that therefore they shall go with it to the heir.

Co. Lit. 8. Off. of Exec. 57. Swinb. 403. If a man hath fish in his pond, and die, they go to his heir, for they are considered as the profits thereof, and therefore descend with the pond to the heir.

Co. Lit. 8. But if a man has fish in his trunk or net, they go to the executor, for they are severed from the soil, and felony may be committed in stealing them.

So, doves in a dove-house descend, together with the house, Off. of
to the heir; but the young ones, that are not able to fly out, Exec. 57.
belong to the executor.

So, deer, conies, pheasants, or partridges, if tame, or kept Off. of
alive in any room, cage, or like receptacle, as pheasants and par- Exec. 57.
tridges often are, shall go to the executor: so, hawks reclaimed
shall, as chattels personal, go to the executor.

As to charters and writings relating to the freehold and in- Roll. Abr.
heritance, they follow the interest of the land, and belong to 919. Off.
the heir: but as to those deeds and writings which relate to of Exec. 63,
terms for years, goods, chattels, or debts, they belong to the 64. [If the
executor. writings of
an estate are
pawned or

pledged for money lent, such charters in the hands of the creditor are to be considered as chattels; and chattels; and
in case of his decease, they would go to his executor or administrator, because such personal representa- ative would be entitled to the benefit accruing from the loan. Noy, Max. 50.]

[A bill was brought in Chancery, suggesting, that an antique Pusey v.
horn with an old inscription had immemorially gone with the Pusey,
plaintiff's estate, and was delivered to his ancestors to hold their 1 Vern. 273.
land by, and praying that it might be restored: the Lord Keeper
was of opinion, that if the land was of the tenure called *cornage*, 1 Inst. 107.
the heir was entitled to this monument of antiquity *at law*.] a.

4. What Things shall go to the Wife of the Deceased, and not to the Executor.

The law looks upon husband and wife as one person, and Doct. &
therefore will not regularly allow the wife to have any property Stud. Dial.
separate and distinct from the husband. Hence all the personal 1 cap. 7.
estate, as money, goods, &c., which were the wife's, and in her Co. Lit. 351.
actual possession at the marriage, are actually vested in the hus- Sid. 111.
band; so that of these he may make any disposition in his life-
time, without her consent, or may by will devise them, and they
shall, without any such disposition, go to the executors or ad-
ministrators of the husband, and not to the wife, though she sur-
vive him.

But chattels real, such as leases for years, estates by statute Co. Lit.
merchant, staple, *elegit*, &c., though of these he may alone dis- 46. b. 351.
pose, forfeit, or they may be extended for his debts; yet if he Roll. Abr.
makes no (a) disposition of them in his life-time, they survive to 342. (a) But
the wife, and shall not go to the executors of the husband. if the hus-
band makes
a lease of part

of the wife's term, reserving rent, the rent shall go to the executors of the husband; for as he had a Poph. 5. 97.
power in his lifetime to dispose of the whole, so he might have disposed of any part of it. And what shall be said a disposition by him, so as to bar
the wife, *vide tit. Baron and Feme*, letter (C).

So, of *chofes in action*, as debts due to the wife by obligation, Co. Lit. 351.
&c., though these are likewise so far vested in the husband, that 3 Mod. 186.
during the coverture he may reduce them into possession; yet if
he dies before any alteration made by him, they belong to the
wife, and not to the executors of the husband.

Godolph.

130.

Sw'nb. 403.

Cro. Car.

344.

As to the wife's *paraphernalia*, which survive to her, and go not to the executors of the husband; these by the civil law are defined *bona quæ mulier ultra dotem odfert*, and are understood to be not only her necessary apparel, but also such jewels and other ornaments as are suitable to her degree and quality: of these, by the civil law, the wife had such an absolute property, that she might dispose of them *in vitâ mariti invito marito*, nor could the husband devise them by will from her, nor were they liable to his debts or legacies.

Roll. Atr.

519.

Cro. Car.

343.

(a) If the husband delivers his wife a piece

But herein our law differs, and prohibits the wife from making any disposition of them in the life-time of the husband: also, our law distinguishes between things of ornament and mere (a) necessity; and as to matters of ornament, subjects them to the husband's debts, and even allows the husband power to dispose of them by will.

of cloth to make her a garment, and dies; although it is not made up in the lifetime of the husband, yet the wife shall have it, and not the executor of the husband, because it was delivered to her for this purpose: but against a creditor of her husband, she shall not have more apparel than is convenient for her. Roll. Abr. 911. Harwell and Harwell.

Cro. Car.

343. Lord

Hastings v.

Sir Archibald

Donglass, Jon.

332. and

Roll. Abr.

911. S. C.

2 Vern.

245-6. S. C.

cited, where

the husband

devoted the

wife's jewels,

being of

great value,

to the wife

for life, the

remainder

to his son;

and the wife

made no

election to

claim them

as her *para-**phernalia*, and held,

that her administrator

cannot make this claim;

and there said, that

although, where

the husband dies

intestate, or without

disposing of the

wife's jewels by

will, the wife may

claim them if there

are no creditors,

yet she cannot

against a disposition

of them by will

by her husband.

(a) As in trover

against the

Viscountess of

Bandon, for several

jewels of considerable

value; she, as to

all, except a chain

and bracelets, not

exceeding the value

of 160*l.* pleaded not

guilty, and as to that

she pleaded, that she

was the wife of

Viscount Bandon,

and that she usually

wore those jewels as

ornaments of her

body; and averred,

that the executors

had assets to satisfy

his funeral, and all

his debts and

legacies besides

these jewels; and

on demurrer, she

had judgment. Moor,

213. pl. 354. 2

Leon. 166. S. C.—Where

the wife's *paraphernalia*

being superfluities

and ornaments, were

in equity holden

liable to the husband's

debts; vide Preced.

Chan. 295-6., a

good case.—But

where the wife's

jewels and plate,

being bought with

her own pin-money,

and the value not

amounting to more

than 500*l.* which

was esteemed but

little in respect of

the husband's

estate, were holden

not to be liable. Preced.

in Chan. 27.

And therefore where the daughter of an earl, who was married to Sir John Davies, (the king's serjeant at law,) usually wore a diamond chain, value 370*l.* and Sir John devised the use of his jewels to his wife, during her widowhood, she giving security to leave the same to his daughter, at the day of her death or second marriage, which should first happen; the widow marrying again, it was holden by two judges against two, that these being matters of ornament, the husband had a power of disposing of them by will, and consequently that the limitation annexed to them in the present case was good; but they seemed to admit, that if the husband had made no disposition of them, and there had been no (a) creditors of the husband, that they should have belonged to the wife: but the other two judges held, that there was no other way of determining what ought to be accounted the wife's *paraphernalia*, or matters of ornament or necessity, but by the discretion of the judges; and that, if these were things suitable to her degree and quality, and usually worn by her as ornaments of her person, the husband could not devise them from her.

and held, that her administrator cannot make this claim; and there said, that although, where the husband dies intestate, or without disposing of the wife's jewels by will, the wife may claim them if there are no creditors, yet she cannot against a disposition of them by will by her husband. (a) As in trover against the Viscountess of Bandon, for several jewels of considerable value; she, as to all, except a chain and bracelets, not exceeding the value of 160*l.* pleaded not guilty, and as to that she pleaded, that she was the wife of Viscount Bandon, and that she usually wore those jewels as ornaments of her body; and averred, that the executors had assets to satisfy his funeral, and all his debts and legacies besides these jewels; and on demurrer, she had judgment. Moor, 213. pl. 354. 2 Leon. 166. S. C.—Where the wife's *paraphernalia* being superfluities and ornaments, were in equity holden liable to the husband's debts; vide Preced. Chan. 295-6., a good case.—But where the wife's jewels and plate, being bought with her own pin-money, and the value not amounting to more than 500*l.* which was esteemed but little in respect of the husband's estate, were holden not to be liable. Preced. in Chan. 27.

2 Vern. 83.

Also, it has been holden, that if a woman by marriage-articles agrees that she shall have no part of the personal estate but what the

the husband gives her by his will, that this bars her of her *paraphernalia*.

5. Where after Debts and Legacies paid the Executors shall have the Surplus to themselves, and are not to be Trustees for the next of Kin.

By law the very naming an executor is a disposition to him of all the testator's personal estate; for he comes *in loco testatoris*, and is chargeable with his debts and legacies as far as he has assets; and therefore, the law gives him the whole personal estate; the surplus of which, after he has executed his trust by payment of debts and legacies, belongs to himself, as a recompence for his labour and trouble.

But though the executor be entitled to the surplus of the personal estate undisposed of, yet if there be any fraud in obtaining the executorship, or if it appear manifestly to have been the intention of the testator, that the executor should not have the surplus to his own use (a), a court of (b) equity may decree such executor a trustee for the next of kin to the testator, and that the surplus shall go according to the statute of distributions.

trustee. *Pring v. Pring*, 2 Vern. 99. *Graydon v. Hicks*, 2 Atk. 18. *Dean v. Dalfon*, 2 Br. Ch. Rep. 634. *Bennet v. Bachelor*, 3 Br. Ch. Rep. 28. 1 Vez. jun. 63. Or, if the will contains a residuary clause, but the name of the residuary legatee is not inserted. *Bishop of Clyne v. Young*, 2 Vez. 91. *Lord North v. Purdon*, 2 Vez. 495. *Hornby v. Finch*, 2 Vez. jun. 78. Or, if the residuary legatee has died in the lifetime of the testator. *Nicholls v. Crisp*, Ambl. 769. *Bennett v. Bachelor*, 3 Br. Ch. Rep. 28.] (b) But if the ecclesiastical courts go about to compel an executor to distribute the residue of a personal estate, a prohibition will be granted; for they have no jurisdiction to compel a distribution amongst the next of kin, but where the party dies intestate. 5 Mod. 247. *Petit and Smith*.

And this it is said was first done in the case of *Foster and Munt*, where the testator devised particular legacies to his children and grandchildren, and 10*l.* a-piece to *A.* and *B.*, whom he made executors, for their (c) care and pains; and the surplus of the personal estate, being 5000*l.* and upwards, the question was, Whether the surplus should be a trust for the children, or go to the executors; and it was decreed a trust for the children.

and said to have been affirmed in the House of Lords. (c) 2 Vern. 676. S. C. cited, that the words care and pains implied a trust for the children. [See *acc.* 2 Vern. 248. 2 P. Wms. 157. 2 Atk. 46. 2 Vez. 97.]

Since this there have been several cases, where from the intention of the testator, in making strangers executors, and giving them legacies, they have been decreed trustees for the next of kin, and compelled to make distribution accordingly.

in equity, that if a sole executor has a legacy generally and absolutely given to him, he shall be excluded from the residue; *Joslin v. Brewett*, Bunb. 112. *Davers v. Dewes*, 3 P. Wms. 40. *Farrington v. Knightly*, 1 P. Wms. 544. *Vachel v. Jefferies*, Pr. Ch. 170. *Petit v. Smith*, 1 P. Wms. 7., and this, though the legacy be specific; *Randall v. Bookey*, 2 Vern. 425. *Southcot v. Watson*, 3 Atk. 226. *Martin v. Rebow*, 1 Br. Ch. Rep. 154., or legacies be given to the next of kin; *Bayley v. Powell*, 2 Vern. 361. *Wheeler v. Sheers*, Mosel. 288. *Andrew v. Clark*, 2 Vez. 162. *Kennedy v. Stainsby*, stated in a note, 1 Vez. jun. 66.; for the rule is founded rather on a presumption of intent to exclude the executor, than to create a trust for the next of kin; and therefore, if the executor be the next of kin, a trust shall result for the crown. *Middleton v. Spicer*, 1 Br. Ch. Rep. 201. The above

Off. of
Exec. 4.

Vern. 473.
2 Vern. 676.
Abr. Eq.
243.
[(a) As, if
he expressly
declare that
the execu-
tor shall
be only a

Vern. 473.
Foster and
Munt, de-
creed Mich.
1687, per
Lord Chan-
cellor Jef-
feries.

2 Vern. 64.
S. C. cited,

For which
vide 2 Vern.
148. 361.
648. 676.
[It is now a
settled rule

rule is founded upon the objection, that the executor cannot take part and *all*. But if there be two or more executors, a legacy to one is not within such objection, for the testator might intend a preference to him *pro tanto*. *Coleworth v. Brangwin*, Pr. Ch. 313. *Johnson v. Twist*, cited 2 *Vez.* 166. *Buffar v. Bradford*, 2 *Atk.* 220. So, where there are unequal legacies, whether pecuniary or specific, to several executors, they shall not be excluded. *Brailbridge v. Woodroffe*, 2 *Atk.* 68. *Bowker v. Hunter*, 1 *Br. Ch. Rep.* 328. *Blinkhorn v. Featt*, 2 *Vez.* 27. *Secus*, where equal pecuniary legacies are given them. *Petit v. Smith*, 1 *P. Wms.* 7. *Carey v. Goodinge*, 3 *Br. Ch. Rep.* 110. But see *Heron v. Newton*, 9 *Mod.* 11.]

Abr. Eq.

244-5.

Hill. 1697.

Lord Bristol

and *Hungerford*.

3 *Will. Rep.*

194.

As where *A.* devised lands to be sold for payment of his debts, and willed, that the *su. plus* should be deemed part of his personal estate, and go to his executors; and gave to his executors 100*l.* a-piece as a legacy; the question was, Whether the executors should have the surplus to their own use, or should distribute according to the statute of distributions? For the executors it was insisted, that the surplus should be part of his personal estate, and go to them; and that he meant it them to their own use; and his giving them a legacy of 100*l.* a-piece cannot alter the case; for the surplus perhaps might be nothing, and therefore he gave them the 100*l.* that they might at all events be sure of something, and not to exclude them from the benefit of the surplus; and this being a devise of the surplus, after debts and legacies paid, cannot be a trust in them; for then all their trust is performed when debts and legacies are paid. On the other side it was said, that the words in the will, that *the surplus should be part of his personal estate, and go to his executors*, were only intended to exclude the heir, who else would have it; and not to give any greater interest to his executors than they would have had otherwise; and of this opinion was my Lord Chancellor, and decreed accordingly; which decree was affirmed in parliament.

Abr. Eq.

245. *Trin.*

1704.

Crittith and

Rogers,

Pre. Ch.

231.

[*Newstead*

v. John-

Rone,

2 *Atk.* 45.

Southcot v. Watson, 3 *Atk.* 229.]

But as this construction has been made purely on the intention of the testator, so such intention must appear exceeding plain; otherwise the rule of law is to take place; as where a man devised his library of books to *A.*, (except ten books, such as his wife should choose; as plays, romances, sermons, but not law books,) and made her executrix; it was holden that she should not by this devise be excluded from the benefit of the surplus of the personal estate.

2 *Vern.* 675.

Hill. 1711.

Bale and

Smith.

[This case

has been

over-ruled,

and it is now

settled, that

a wife, ap-

pointed exe-

cutrix, is, as

to the resi-

due, pre-

cisely in the

situation of

any other

executor;

So, where *A.* was executrix to *B.* her former husband, and after married *C.*, who by his will in 1686 devised to his wife the plate and goods she brought him in marriage, and two silver salvers in lieu of plate that had been exchanged away, and made her executrix and died, leaving a daughter by a former wife, and his wife *enfeint* of a daughter; and there being no devise of the surplus of the personal estate, the question was, Whether she should take it as executrix to her own use, or liable to distribution; and my Lord Keeper decreed the surplus to the wife, as well for that this will was made before the case of *Foster and Munt*, as also for that in this case nothing is devised to the wife but what was her own before, and as she was executrix to her former husband; but principally because, where a wife is made

executrix, it is to be presumed she was not made so to have barely an office of trouble, but of benefit to take the surplus.

Godfall v. Sounden, 2 Eq. Caf. Abr. 444. pl. 58. Martin v. Rebow, 1 Br. Ch. Rep. 154. ; unless the legacy to her, being specifick, consist of property, which was her's before marriage ; for this may vary the rule. Lawfon v. Lawfon, 7 Br. P. C. 511.]

Lake v.
Lake,
Ambl. 126.

So, where *A.*, possessed of a long term for years, by will devised it to his wife for life, and after her death to the child she was then *enfeint* with ; and if such child died before it came to twenty-one, then he devised one third part of the said term to his wife, her executors and administrators ; and the other two thirds to other persons, and made his wife executrix of his will, and died ; and a bill was brought against her by the next of kin to the testator, to have an account and distribution of the surplus of his personal estate, not devised by the will ; two questions were made ; 1st, Whether the devise to the wife of one third part of the term was good, because it happened she was not then *enfeint* at all, and so the contingency upon which the devise to her was to take place never happened ? the other question was, Whether this term, being part of the personal estate, and expressly devised to her for life, with such other contingent interest on the death of the supposed *enfeint* child before twenty-one, should shut her out from the surplus of the personal estate, which belonged to her as executrix ; and so the surplus go in a course of administration to be distributed among the next of kin ? As to the first point, my Lord Keeper delivered his opinion, that though the wife was not *enfeint* at the time of the will, yet the devise to her of such third part of the term was good ; and as to the other point (a), dismissed the plaintiff's bill, and so let in the executrix to the surplus of the personal estate, notwithstanding the devise to her of part as aforesaid.

Abr. Eq.
245. Mich.
1711. Jones
and West-
comb, [Pr.
Ch. 316.
S. C.]

So, the testator, being possessed of a personal estate to the value of about 2000*l.*, and being taken ill, makes his will in writing the very day before his death ; and thereby devises several legacies to his relations ; and amongst the rest gives the plaintiff his sister about 1000*l.*, and gives 70*l.* to Mr. Searle and his wife, and their four children, to buy them mourning ; and gives to his dear and most esteemed friend Mrs. Sarah Searle (one of the daughters of Mr. Searle, to whom he had made his addresses in way of marriage) 500*l.*, and gives his horse and furniture to one of the defendants by his christian name and surname ; and his clothes to be disposed of by his executors ; and then concludes, *as to the 700*l.* I am entitled to in the South-Sea Company, and the rest of my personal estate, I will that the same shall be sold for the payment of my debts and legacies ; and I make Mr. John and Mr. Thomas Searle my executors*, and dies. The executors were two of the children of Mr. Searle, and entitled to their proportion of the 70*l.* devised for mourning ; and one of them to the horse and furniture ; but were no ways related to the testator. The surplus of the personal estate came to about 600*l.*, and the bill was brought against the executors to have an account thereof, and

[(a) See acc.
Lady Gran-
ville v.
Duchess of
Rutland,
1 P. Wms.
114. Nourse
v. Finch,
1 Vez. jun.
356.
Hoskins v.
Hoskins, Pr.
Ch. 263.]
Hill. 1716.
Batchelor
and Searle,
2 Vern. 736.
Abr. Eq.
246. S. C.
Gilb. Rep.
125.]

that it might be paid to the plaintiff, whose wife was the only sister and next of kin to the testator. For the plaintiff it was insisted, that the executors were mere strangers, no ways related to the testator; and that they had particular legacies left them for mourning out of the 70*l.*, and one of them had a horse and furniture expressly devised to him, and therefore it was not reasonable that they should go away with the surplus of the personal estate. On the other side it was insisted, that the defendants being executors, they represented the testator, that they stood in his place, and were entitled to whatever he left undisposed of; that this was the ancient law for many ages, and therefore the legal title being in them, they ought not to be defeated of it without a manifest intention of the testator to the contrary; that there appeared no such intent in the will, for they are not named either by the christian name or surname, or so much as by the name of their office till the very close of the will; nay it was in proof, that the testator did not so much as consider whom he should make his executors till he had disposed of all the legacies; that the giving one of them his horse and furniture was only to exclude the other, who by being executor with him would have been equally entitled to it, and could not be counted a legacy to shut them out of the surplus, since it rather regarded the other executor, than the plaintiff the next of kin; that they had it fully in proof, that the testator being asked, Whether he would not give his sister more? answered, he would not; that being asked Who should have the surplus? he said his will should stand as it was, and that he had a very great regard for the defendant's family, and was to have married their sister; and that these proofs being in affirmance of the disposition the law made for the executors might be read; and that several resolutions since the case of *Foster* and *Munt* had pared away the authority of that case; and therefore prayed that the bill may be dismissed. My Lord Chancellor was clearly of opinion, that the proofs being in affirmance of the disposition ought to be read; and said, that they were so full as to make an end of this case; that without a strong and violent implication, the executors ought not to be defeated of the *residuum*; that here was no such implication in this will; but rather the contrary; that to make sense of the last clause, it must be construed a devise of the *South-Sea* stock, and the rest of the personal estate to his executors; for it is immediately followed by "*and I make John and Thomas Searle my executors*;" which could have no relation to the direction for sale, unless by giving them the surplus which should arise by sale; and as there appeared no strong or violent implication to induce any other construction, he could not give into so great a change of the law, but must decree for the executors; and accordingly did so.

Vide 2 Vern.
252.
The case of
the Countess
and Earl
of Gainbo-

And as this doctrine of making the executor a trustee for the next of kin subsists only by the notions of a court of equity, which by implication, and contrary to the rules of law, gives the *residuum* to the next of kin; so the executors have been admitted

by

by parol evidence to shew, that the testator intended the *residuum* for them, which has been thought reasonable, being only to rebut an equity, and oust an implication arising from the rule of equity.

of Beaufort, 1 P. Wms. 114. S. C. Petit v. Smith, 1 P. Wms. 7. 5 Mod. 247. S. C. Com. Rep. 3. S. C. Bachelor v. Searle, 2 Vern. 736. Duke of Rutland v. Dukes of Rutland, 2 P. Wms. 210. Mallabar v. Mallabar, Ca. Temp. Talb. 78. Lake v. Lake, 1 Will. 313. Ambl. 126. Brown v. Selwin, Ca. Temp. Talb. 240. But parol evidence, it is said, ought in this case to be admitted with great caution; Rackfield v. Careless, 2 P. Wms. 160. Duke of Rutland v. Dukes of Rutland, *id.* 215. Blinkhorn v. Featt, 2 Vez. 28. Nourse v. Finch, 1 Vez. jun. 358, and restricted to what passed at the time of making the will. See the two last cited cases.]

As, where one not of kin, but a stranger, was made executor, and had considerable legacies given him; although it was decreed by Sir *Peter King*, in the mayor's court, in favour of the testator's two brothers, that the surplus should be distributed; yet, upon an appeal to the House of Peers, that decree was reversed, not barely as it stood upon the will, but that parol proof ought to be received in favour of the executor's title, consistent with the will; and the proof being full, as to the testator's frequent declarations, that his executor, though a stranger, should have the surplus, it was decreed accordingly.

So, in the case of *Hatton and Hatton*, where the wife was made executrix, and a considerable legacy devised to her; yet the proof being strong, that the testator intended the surplus to her own use, the same was decreed accordingly, both at the *Rolls* and in *Chancery*.

But where *A.*, being possessed of a considerable personal estate, made his will, and thereby devised several legacies, but gave none to his executor; and the question was, Whether parol evidence ought to be admitted, to prove that the testator did not intend that the executor should have the residue of his personal estate, but that the same should go according to the statute of distributions? it was holden clearly, that no such evidence could be admitted, for that this would be to admit evidence not to oust an implication, but to contradict the rule of law, and what appeared on the face of the will.

(I) How the Personal Estate, after Debts paid, is to be distributed when the Party dies Intestate: And herein, of the Share the Husband or Wife are entitled to.; and of the ascending, descending, and collateral Line, and Admission of the Half-Blood; and where the Distribution shall be *per Stirpes*, and not *per Capita*.

IT hath been already observed, that before the statute 22 & 23 Car. 2. c. 10. the ecclesiastical courts had no jurisdiction to compel distribution of intestates' estates; for though by the

rough, Abr. 230. S. C. and 2 Vern. 648. [Lady Granville v. Dukes of Rutland, 2 P. Wms. 210. Com. Rep. 3. S. C. 245. Littlebury and Buckley. Hil. 6 G. 2. Hatton and Hatton, 2 Str. 865. S. C. Fitzgib. 126. S. C. Hil. 6 G. 2. Lady Osborne v. Villiers. And. 410. 414. Cro. Car. 62. 201.

Jon. 228.
Style, 456.
Hob. 83.
191.
Lev. 233.
Cartei, 125.

Raym. 499.

31 E. 3. *ff. l. c. 11.* and 21 H. 8. *c. 5.* they had authority to grant administration to the widow or next of kin; yet, having once granted it, they had executed their authority; and the administrator, coming in the place of the executor, had the whole personal estate of the intestate, after debts.

Yet after it had been solemnly adjudged in the common law courts, that the ecclesiastical courts could not compel a distribution, it seems that they had a method there, when they were under deliberation, whether they would grant administration to the wife or next of kin, and to which of the next of kin; they used to treat with the parties, and consider what sum the overplus was like to amount to; and how that ought, by their rules, to be distributed; and they would prefer him to the administration, that would before-hand perform such distribution by payment of money, and by giving securities to persons to whom it was appointed.

Raym. 499.
(a) My Lord North observes, that though public inconveniences were urged to the parliament by the civilians, yet they had another reason to desire that those methods might be changed; for the allotting of distributions in this manner was but a barren jurisdiction that could not be drawn out in length; all disputes were ended *uno flatu* without appeal, and the accounts of administrators were never contested, when there was no adversary concerned to demand a share in the overplus upon taking them.

But because it was found very inconvenient for any administrator to pay before he received, for it was hard for him to know what he might undertake before he had possession, and the judge could not have a perfect knowledge of the true value of the overplus, to guide him in the measure of his distribution till after the administration ended, and the account of the estate taken; (a) to remedy these inconveniences, and to compel a just and equal distribution of the estates of intestates,

yet they had another reason to desire that those methods might be changed; for the allotting of distributions in this manner was but a barren jurisdiction that could not be drawn out in length; all disputes were ended *uno flatu* without appeal, and the accounts of administrators were never contested, when there was no adversary concerned to demand a share in the overplus upon taking them.

By the 22 & 23 Car. 2. *cap. 10.* it is enacted, "That all ordinaries and ecclesiastical judges, upon granting administration of persons dying intestate, must take bond of the administrator, with two or more sureties, with condition that the administrator shall make a true and perfect inventory of all the goods and chattels of the deceased, and exhibit it into the registry of the ordinary's court by such a day; and that the said ordinaries and judges respectively shall and may, and are enabled to proceed and call such administrators to account for and touching the goods of any person dying intestate, and, upon hearing and due consideration thereof, to order and make equal and just distribution of what remaineth clear (after all debts, funerals, and just expences of every sort, first allowed and deducted) amongst the wife and children, or childrens' children, if any such be, or otherwise to the next of kindred to the dead person, in equal degree, or legally representing their stocks, *pro suo cuique jure*, according to the laws in such cases, and the rules and limitation hereafter set down; and the same distributions to decree and settle, and to compel such administrators to observe and pay the same, by the due course of his majesty's ecclesiastical laws.

"Provided always, That all ordinaries, and every other person, who by this act is enabled to make distribution of the surplus

“ plus of the estate of any person dying intestate, shall distribute
 “ the surplufage of such estate or estates, in manner and form
 “ following, that is to say, one third part of the said surplufage
 “ to the wife of the intestate, and all the residue by equal por-
 “ tions to and amongst the children of such persons dying intest-
 “ ate, and such persons as legally represent such children, in
 “ case any of the said children be then dead, other than such
 “ child or children (not being heir at law) who shall have any
 “ estate by the settlement of the intestate, or shall be advanced
 “ by the intestate in his life-time, by portion or portions equal to
 “ the share, which shall by such distribution be allotted to the
 “ other children, to whom such distribution is to be made; and
 “ in case any child, other than the heir at law, who shall have
 “ any estate by settlement from the said intestate, or shall be ad-
 “ vanced by the said intestate in his life-time, by portion not
 “ equal to the share which will be due to the other children by
 “ such distribution as aforesaid, then so much of the surplufage
 “ of the estate of such intestate to be distributed to such child or
 “ children as shall have any land by settlement from the intest-
 “ ate, or were advanced in the life-time of the intestate, as
 “ shall make the estate of all the said children to be equal, as
 “ near as can be estimated; but the heir at law, notwithstanding
 “ any land that he shall have by descent, or otherwise from the
 “ intestate, is to have an equal part in the distribution with the
 “ rest of the children, without any consideration of the value of
 “ the land which he hath by descent, or otherwise, from the in-
 “ testate.

“ And in case there be no children, nor any legal representa-
 “ tives of them, then one moiety of the said estate to be allotted
 “ to the wife of the said intestate, the residue of the said estate
 “ to be distributed equally to every of the next of kindred of the
 “ intestate, who are in equal degree, and those who legally re-
 “ present them.

“ Provided that there be no representations admitted among
 “ collaterals after brothers and sisters' children; and in case there
 “ be no wife, then all the said estate to be distributed equally to
 “ and amongst the children; and in case there be no child, then
 “ to the next of kindred in equal degree of or unto the intestate,
 “ and their legal representatives as aforesaid, and in no other
 “ manner whatsoever.

“ Provided also, To the end that a due regard be had to cre-
 “ ditors, that no such distribution of the goods of any person
 “ dying intestate be made till after one year be fully expired
 “ after the intestate's death, and that such and every one, to
 “ whom any distribution or share shall be allowed, shall give
 “ bond, with sufficient sureties, in the said courts, that if any
 “ debt or debts truly owing by the intestate shall be afterwards
 “ sued for and recovered, or otherwise duly made to appear, that
 “ then, and in every such case, he or she shall respectively re-
 “ fund and pay back to the administrator, his or her rateable
 “ part of that debt or debts, and of the costs of suit and charges
 “ of

“ of the administrator, by reason of such debt, out of the part
 “ and share so as aforesaid allotted to him or her, thereby to
 “ enable the said administrator to pay and satisfy the said debt or
 “ debts so discovered after the distribution made as aforesaid.

“ Provided always, That in all cases where the ordinary hath
 “ used heretofore to grant administration *cum testamento annexo*,
 “ he shall continue so to do, and the will of the deceased in such
 “ testament expressed shall be performed and observed in such
 “ manner as it should have been if this act had never been
 “ made.

“ Provided also, That nothing herein shall extend to or preju-
 “ dice the customs of *London* and *York*.

2 Mod. 20.

In the construction of this statute it was doubted, whether the husband was entitled to administration to his wife, as before, so as not to be obliged to distribute the personal estate amongst the rest of kin to the wife; by the 29 *Car. 2. cap. 3. par. 35.* it is enacted, “ That this statute shall not extend to the estates of “ some coverts who die intestate, but that the husband may de- “ mand and have administration of their rights, credits, and “ other personal estates, and recover and enjoy the same, as they “ might have done before the making of the said act.”

(a) The reason of making the act was, because the mother might marry, and carry all away to another husband,

Also, to (a) explain and ascertain what share the mother was entitled to upon the death of a child, where the father was dead, by the 1 *Jac. 2. cap. 17.* it is enacted, “ That if after the death “ of the father any of the children die intestate, without wife or “ children, in the life-time of the mother, every brother and “ sister, and their representatives, shall have an equal share with “ her.”

but the father surviving is entitled to the whole personal estate. *Salk. 251. pl. 2. 1 P. Wms. 48, 49. Lord Raym. 684. Comyns Rep. 96. pl. 65.*

In the construction of this statute for distributing intestates' estates, the following opinions have been holden:

Raym. 496.

Carter and
 Crawley, a
 good argu-
 ment of
 Lord Chief
 Justice
 North's on
 this head.
 [Caldicot v.
 Smith,

1. That the clause which says, that there shall be no representations among collaterals beyond brothers and sisters' children, must be intended brothers and sisters of the intestate, and not to admit representation when the distribution happens to fall out amongst brothers and sisters, though remote relations to the intestate; for the intestate is the subject of the act; it is his estate, his wife, his children, and by the same reason his brother's children, for he is equally the correlative to all *.

2 Show. 286. *Beeton v. Darking*, 2 Vern. 168. *Pett v. Pett*, *Salk. 250. pl. 1. Ld. Raym. 571. S. C.* *Comyns Rep. 87. pl. 56. S. C.* 1 P. Wms. 25. *S. C.* *Bowers v. Littlewood, id. 595.*]

* Therefore, in the case of *Pett and Pett*, 1 *Salk. 250.*, it is said, if a brother of the intestate hath a grandson, and a sister has a son, or daughter, the grandson shall not have distribution with the son, or daughter, of the sister. 1 *Ld. Raym. 571. S. C.*

Mod. 209.

2 Mod. 204.

2 Jon. 93.

Vent. 316.

2 Lev. 173.

2. On that clause of the statute, which directs the distribution to every of the next of kindred of the intestate, who are in equal degree, it hath been adjudged in several books, that a brother or sister of the half-blood shall come in for a share with one of the whole

whole blood, being as near a kin to the intestate. [And (a) this shall extend to a posthumous brother of the half-blood.]
 Show. Parl. Cases, 108. Vern. 437. 2 Vern. 124. Carth. 51. S. P. adjudged. Show. 1, 2, S. P.
 Comb. 112. Clift 243. Holt, 258. pl. 2. [(a) Burnet v. Man, 1 Vez. 156.]

3. That where the statute says, that distribution shall be amongst representatives of persons deceased *pro suo cuique jure*; by this it is meant, that distribution shall be *per stirpes* and not *per capita*; so that if the father has two sons, and one of them dies in his life-time, leaving three children, and the father dies intestate, the surviving son shall have half the personal estate, and the other moiety shall be equally divided amongst the children of the dead son: yet, it hath been holden, that if A. has three brothers, and one dies leaving three children, another two, and the third five, and A. dies intestate, that in this case the distribution shall be *per capita*, and not *per stirpes*, and that all the children shall have an equal share; for the brothers being all dead, none take by way of representation, but all as next of kin.

Stanley v. Stanley, *id.* 455. Janfon v. Bury,

4. On the clause of the statute, which directs, that no distribution shall be within a year after the death of the intestate, it hath been adjudged, that, if a person entitled to a distributive share dies within the year, yet it is such an interest vested in him as shall go to his executor or administrator; for the statute doth not make any suspension or condition precedent to the interest of the parties, but is a clause merely for the benefit of creditors: also, this statute, being in nature of a will for all persons who die intestate, ought in this instance to be resembled to the case of a residuary legatee, in which it is always holden, that if such a legatee die before the debts are satisfied, so that it doth not appear to how much the surplus will amount, yet the executor or administrator of such a legatee shall have the whole residue &c. which remains over, and not the executor of the first testator.

5. It hath been holden, that, if the father dies intestate, leaving one child, this is not *casus omissus*; and consequently, if there be a wife, that she shall have but a third part; and that, if the child die intestate, administration is to be granted to the next of kin to him, and not to the next of kin to the father.

6. It hath been resolved, that if one dies intestate, leaving a grandmother and uncles and aunts, the grandmother is entitled to the personal estate, in exclusion of the uncles and aunts.

A man died intestate, leaving a widow and one son: afterwards the son died intestate; then the mother was delivered of a child whereof she was ensigned at her husband's death: decreed, that such posthumous daughter was entitled to a share of the son's personal estate.

2 Atk. 115. S. C. Ball v. Smith, 2 Freem. 230. S. P.]

Keilway v.
Keilway,
2 P. Wms.
344. 1 Str.
710. Gillb.
Rep. 189.
Stanley v.
Stanley,
1 Atk. 455.

[It hath been resolved on the statute of *Ja.*, that if a man die intestate and without issue, leaving a *wife*, and several brothers and sisters, and his mother living, the mother shall have no more than an equal share of a moiety of the estate with the brothers and sisters. And though there should be no brother or sister, yet if there are the children of a deceased brother or sister, they shall take the same share with the mother which their parent would be entitled to.]

(K) Of Advancement, and bringing into *Hotchpot*.

Co. Lit.
176. b.
Reg. 142.
for the cus-
tom of Lon-
don herein,
vide tit.
Customs of
London.

BY a custom, which has prevailed time out of mind in certain places, the wife and children of a person deceased are entitled to the writ *de rationabili parte bonorum*, on which writ they shall, according to the custom, recover their shares and proportions of the personal estate; but such children, as were reasonably advanced by the father in his life-time with any part of his goods, shall have no farther share; for the words of the writ are, *nec in vitâ patris promoti fuerunt*; but yet such child being only in part advanced may bring such advancement into *hotchpot*, or, as the civilians express it, into the *collatio bonorum*, and then such child will be entitled to an equal share with the rest.

Swinb. 217.

This advancement that will exclude a child must be by the father, and not by any other; nor will any fortune, though never so great, acquired by the child by his labour and industry, exclude him.

Swinb. 217.

Also, such advancement as will exclude a child, unless he brings it into *hotchpot*, must be given directly to the child, and not to another for the benefit or advantage of the child; and therefore money given to bind a child out an apprentice, or laid out in his education, either at school or at an university, is no advancement.

Swinb. 217.

So, if the father purchases for his child an advowson, or any other ecclesiastical benefice, or if he buys him any office civil or military; these are not such advancements as will exclude him from a distributive share.

2 Vern. 638.
Phiney and
Phiney.

On the statute 22 & 23 *Car. 2. c. 10.*, which expressly excludes every child advanced by the father, except the heir at law, from a farther share, unless he brings such advancement into the *collatio bonorum*, it hath been holden, that if the heir at law hath a settlement or provision made on him on his father's marriage, out of the *personal estate*, that upon the father's dying intestate, to entitle him to any more, he must bring such advancement into *hotchpot*.

Abr. Eq.
249. &c.
Freeman and
Edwards,
2 P. Wms.
435.

So, where the father, on his marriage, in consideration of a marriage-portion, covenanted to settle such an estate to the use of himself for life, remainder to his intended wife for life, remainder to the first and every other son of the marriage in tail male, remainder to trustee for 1000 years, in trust to raise portions for daughters in case there were no sons; that is to say, if
but

but one such daughter, the sum of 5000*l.*, and if two or more, then the sum of 6000*l.*, equally between them, payable at their respective ages of eighteen, or days of marriage, which should first happen, and 80*l.* maintenance in the mean time; the wife died, leaving but one daughter; the father married again and had several children and died intestate, the daughter by the first marriage not being above the age of eighteen; it was holden, that, in order to entitle her to share with the other children, she must bring this 5000*l.* into hotchpot.

If a father dies intestate, as to part of his personal estate, a child advanced by him in his life-time is not to bring in such advancement into hotchpot, in order to have a distributive share of such part, whereof he died intestate.

into hotchpot, it not being a provision secured by the parent in his life time. [2 P. Wms. 446. *Nei-*
ther shall what a child receives out of the mother's estate. *Holt v. Frederick, id. 356.*]

Preced.
Chan. 170.
A legacy to
a child shall
not be
brought
446. *Nei-*

[If a child, who hath received any advancement from his father, die in his father's life-time, leaving children, those children shall not be admitted to their father's distributive share, without bringing their father's advancement into hotchpot. And the reason is, because they do not take in their own right, but as representing their father.

Proud v.
Turner,
2 P. Wms.
560.

A child, partly advanced, shall bring in its advancement only among the other children; for the wife shall have no advantage of it.]

Ward v.
Lant, Pr.
Ch. 182-4.

(L) What shall be a *Devastavit*, either in Executors or Administrators: And herein of the Order of paying Debts and Legacies.

1. What Manner of wasting will amount to a *Devastavit*.

A *Devastavit* is a mismanagement of the estate and effects of the deceased, in squandering and misapplying the assets contrary to the trust and confidence reposed in them, for which executors and administrators shall answer out of their own pockets, as far as they had, or might have had, assets of the deceased.

Off. of
Exec. 156.
Godolph.
203.

Executors may be guilty of a *devastavit*, not only by a direct abuse by them, as by spending or consuming the effects of the deceased, but also by such acts of negligence and wrong administration as will disappoint creditors of their debts.

Off. of
Exec. 157.

Therefore it hath been holden, that if the executor sells the testator's goods at an under-value, especially if he might have gotten more for them; or if this were done by him for his own advantage, and to defraud creditors, it is a *devastavit*, and he shall answer the real value.

Off. of
Exec. 157.
Kelw. 59.
62., &c.
3 Leon. 143.

So, if an executor omits to sell the goods at a good price, and after they are taken from him, there the value of the goods shall be assets in his hands, and not what he recovers, for there was a default in him.

6 Mod.
181-2.

But

6 Mod. 181. But if, without any omission of his, goods are taken out of his possession, and he does not recover so much in damages as the goods were really worth, and that happens not through any default of his, he shall answer for no more than he recovers: so, if the goods be perishable goods, and before any default in him to preserve them, or sell them at due value, they are impaired, he shall not answer for the first value, but shall give that matter in evidence to discharge himself: but if one takes goods out of his possession, he must sue him that took them, to have an opportunity of discharging himself of answering more in assets than he recovers.

Off. of
Exec. 158.
Hob. 66.
And. 138.
Cro. Eliz.
43.
2 Leon. 102.
Godb. 29. If the executor releases debts due to the testator, this shall charge him to the (a) value of the debt, though perhaps he did not receive near so much as was due: so, if he releases a cause of action, accruing either in the life-time of the testator, or in his own time, in right of the testator, this will be a *devastavit*.

(a) If an executor should release a debt of 100 l. for one shilling, that will not bind a creditor; but in case there is no other creditor, save only the executor himself, there his assent will be binding to him; as if an executor will voluntarily release a debt, he shall not be relieved against it, though a creditor should. Vern. 455. per Lord Chancellor.

Hob. 167. Also it is said, that if an executor pays money in discharge of
Noy, 129. an usurious bond, entered into by his testator, that this is a *devastavit*.
S. P. If he pays money
on an usurious contract entered into by the testator.

Off. of
Exec. 158. It is holden, that if an executor to an obligee in a penal bond,
(b) Cro. after the bond is forfeited, releases the penalty on receipt of
Car. 400. principal and interest, this is a *devastavit*; but the contrary hereof
Kniveton is holden by three judges in (b) Cro. Car., for that the executor
and Latham, in this case does no more than what in equity and conscience he
W. Jones, ought to do; but if an infant executor gives such a release, it is
400. [Ca. void; but this it seems arises from the privilege of infancy.
Temp.
Hardw. 226.
and see 4 Ann. c. 16. § 13.]

Off. of
Exec. 158. If an executor takes an obligation in his own name, for a debt
Yelv. 10. due by simple contract to the testator, this shall charge him as
2 Lev. 189. much as if he had received the money; for the new security
Keil. 52. hath extinguished the old right, and is *quasi* a payment to him.

2 Lev. 189. So, if the executor sues a person by trover and conversion, in
Norden and which he has a right to recover; and afterwards he and the de-
Levit. 2 Jon. fendant come to an agreement that he shall pay the executor such
88. S. C. a sum at a future day, and the party fails, this is a *devastavit*;
adjudged. and he shall answer *ad valorem*.
Vern. 474.
S. C. cited,

and said to have been affirmed in a writ of error in the House of Lords, and a case there cited by Lord Chancellor, which he said was adjudged when Pemberton was chief justice, where an executor of an obligee accepted a note drawn upon a goldsmith for the money; the goldsmith accepted the bill, and before payment, fails; the executor afterwards brought an action upon the bond, and this matter being given in evidence, was adjudged a good *payment*.

Off. of
Exec. 71. So, if an executor submits the debts, or whatever he is entitled
159. to in right of the testator, to arbitration, and the arbitrators
3 Leon. 51. award him less than his due; this, being his own voluntary act,
Vide tit. shall bind him, and he shall answer for the full value.

Arbitrament, &c. (C).

If an executor neglects to pay interest, and afterwards acknowledges a judgment for principal and interest, this is a *devastavit*, unless he shews want of assets to pay interest, &c. 2 Lev. 40.

2. Where it will be a *Devastavit* to pay Debts of an inferior Nature before those of a superior, and the Order in which Debts are to be paid.

The better to consider the order which the law prescribes for the payment of debts, and the duty enjoined executors and administrators in discharging themselves of the assets of the deceased, which they must observe at their peril, it is necessary to take notice, that these debts are divided into three sorts: 1. Debts by record. 2. Debts by specialty. 3. Debts by simple contract. Off. of Exec. 131.

Debts by record, which are to have the first (a) precedence, are again divided into debts due to the crown, debts by judgments obtained in any court of record, and debts by recognizances, statutes merchant or staple. Off. of Exec. 131. [(a) This is not quite correct: funeral and

testamentary charges are in the first place to be paid. Off. of Exec. 137. 2 Bl. Comm. 511.]

Of these the highest in its nature is the king's debt, and his prerogative to be (a) preferred before other creditors arises from the regard the law hath to the publick good beyond any private interest. 2 Inst. 32. Off. of Exec. 132. Cro. Eliz.

said, that if there be a debt owing to the king, equity will order it to be paid out of the real estate, that other creditors may have satisfaction of their debts out of the personal assets. Vern 405. 793. (b) But it is

Therefore if an executor, whose testator was indebted by matter of record to the king, be sued by judgment, or any other creditor, he may plead in bar, that his testator died so much indebted to the king, (b) shewing how; and that he hath not assets above the value of that debt; and this will be a good plea: so, if a creditor pursues his remedy by suing out execution upon a statute merchant or staple, the executor upon setting forth this matter will be relieved on an *audita querela*. Off. of Exec. 132: (c) In debt upon an obligation against an executor, who pleaded, that the testator,

tempore mortis sue, was indebted to the king for the office of sheriffship; and because it was not averred, that it was *verum & justum debitum & minime solutum*, it was demurred in law, and without argument (because an injunction was served out of the exchequer) adjudged for the plaintiff. Cro. Jac. 182. Wodell and Hungate. But where in debt against an executor, he pleaded that the testator entered into a bond in such a penalty to J. S., conditioned to pay so much money, which was not yet paid, beyond which he had not assets; and there being a special demurrer to this plea, because the defendant did not aver (as he ought) that the bond was entered into by the testator *pro vero & justo debito*, the court held the plea good without such an averment; for it shall be intended the bond was given for a just debt, and the obligation itself shall be sufficient to charge the executor, though the testator never received any money thereon. Carth. 8. Rake and Row; and vide Cro. Jac. 8. 625. 6 Co. 109. Lev. 132. bad witness such averment on special demurrer*.

* The usual of pleading now, is to aver the bond was given for a true and just debt, that it remains unsatisfied, and is still in full force, &c.

But the debts due to the crown, which are to have a precedence, must be understood of debts by matter of record; and therefore, sums of money due to the king upon wood-sales, sales of tin, or other his minerals, for which no specialty is given, are Off. of Exec. 133.

(a) But it seems that if the king's debt, and likewise that of a subject, be both inferior to debts of record, the king shall be preferred. *Off. of Exec. 134-5.*

Off. of Exec. 133. So, of amercements in the king's courts baron, courts of his honours which be not of (b) record; also of fines for copyhold estates, or money for which strays within the king's manors, or liberties, are sold; these are not debts by record.

Off. of Exec. 133. Also, whatever accrues to the king by an attainder or outlawry, is to be considered as a debt by single contract before office found; for though the debts due to the person outlawed, or attainted, were by matter of record, and although the outlawry and attainder are upon record, yet the king's title also must appear on record, which cannot be before office found.

Off. of Exec. 134. Also it is said, that the arrearages of rent due to the king, whether it be a fee-farm rent, or rent reserved on a lease for years, are to be considered as a debt by simple contract.

Off. of Exec. 135. Roll. Abr. 296. Cro. Eliz. 753. [(c) That is, judgment obtained against, or confessed by the testator; not the executor; for to these, this priority doth not extend; Off. of Exec. 137.; nor will it prevail against certain debts by particular statutes, as the forfeitures for not burying in woollen, 30 Car. 2. c. 3.; money due from the overseers of the poor, 17 Geo. 2. c. 38. § 3.; for letters to the post-office, 9 Ann. c. 10. § 30., &c.] (d) An executor shall discharge a subsequent judgment before a prior statute, because of the notoriety of it. 4 Co. 59.—But if the statute be extended, whether the judgment creditor may enter on the consuec, *Q. & A. 2 And. 157.* Cro. Eliz. 734. 822. It is said to have been decreed at the *Rolls*, that mortgages were to be paid in the first place, and then judgments, and then recognizances; but that upon appeal to the House of Lords it was adjudged, that mortgages were not to be preferred to other real incumbrances; but that mortgages, judgments, statutes, and recognizances should take place according to their priority, and as they stood in order of time. 2 Vern. 524. But for this, and the order in which debts must be paid in equity, and the difference between legal and equitable assets, *vide* Abr. Eq. 141., &c. 235., &c.

Cro. Eliz. 575. Ordway and Godfrey, Allen, 48. Moor, 858. Stil. 56. Dub. Raym. 230. Dub. 3 Keb. 258. Dub. Therefore if a *scire facias* be brought against an executor on a judgment entered into by his testator, he cannot plead *plene administravit*; for a judgment being to be paid next to the king's debt, the executor ought to shew that he laid out the assets in discharging the king's debt, or in satisfying some other judgment; otherwise it might be, that he administered the assets in discharging statutes, recognizances, or debts on specialty; which he could not do before a debt on a judgment.

but Comb. 298. Ld. Raym. 3. Salk. 296. pl. 5. 4 Mod. 296. Sill. S. C. and S. P. and there held, that such a plea is good on a general, though not on a special demurrer.—And by the Off. of Exec. 137. it is said, that an executor may, to such a *scire facias*, plead generally, that he hath fully administered, without shewing that he did administer in payment of debts of as high a nature; but yet that must be proved upon the evidence, else the trial will fall out against the executor.

But

But if the judgment be satisfied, and only kept on foot to (a) wrong other creditors; or if there be any defeazance of the judgment yet in force, the judgment will not avail to keep off other creditors from their debts.

Off. of Exec. 136.
(a) For pleading that a judgment is kept on

foot by fraud and covin, *vide* 8 Co. 132. 9 Co. 103. Cro. Jac. 35. 102. 726. Roll. Abr. 802. Jon. 91. Vaugh. 103, 104. Sand. 336. 2 Saund. 48. 2 Keb. 571. Mod. 33. Lev. 281. Sid. 333. Salk. 298. pl. 10. 4 Mod. 63. 2 Mod. 36. See Ld. Raym. 283. Carth. 429. 12 Mod. 153. 229. Comb. 414. 449.

It has been holden, and seems now agreed, that a decree in a court of equity is equal (b) to a judgment at law; and that the filing of a bill in equity is of equal force to the filing of an original at law, to prevent the alienation of assets; and therefore where an executor, though without notice of a decree, paid a debt due by specialty, he was decreed to pay it over again out of his own pocket.

Vern. 143.
3 Lev. 355.
2 Vern. 37.
88. [Pr.
Ch. 179.
188.
Bunb. 48.
Ca. Temp.
Talb. 217.
2 Atk. 385.]

Though the contrary is holden, Roll. Abr. 377., Stil. 38. [(b) That is, in the course of administration of assets, but not so as to affect the lands of the debtor. 1 Vez. 496. 2 P. Wms. 621. However, there have been cases, where even decrees have been holden to bind lands, and where decrees are to hold and enjoy over. Ca. temp. Talb. 222.]

As to statutes and recognizances, they are of an equal degree, and to be paid next to judgments; and therefore the executor, where there are several devisees, may prefer a subsequent statute to a prior; for each statute equally affects the personal estate, though as to lands the first shall have precedence.

Off. of Exec. 133.
Dyer, 80.
Roll. Abr. 925.
Bridgm. 79.
So. But for this *vide* tit. Execution.

But if the testator had entered into a statute for performance of (c) covenants, and none of them were broken, in an action of debt against the executor on a specialty, he cannot plead this statute; for perhaps the covenants may never be broken, and it would be unreasonable to allow the executor to ward off a just debt upon a contingency that may never happen.

5 Co. 28.
Harrison's case. Roll. Abr. 925.
Cro. Jac. 8.
Cro. Car. 362.
(c) Or for

payment of money when an infant shall come of age. 5 Co. 28. & *vide* Roll. Abr. 925-6.

Debts by specialty, as those by bonds, &c., sealed by the testator, are next to be paid.

Off. of Exec. 141.

Also it has been adjudged, that, if an action be brought against an executor on a simple contract of his testator's, he may plead, that his testator entered into a bond payable at a future day, and this will be a good bar (d).

Cro. Eliz. 315.
3 Lev. 57.
S. P. Cro. Car. 362.
S. P.

[(d) But this will cover assets no farther than the amount of the sum payable by the condition." Ca. temp. Hardw. 228.]

[The grantor's covenant in a marriage-settlement for him and his heirs, that the premises were free from incumbrances, shall rank equally with debts on bond.

Parker v. Harvey, Vin. Abr. tit. Executors, (Q. a.) pl. 39.

If two men are partners in trade, and one of them gives a bond to leave his wife 1000*l.*, and dies; and the other partner administers; if the wife would be paid out of the separate estate of the husband, on there being effects, she shall have a preference before other creditors: but if there is no separate estate, and

Croft v. Pye, 3 P. Wms. 182.

the wife would have satisfaction out of the partnership effects, then all the partnership debts must be first paid.]

Off. of
Exec. 145.
Roll. Abr.
927.

Also rent arrear, and unpaid by the testator, is equal to a debt by specialty; for this favouring of the realty, and maintained from receiving the profits of the land, the executor can no more wage his law against such a debt, than he can against a debt by specialty. *Ergo* it is more than a mere personalty.

3 Lev. 267.
Newport and
Godfrey.
4 Mod. 44.
2 Vent. 184.
S. C. ad-
judged.
Comb. 183.
Ver. 450.
Willett v.
Earle.

So, where debt was brought against an executor for rent reserved on a parol lease, after the lease was determined, and the executor pleaded that the testator entered into an obligation, and that he had not assets *ultra* 5*l.*, which were not sufficient to discharge this obligation; on demurrer it was resolved, that this rent, though reserved on a parol lease, was yet equal to an obligation; and that the contract still remained in the realty, though the term was determined, and no distress now.

Gage v. Aston, Com. Rep. 67. Stonehouse v. Ilford, *id.* 145. S. P.]

Cro. Eliz.
409.
Nov. 53.
Roll. Abr.
557.

Also, by the custom of *London*, if a citizen of *London* dies indebted by simple contract, such debt is equal to a debt by specialty, and shall bind the plaintiff, though a stranger, and no citizen*.

* *Sed qu.* If the executor will not be justified in paying the debt on specialty, and if he has not a right to plead the specialty, &c.

9 Co. 83.
Off. of
Exec. 155.
Roll. Abr.
922.

Debts by simple contract are postponed to all (a) others, being debts of an inferior nature; yet an executor is bound, as far as he has assets, to pay them, as much as any other debt; and therefore a simple contract creditor need not allege, that the executor had assets to satisfy debts of a superior nature, and his also; but if the truth be, that the executor has only assets sufficient to satisfy such superior debts, he must plead it.

5 Co. 82.
(a) it is said,
that debts
due for ser-
vants wages,

on the statute of labourers, shall be paid before debts by simple contract. Roll. Abr. 927. — If a man recovers a judgment, or has a sentence in *France* for money due to him, the debt must be considered here only as a debt due on simple contract. 2 Vern. 540. Walker v. Whitter, Dougl. 1. — Also in equity it hath been ruled, that a voluntary bond shall not, in a course of administration, take place of real debts, though by simple contract; but shall, notwithstanding, be paid before legacies. Abr. Eq. 143-4. 3 P. Wms. 223. Com. Rep. 255.

Kellw. 51.
Plow. 279.
2 And. 157.
Harman v.
Harman,
2 Show. 492.
pl. 457.
3 Mod. 115.
S. C.

But though the law requires, that debts should be paid according to their superiority; as herein set forth; yet may an executor pay a debt on a simple contract before (b) a specialty, if he has no (c) notice of such specialty; for otherwise, it might be in the power of the obligee to ruin the executor by keeping his bond in his pocket until he had paid away all the assets in discharging simple contract debts.

Edgumbe

v. Dee, Comb. 35. not determined. 3 Lev. 113-4. Vaugh. 94. [In the case of Harman v. Harman, as reported in Shower, and 3 Mod., the court agreed, that a judgment upon a simple contract debt may be pleaded in bar to an action of debt upon bond, and that it is no *devastavit* in an executor to pay a debt upon such a contract before a bond debt of which he had no notice; and they relied on the cases of Edgumbe v. Dee, and Brooking v. Jennings, 1 Mod. 174., but it was adjourned; and afterwards, according to Comberbach, judgment was given for the plaintiff. But from a later case of Davis v. Monkhouse, Fitzg. 76., Bull. M. P. 173., it seems to be settled, that an executor may plead a judg-

ment covered on a simple contract to an action of debt on bond, unless he has notice of such bond, and that for the reason given in the text. But where an executor to an action of debt upon bond pleaded a judgment confessed on the preceding day in a simple contract debt, the plea was disallowed, because it did not aver that it was without notice of the plaintiff's demand, for in such case only is an executor excused in confessing a judgment. *Sawyer v. Mercer*, 1 Term. Rep. 690.] (b) But where to a *scire facias* against executors, upon a judgment against their testator in debt, they pleaded, that before they had any consanguinity of this judgment, they had fully administered all their testator's goods, in paying debts upon obligations; upon demurrer it was adjudged a bad plea, for they at their peril ought to take consanguinity of debts upon record; and ought first of all (unless for debts due to the crown) to satisfy them; and although the recovery was in another county than where the testator and executors inhabited, it is not material. *Cro. Eliz.* 793. *Littleton and Hibbins*, 3 Mod. 115. *Abr.* 236. (c) It is said, the notice must be by action, 1 Mod. 174., [or bill in equity. 2 Vern. 37. 38. 3 P. Wms. 402. note. 2 Bl. Comm. 512. but *qu.*]

Also, (a) where there are several creditors in an equal degree, the executor may prefer which he pleases; and (b) may, when a creditor himself, retain assets against those who are in an equal degree with himself.

(a) For this *vide Off. of Exec.* 142. *Dyer*, 22. *Roll. Abr.* 926. *Sid.* 21.

[As this power may be an inlet to fraud, the Chancery will sometimes interpose. 10 Mod. 496.] (b) For this *vide Roll. Abr.* 922-3. *Hob.* 127. 250. *Godb.* 217. *Cro. Eliz.* 115. 130. *Leon.* 111. *Moor*, 260. *Dyer*, 2. *Keilw.* 63. *And.* 24. *Mod.* 208. 2 *Show.* 403. *pl.* 375. 3 *Danv.* 386. *pl.* 17. *Skin.* 214. *pl.* 7.

[If a man has covenanted with B. and C. to leave by his will, or that his executors within six months after his death shall pay 700*l.* to them, in trust to pay the interest to his wife for life, then to be divided among his children, and in default of children, as he shall appoint; and binds himself, his heirs, &c. in a penalty for performance, and dies without issue, and intestate; if B. administers, he may retain assets against a bond creditor who sues him before the six months are elapsed.

Plumer v. Marchant, 3 *Burr.* 1380.

But with respect to debts in equal degree, if a suit hath been commenced for any one, such debt shall be first paid; for after a suit begun, an executor (it hath been holden) may not excuse himself by any voluntary payments. Yet, it is said, that the executor, before notice of such suit, may pay any other creditor in equal degree, and then plead that he hath fully administered before notice.

2 *Ch. Ca.* 201. 2 *Vern.* 62.

Br. Executors, *pl.* 43. *Went.* 146.

And it was holden by Lord Cowper, that pending a bill in equity (c) against an executor, or after a decree *quod computet*, an executor may pay any other debt of an higher nature, or of as high a nature, if there be *legal* assets; but if he hath only *equitable* assets, then the court of Chancery will not indemnify him, and suffer him to prejudice and disappoint the first suitor. But he cannot do so, his lordship added, after a final decree.

Mason v. Williams, 2 *Salk.* 507. (c) See the case of *Dorston v. Earl of Orford*, 3 *P. Wms.* 401. n. where a voluntary

payment made by an executor of a debt in equal degree, pending a suit in equity, was allowed. — See too the case of *Waring v. Danvers*, 1 *P. Wms.* 205., where, after an action at law brought by one creditor, an executor confessed judgments to other creditors, and equity would not interpose.

Where a creditor sues an executor at law and in equity at the same time for the same demand, equity will not compel him to make his election in which of the courts he will proceed, in case the executor is attempting to prefer other creditors before him, by confessing judgments to them; but will merely restrain him from taking out execution upon the judgment without leave of the court.

Barker v. Dumeres, *Barnard*, *Ch. Ca.* 277.

For the distinction between legal and equitable assets, *vide sup.* H. Ca. temp. Talb. 220. 2 Vern. 435.

Where there are only *equitable* assets, the court of Chancery will direct the application of them according to that course which is most just, namely, to pay every creditor his share in proportion. So, where the assets are partly *legal* and partly *equitable*, although the court cannot take away the legal preference on legal assets, yet where one creditor hath been partly paid out of such legal assets, when satisfaction comes to be made out of equitable assets it will postpone him till there is an equality, in satisfaction to all the other creditors out of the equitable assets, proportionable to so much as the legal creditor hath been satisfied out of the legal assets.]

3. Of paying Legacies before Debts, and therein of the Executor's Assent to a Legacy.

Off. of Exec. 26. Keilw. 128. Dyer, 254. Legacies are properly recoverable in the spiritual court, yet (a) if an executor pays legacies before debts, though by simple contract, it is a *devastavit* in him.

[But where lands are devised for payment of debts and legacies, and the debts are such as land is not liable to satisfy, as debts by simple contract; there, it is said, the debts shall have no preference of the legacies; but if there be not sufficient to pay all, they shall be paid in proportion. 2 Freem. 270. So, if a man bind himself in an obligation to perform a certain thing, and devise divers legacies, and die, leaving only sufficient to satisfy the obligation if this should come to be forfeited; yet this obligation shall not be any bar of the legacies, because it is uncertain whether it will ever be forfeited: but the executor shall make a conditional delivery of the legacy, (to wit,) that if the obligation should be recovered against him, the legatee shall re-deliver the legacy. 1 Roll. Abr. 928.] (a) And therefore if the spiritual court go about to compel an executor to pay a legacy without security to refund, a prohibition shall go. Vern. 93.

Godolph. 148, 149. Off. of Exec. 27.

And as the law makes it a *devastavit* in the executor to pay legacies before debts; so it prohibits the legatee from meddling with the legacy without the assent of the executor; and therefore it hath been holden, that if a legatee takes possession of the thing devised, without the assent of the executor, that he may have an action of trespass against him.

Off. of Exec. 29. Godolph. 148. Plow. 525.

But as it is the will of the testator which gives the interest to the legatee; so this matter of assent seems only a perfecting act for the security of the executor; and therefore the law does not require any exact form in which it is to be made. Hence any expression or act done by the executor, which shews his concurrence to the thing devised, will amount to an assent.

4 Co. 28. 3 Co. 96.

If *A.* devises a term to *B.* for life, remainder to *C.*; and the executor assents to the devise to *B.*, this will amount to an assent to the devise over to *C.*, and vest the interest in him accordingly.

10 Co. 47. Plow. 520. a. Dyer, 367. 100. Eliz. 2: 3. 2 Co. 37. b.

If one is himself both executor and devisee, and he enters generally without claim or demonstration of election, he shall have the thing devised as executor, which is his first and general authority.

Lev. 25. Garret and Lister, S.C. Keb. 15.

So, where a man possessed of a long term devised to his wife for life, remainder to trustees for his son's life, &c., and made his wife executrix; it was holden, that the wife took the term wholly as executrix in the first place, till she agreed to the devise;

wife; but it being proved that she said she would take the term according to the will, it was holden by the court to be a sufficient assent.

So, where in a like case, the wife said, that the son was to have the estate after her; this was resolved to be a sufficient assent. Lev. 25.

Hence it hath been holden, that if a specifick legacy be devised, as three gowns, &c., and the legatee take money in satisfaction of them, that this amounts, *1/2*, to a consent of the executor to the legacy or devise of them; and then it is a sale of them by the legatee or devisee to the executor for the money *eo instanti*. Hill. 5 Ann. Becker and Ball.

See further tit. *Legacies*, (L.)

4. What shall be allowed on Account of Funeral Expences.

An executor may lay out so much of the testator's assets as are necessary for defraying his funeral expences, before he has paid any of his debts or legacies. 37 H. 6. 30. Koll. Abr. 926.

And herein the executor is to be careful that the expences be moderate, and not exceeding the (a) degree and circumstances of the deceased; otherwise he may be guilty of a *devastavit*. Off. of Exec. 129. Suppl. to Wentw. 37.
130. Comb. 342. (a) Where the court of Chancery allowed 600*l.* as a reasonable sum, in defraying the expences of a man of great estate and reputation in his country, and being buried there; but if he had been buried elsewhere, it seems his funeral might have been more private, and the court would not have allowed so much. *Preced. Chan.* 27.

And, in strictness, it is said, that no funeral expences are allowable against a creditor, except for the coffin, ringing of the bell, parson, clerk, and bearers' fees, but not for pall or ornaments. 1 Salk. 296. [In Comb. 342., Holt, Ch. J. is represented to say, that 10*l.* is enough to be allowed for the funeral of one in debt. And where a man dies insolvent, no more than 40*s.* shall be allowed. 3 Atk. 249.]

[(L 2.) Where the Personal Estate shall be first applied in Discharge of Debts, &c. And herein of marshalling the Assets.

THE general rule is, that the personal estate of a testator shall in all cases be primarily applied in the discharge of his *personal* debt, (or general legacy,) unless he by express words or *manifest* intention exempt it (b). 1 Cox's P. Wms. 291. Hallwood v. Pope, 3 P. Wms. 324.

French v. Chichester, 1 Br. P. C. 192. Fereyes v. Robertson, Bunb. 302. Walker v. Jackson, 2 Atk. 624. Bridgeman v. Dove, 3 Atk. 201. Earl of Inchiquin v. French, Ambl. 33. and 1 Will. 82. Samwell v. Wake, 1 Br. Ch. Rep. 144. Duke of Ancafter v. Mayer, *id.* 454. (b) That it may be so exempted, see Bampfild v. Wyndham, Pr. Ch. 101. Wainwright v. Bendalows, 2 Vern. 718. and Ambl. 581. Stapleton v. Colville, Ca. temp. Talb. 202. Walker v. Jackson, 2 Atk. 624. Anderton v. Cooke, and Kynaston v. Kynaston, cited in 1 Br. Ch. Rep. 456-7. Holiday v. Bowman, cited in 1 Br. Ch. Rep. 145. Webb v. Jones, 2 Br. Ch. Rep. 60.

So it shall be, although such personal debt be also secured by mortgage; and this, whether there be a bond, or covenant for payment, or not. Cope v. Cope, 2 Salk. 449. Howel v. Galton v. Hancock,
Price, 1 P. Wms. 291. Pockley v. Pockley, 1 Vern. 36. King v. King, 3 P. Wms. 360.
G 3

v. Hancock, 2 Atk. 436. Robinson v. Gee, 1 Vez. 251. Earl of Belvidere v. Rochfort, 6 Br. P. C. 520. Philips v. Philips, 2 Br. Ch. Rep. 273.

(a) Bartholomew v. May, 1 Atk. 487. So, lands subject to, or devised for payment of debts, shall be liable to discharge such mortgaged lands either descended or devised; (a) even though the mortgaged lands be devised expressly *subject to the incumbrance* (b).
Tweedale v. Earl of Coventry, 1 Br. Ch. Rep. 240. (b) Serle v. St. Eloy, 2 P. Wms. 386.

Galton v. Hancock, 2 Atk. 424. So, lands descended shall exonerate mortgaged lands devised.

Carter v. Barnardiston, 1 P. Wms. 505. So, *unincumbered* lands and *mortgaged* lands both being specifically devised, (but expressly "after payment of all debts,") shall contribute in discharge of the mortgage.
and 2 Br. P. C. 1.

(c) Counts of Coventry v. Earl of Coventry, 2 P. Wms. 222. But in all these cases, the debt being considered as the *personal* debt of the testator himself, the charge on the real estate is merely collateral. The rule therefore is otherwise, where the charge is on the *real* estate principally, although there be a collateral personal security (c); or where the debt (although personal in its creation) was contracted originally by another (d).
Freeman, *id.* 437. Wilton v. Earl of Darlington, 2 Cox's P. Wms. 664. note. Ward v. Lord Dudley, 2 Br. Ch. Rep. 316. (d) Cope v. Cope, 2 Salk. 449. Bagot v. Oughton, 1 P. Wms. 347. Leman v. Newnham, 1 Vez. 51. Robinson v. Gee, *id.* 251. Parsons v. Freeman, Amb. 115. Lacan v. Mertins, 1 Vez. 312. Perkyns v. Baynham, 2 Cox's P. Wms. 664. note. Shafto v. Shafto, *ibid.* Bassett v. Percival, *ibid.* Lawson v. Hudson, 1 Br. Ch. Rep. 58. Earl of Tankerville v. Fawcett, 2 Br. Ch. Rep. 57. Tweddell v. Tweddell, *id.* 101. 152. Billingham v. Walker, *id.* 604.

Lanoy v. Duke of Arhol, 2 Atk. 446. It is a rule in equity, that where one claimant has more than one fund to resort to, and another claimant only one, the first claimant shall resort to that fund, on which the second has no lien. If therefore a specialty creditor, whose debt is a lien on the real assets, receive satisfaction out of the personal assets, a simple contract creditor shall stand in the place of the specialty creditor against the real assets, *so far* as the latter shall have exhausted the personal assets in payment of his debt; and legatees (e) shall have the same equity as against assets descended.
Martins, 1 Vez. 312. Meggs v. Hodges, 2 Vez. 53. (e) Anon. 2 Ch. Ca. 4. Sagittary v. Hyde, 1 Vern. 455. Neave v. Alderton, 1 Eq. Ca. Abr. 144. Wilson v. Fielding, 2 Vern. 763. Galton v. Hancock, 2 Atk. 436. (f) Culpepper v. Aston, 2 Ch. Ca. 117. Bowdman v. Reeve, Pre. Ch. 578. Tipping v. Tipping, 1 P. Wms. 730. Lucy v. Gardiner, Bunb. 137. Lutkins v. Leigh, Ca. temp. Talb. 54.

Haslewood, v. Pope, 3 P. Wms. 323. So, where lands are subjected to the payment of *all* debts, a legatee shall stand in the place of a simple contract creditor, who has been satisfied out of personal assets.

Hyde v. Hyde, 3 Ch. Rep. 83. So, where legacies by will are charged on the real estate, but not the legacies by codicil, the former shall resort to the real assets upon a deficiency of the personal assets to pay the whole.
Masters v. Masters, 1 P. Wms. 422. Bligh v. Earl of Darnley, 2 P. Wms. 620.

Clifton v. Burt, 1 P. Wms. 678. But from the principles of these rules it is clear that they cannot be applied in aid of one claimant so as to defeat the claim of another; and therefore a pecuniary legatee shall not stand in the place of a *specialty creditor*, as against land devised, (though he shall

shall as against land descended): but such legatee (*a*) shall stand in the place of a mortgagee who has exhausted the personal assets, to be satisfied out of the mortgaged premises, though specifically devised; for the application (*b*) of the personal assets, in case of the real estate mortgaged, does not take place to the defeating of any legacy.

Lord Leigh, Ambl. 171. (*b*) Oneal v. Mead, 1 P. Wms. 693. Tipping v. Tipping, *id.* 730. Davis v. Gardiner, 2 P. Wms. 190. Rider v. Wager, *id.* 335.

324. Scott v. Scott, Ambl. 383. (*a*) Lutkins v. Leigh, Ca. temp. Talb. 53. Forrester v. 730. Davis

But none of the rules deducible from these cases subject any fund to a claim to which it was not before subject, but only take care that the election of one claimant shall not prejudice the claims of the others.

2 Atk. 438. 1 Vez. 312. Robinson v. Tonge, 2 Cox's P. Wms. 680. note.

A court of equity will not marshal assets in favour of a charitable bequest, so as to give it effect out of the personal chattels, it being void so far as it touches any interest in lands.

General v. Tyndal, Ambl. 614. Foster v. Blagden, *id.* 704. Hillyard v. Taylor, *id.* 713.

Mogg v. Hodges, 2 Vez. 52. Attorney

Where a legacy is given out of a mixt fund of real and personal estate payable at a future day, and the legatee dies before the day of payment; *quare*, Whether the court will marshal the assets so as to turn such legacy upon the personal estate, in which case it would be vested and transmissible; whereas as against the real estate it would sink by the death of the legatee?

Prowse v. Abingdon, 1 Atk. 482. Pearce v. Taylor, Tr. Vac. 1790. before Ld. Thurlow.

As against real assets *descended*, it seems, that the wife shall stand in the place of creditors for the amount of her *paraphernalia*. But as against real assets devised, (*c*) *quare*.

Snelson v. Corbet, 3 Atk. 369. Graham v. Londonderry, *id.* 393. (*c*) Probert v. Clifford, 2 Cox's P. Wms. 544. note. and Ambl. 6. Inclendon v. Northcote, 3 Atk. 438.]

Tipping v. Tipping, 1 P. Wms. 730. 2 Cox's

(M) In what Cases an Executor may make himself liable *de bonis propriis*: And herein,

1. Where he shall be liable *de bonis Propriis* by his false Pleading.

EXECUTORS are no farther chargeable than they have assets, unless they make themselves so by their (*d*) own act; as by pleading a false plea, *i. e.* such a plea as will be a perpetual bar to the plaintiff, and which of their own knowledge they know to be false.

Roll. Abr. 930. Godolph. 198. (*d*) If an executor suffers judgment

ment to go against him by default, upon executing a writ of inquiry, he shall not give evidence of want of assets, for he is estopped, as if it had been the case of an heir; for he should have pleaded *plene administravit*, or specially what assets he had. 6 Mod. 308. *per Curiam*. Sir W. Jones, 87. That if an executor confesses or suffers judgment by default, he admits assets in his hands, and is estopped to say the contrary. [Rock v. Leighton, 1 Salk. 310. 1 Ld. Raym. 589. S. C. Com. Rep. 87. S. C. 3 Term Rep. 690. S. C. Skelton v. Howling, 1 Will. 258. S. P. So, if he pleads only the general issue, and has a verdict against him. Ramiden v. Jackson, 1 Atk. 292. Erving v. Peiers, 3 Term Rep. 685. For he can never avail himself of matters in a subsequent stage of the proceedings, which he might have pleaded in an earlier stage. Earle v. Hinton, 2 Str. 732. and cases *supr.*—In *assumpsit* against an executor, he pleaded *non assumpsit* and *plene administravit*; it was insisted, that if the plaintiff could prove assets unadministered, to any amount, he must have judgment for the whole. But Lord Mansfield said, the law had been understood to be so, and many cases decided to that effect; but that he thought it absurd and wrong, that the plaintiff should recover of the executor more than the assets in his hands;

hands; and the judgment was given accordingly. *Harrison v. Beebles*, Guildh. Tr. 1769, cited by Lord Kenyon, 3 Term Rep. 633.] An executor must defend himself by legal pleading, and cannot in these cases have any relief in equity. [Thus, where to three several actions an executor pleaded that he had no assets *ultra* 100*l.*, and judgment was had upon each action for 100*l.*, equity refused an injunction. *Anon.* 1 Vern. 119. So, where he had pleaded a false plea, by the mistake of his attorney, as alleged, and a verdict had passed against him, equity would not relieve him, though the merits had never been tried. *Stephenson v. Wilson*, 2 Vern. 325. However, in the case of *Robinson v. Bell*, 2 Vern. 146., where the attorney had, by mistake, pleaded a different plea from that which he was directed to plead, and the executor had confessed a mortgage to the testator, which afterwards turned out to be worth nothing, upon which confession a verdict had been given against him, the court thought fit to relieve. And in that case Lord Commissioner Hutchins mentioned two instances where the court had interposed in behalf of executors after verdicts on *ne unques executor*.—Under the circumstances of the anonymous case above cited from 1 Vern. 119., the executor may now defend himself at law, without resorting to equity, by pleading to one action *plene administravit præter* a certain sum, and afterwards to the others, though brought in the same term, the like plea of *plene administravit præter* the same sum, and as to that sum that he had confessed it in the other action. *Waters v. Ogden*, Dougl. 452.]

46 E. 3. 10. Therefore if an executor, being sued, pleads *ne unques executor*, and it is (a) found against him, the judgment shall be *de bonis testatoris si*, &c. (b) *Si non de bonis* (c) *propriis*; for thereby he estrangeth himself from the testator, and the benefit of the will, and by his own falsity and folly hath made his own goods chargeable.

(a) If, upon a false plea judgment be given against an executor upon demurrer, and execution be awarded, the sheriff cannot return *nulla habet bona testatoris*, but is to return a *devastavit*, as if it had been found against the executor by verdict. *Cro. Eliz.* 102. (b) But if there had been judgment against the testator, and the party who recovered had brought a *scire facias* on the judgment against the executor; in this case, though the executor had pleaded *ne unques executor*, and it had been found against him, yet he shall be chargeable *de bonis testatoris* only; for the prayer of the writ is for execution of the goods of the testator, by which he is stopped to demand any other. *Roll. Abr.* 933. *Waldron and Berrie*. (c) As well of the debt as of the damages and costs. *Roll. Abr.* 950.

Cro. Jac. So, if to an action brought against him he pleads a release made to himself, and it is found against him, this shall charge him *de bonis propriis*; for it is a falsity which (d) falls within his own knowledge.

(d) Where the executor pleaded, that he performed a condition, which being found against him, it was holden, that he should be charged *de bonis propriis*. *Moor*, 69. *per Dyer*.

Yelv. 219. So, where an action of debt upon an obligation was brought against an administrator for 14*l.*, and he pleaded, that before notice of the action his administration was revoked; and that likewise before notice he delivered over 200*l.*, which he had of the intestate's, to the new administrator; the plaintiff replied, that the revocation was by (e) covin and fraud, which being found for him, it was holden, that he should recover absolutely from the administrator.

(e) But where to an action of debt against an executor he pleaded a former judgment had against him by another person, and that he had not assets more than sufficient to satisfy the judgment; and the plaintiff replied, that this judgment was had by covin, to defraud the other creditors, though it be found accordingly; and though this be a false plea; yet the judgment against the executor shall only be *de bonis testatoris*. *Roll. Abr.* 931. *Beriet and Boys*. [*Sed qu. de hoc?*]

Roll. Abr. But if an executor pleads, that such a deed is not the deed of his testator, or that a release was given to the testator; though these prove false, yet the judgment shall be *de bonis testatoris*; for of these the executor cannot be presumed to have so perfect a knowledge.

931. *Cro. Jac.* 672. [If an executor pleads a former judgment had against him by another person, and no assets *ultra*, and the plaintiff reply *per fraudem*, and it be so found, yet shall the judgment only be *de bonis testatoris*. *Bull. N. P.* 144.]

So, in debt upon a bond against baron and feme as administratrix, the defendant pleaded payment by the feme, after the death of the intestate, and it was found against him, and the judgment was, *quod recuperet* against them *de bonis testatoris, si tantum habent in manibus, Et si non, pro misis de bonis (a) propriis*, and held well enough; for though the plea is false, yet the husband was a stranger to the intestate, and might not know whether the wife had paid it to the plaintiff or not.

for that a feme covert cannot have any goods, but disallowed; for although a feme covert hath not any goods during the coverture, yet because the baron is charged only in respect of the feme, she might have goods if she had survived, and execution might be taken against her. Cro. Jac. 191-2; but for this *vide* Roll. Abr. 930-1. Cro. Car. 693. *—If there be judgment against the husband and wife, executrix, and a return that the husband wasted, it shall be *de bonis suis propriis*. 1 Roll. 932. l. 25.—If a return be that the wife *dum sola* wasted, it shall be *de bonis propriis* of both. 1 Roll. 931. l. 5. R. Cro. Car. 519. See also 1 Roll. 930. l. 50.—If a *devastavit* is returned against a *feme covert*, executrix, and her husband, that sufficient goods have come to their hands, which they have wasted and converted to their own use, it is good; the conversion is not necessary, and may be rejected; and judgment shall be *de bonis propriis* of both. Stra. 440.

So, if an action of covenant be brought against an executor, and the breach assigned be in the time of the executor; yet the judgment shall be *de bonis testatoris*, for it is the testator's covenant which binds the executor, as representing him, and therefore he must be sued by that name.

Cro. Jac. 191. Johns and Adams. (a) It was objected, that the judgment ought to have been *de bonis propriis* of the baron only, Hob. 188. Cro. Jac. 647. 671. Hut. 55. Brownl. 24. Roll. Abr. Saund. 112. 931, 932.

It is holden in *Shipley's* case, that if an action of debt on an obligation of 200*l.* be brought against an executor, who pleads fully administered; and the plaintiff replies assets, which are found by the jury to the value of 172*l.*, that a judgment to recover the entire debt and damages, and costs of the goods of the testator, *si, &c., Et si non, tunc* the damages of his (b) proper goods, is good; for that the defendant's bar being in effect, that he had not assets, the same amounted to a (c) confession of the debt, on which the plaintiff may take judgment immediately, though he cannot have execution until assets come to the hands of the executor.

must be levied of the goods of the executor for the delay; and the levying of the damages of the testator, when it appears they are not sufficient to satisfy the debt, is erroneous; for the testator's goods are to be charged with the debt and not the damages, if they are not sufficient to discharge both. Lev. 7. (c) That in an action on the case against an executor, who pleads *plene administravit*, the plaintiff must prove his debt, otherwise he shall recover but 1*d.* damages, though there be assets; for the plea only admits the debt, but not the quantity. Salk. 296. pl. 3. *per* Holt, Ch. J.

8 Co. 134. May Shipley's case. Hob. 199. S. C. cited. (b) That if the executor has not sufficient goods of the testator's to satisfy both debt and damages, the damages

But in the case of *Dorchester* and *Webb* it seems to be holden, that the plaintiff, upon a plea of *plene administravit*, cannot have judgment of assets *in futuro*; for that this is such an acknowledgment of the want of assets, as will bar him in the same manner as if the plaintiff had denied that he had fully administered, which being found against him will bar him, and on which the plaintiff must also pay costs*.

Cro. Car. 373. * It is common now, on such plea, to admit the truth of it, and take judgment *de bonis quando*

acciderint. [But after the plaintiff hath taken such judgment, he shall not in a subsequent action against the executor, suggesting a *devastavit*, be allowed to go into evidence of assets having been in the defendant's hands before that judgment; for by so taking his judgment, he admits that the defendant hath fully administered to that time. Bull. N. P. 169. In a *fiere facias* therefore on the judgment, he must not pray execution of assets generally, but of those only which have come to the executor's hands, since the former judgment. *Mara v. Quin*, 6 Term Rep. 1. But if the executor receive assets between the time of the plaintiff's suing out the writ in the first action and the judgment, the judgment

ment will be amended by being made a judgment as of that term when the plaintiff could, at the soonest, have entered it up, unless the defendant can shew that in point of fact some injustice will be done by it in the particular case. *Ibid.*]

Lev. 286.
2 Saund.
214.
Sid. 448.
2 Keb. 606.
671. Vent.
94. S. C.

But this matter came to be fully considered in the case of *Noel and Nesson*, where in debt against an executor he pleads fully administered, whereupon the plaintiff prays judgment of assets *in futuro*, and it was so entered; and after, upon a suggestion of assets, the plaintiff sues forth a *scire facias*, to which he pleads no assets, and it is found against him, and judgment accordingly; and it was urged for error, that the plaintiff hereby has confessed the plea of fully administered, and then it is as strong against him as if there had been a verdict, in which he should have been barred for ever; but it was resolved for the plaintiff, for he had a good cause of action, and probably did not know but that there were assets, and hath done nothing amiss; for as soon as the executor denies assets by his plea, he rests satisfied, and makes only a reasonable prayer, that he may be paid when assets do come, as it is fit he should, and therefore they agreed *Shipley's* case to be good law; for when the executor pleads *riens en mains*, he confesses the debt, which is a good foundation for the judgment; but the want of assets at present hinders execution, which is therefore stayed till assets shall come.

2. Where by his Promise to pay or discharge the Testator's Debts or Legacies, he makes himself liable.

Cro. Jac.
47. Co. 94.
Roll. Abr.
921.—
Note, that
by the sta-

If an executor, in consideration that a creditor to the testator will forbear to sue him for a certain time, promises to pay him his debt, this shall bind him; and an *assumpsit* lies against him on this promise, (a) without alleging that he hath assets.

tute of frauds, 29 Car. 2. c. 3., such promise must be in writing. (a) It is said in 9 Co. 94. a., that though the plaintiff need not allege, that the executor has assets; yet, if in truth there be no debt due from the testator, or if the executor had no assets at the time of the promise made, he may give these matters in evidence.—But the better opinion seems to be, that the plaintiff need not prove his having assets, and that forbearance is sufficient consideration to entitle him to the action. *Vide* Roll. Abr. 24. Cro. Jac. 273. 604. 613. 3 Leon. 67. 2 Lev. 20. 122.—But a promise by an administrator *during minority* after the infant has come of age, will not bind such administrator. Cro. Car. 516. Roll. Abr. 910.

2 Lev. 3.
Davis and
Reyner,
Vent. 120.
S. C.

So, in *assumpsit* the plaintiff declared, that *J. S.* devised a legacy to him, and made the defendant executor, and the plaintiff intending to sue him for the legacy, the defendant, in consideration of forbearance, promised to pay him: the defendant pleaded divers bonds and judgments, and *null assets ultra*, upon which the plaintiff demurred, and had judgment without argument: for it is not material whether he had assets or no, for he is charged upon his own promise, in consideration of forbearance; and a forbearance of suit for a legacy is a sufficient consideration.

S. J. Sg.
Scot and
Stephens,
Ld. 71.
S. C. Roll.
Rep. 27.
S. P. for

So, if *A.*, together with *B.*, is bound to *C.* for the proper debt of *B.*, &c., and *A.* pays the money, and *B.* dies and makes *D.* his executor, and *D.*, in consideration that *A.* will forbear to sue him till such a time, assumes and promises to re-pay him; this consideration is good, though *D.* was liable in equity only.

Croke. [Forbearance seems a good consideration for a promise by an executor to pay a debt of his testator. *Keen v. Kennegal*, 1 Vez. 125.]

(N) What Actions Executors or Administrators may bring in Right of those they represent.

AN executor stands in the place of his testator, and (a) represents him as to all his personal contracts, and therefore may regularly maintain any action in his right, which he himself might.

Cro. Eliz. 377.
 Latch. 167.
 Roll. Abr. 912.
 Savill, 118.
 133.
 Poph. 189. Leon. 193. (a) But if one enters into an obligation, conditioned to pay 20*l.* to such person as the testator shall by his last will appoint, and the testator makes no particular appointment, his executors cannot maintain an action for this 20*l.*; for though they are his assignees in law, yet the assignee here must be an assignee in deed; for the word *paying* carries property with it. Hob. 9, 10.

But it seems that executors could not at common law bring trespass for a trespass done to the testator; to remedy which, by the 4 *E. 3. c. 7.* reciting, That “whereas in times past executors “have not had actions for a trespass done to their testators, as “of the goods and chattels of the same testators, carried away “in their life, and so such trespasses have hitherto remained unpunished; it is enacted, That executors in such (b) cases shall “have an action against the trespassors, and recover their damages in like manner as they whose executors they be should “have had, if they were in life.”

his testator's time; for though it is a tort done to his person, yet it is maintainable within this statute. Vent. 30.

Also it was holden, that at common law there was no remedy for recovery of rent-arrear in the life-time of the testator; for the heir could not maintain an action of debt for it, because he had nothing to do with the personal contracts of his ancestor; nor the executor, because he could not represent his testator, as to any contracts relating to the freehold and inheritance; but this is remedied by the 32 *H. 8. cap. 37.*, by which executors and administrators are enabled to sue for and recover all such arrears of rent, &c., for which *vide* title *Debt*, letter (C).

Executors and administrators may bring trover for the goods of the deceased, though the defendant took the goods before probate or administration committed, for the probate and administration relate back to the death of the testator or intestate; and they may allege the possession in the testator or intestate; for though this be a possessory action, yet the law supposes the possession in the executor or administrator, as soon as the property is derived to them.

An executor, (and not heir or assignee,) for a covenant broken in the life-time of the testator, shall have an action of covenant, though it were a covenant real, which runs with the land, as he cannot of that have an heir, &c., and the damages shall be recovered by the executor, though not named, as he personally represents the testator.

Palm. 558.—But covenants annexed to the freehold and inheritance, though made with the testator, his executors and administrators, shall descend to the heir. And. 55. Skin. 305. pl. 1. *vide* title *Covenant*.

But

(b) It hath been adjudged, that an executor may have an action of debt upon the statute 2 & 3 *E. 6. c. 13.* against a defendant, for not setting out tithes in the equity of

Co. Lit. 162. a.

Cro. Eliz. 377.
 Vent. 30.
vide title *Trover and Conversion*.

2 Lev. 26.
 Vent. 175.
 S. C. That executors shall take advantage of covenants in gross.

Vent. 30. But though an executor represents the testator as to his personal estate and contracts only, yet an executor may bring an ejectment * for an ejectment in the life of the testator; for in this action damages as well as the possession of the lands are to be recovered (a).

(a) So they may bring a *quare impedit* for a disturbance in their lifetime of the testator, and shall recover damages within the equity of the statute 4 E. 3. c. 7. Cro. Eliz. 207. 1 And. 241. S. C. 1 Leon. 205. S. C. 4 Leon. 15. S. C.

Carth. 90. So, if a lord of a manor assesses a fine upon a copyholder for his admittance, and dies, his executor may bring an action for it; for it does not depend upon the inheritance, but is *quasi* a fruit fallen.

3 Mod. 239. 3 Lev. 261. Show. 35. Comb. 151. S. C. adjudged by three judges against Holt, C. J. Ld. Raym. 502. [Evelyn v. Chichester, 3 Burr. 1717. *acc.*]

Salk. 295. An executor may bring a writ of error to reverse an attainder pl. 1. King of high treason of his testator, for he is privy to the judgment, and may have a loss thereby.

judges against Holt, who held, that by the reversal the blood and land is restored, which is no advantage to him, and the goods were forfeited by the conviction of the testator, and not by the attainer.

Doe v. Porter, 3 Term Rep. 13. [The personal representative of a tenant from year to year as long as both parties please, may maintain an ejectment, for it is a chattel interest which vests in him.]

(O) How such Actions must be laid: And therein of joining a Matter in Right of the Testator, and in their own Right, in the same Action.

Moor, 419. Cro. Eliz. 406. Hob. 184. Noy, 19. Vent. 263. 2 Lev. 110, 111. 228. 2 Keb. 814. 3 Lev. 74. Show. 366. Salk. 10. pl. 1. Carth. 235. [2 Str. 1271. 4 Term Rep. 480. But it is the constant practice to join in the same declaration several counts for money had and received by the defendant to the use of the testator, and to the use of the executor as *sub.* Petrie v. Hannay, 3 Term Rep. 660.]

Hob. 88. And therefore, if in *assumpsit* against an administratrix, the plaintiff declares upon a sale of goods to the intestate for 200*l.*, and upon another sale to the defendant herself for 27*l.*, and that upon account the defendant was found indebted to the plaintiff in these sums, and promised, &c.; the declaration is naught, for the charge being in several manners, *viz.* in her own right, and as administratrix, it ought to have been by several actions.

Carth. 170, 171. Kemp v. Andrews. So, if A., B., and C. be possessed as joint merchants of goods, which come to the hands of J. S., and afterwards B. and C. die, A. alone may bring trover for these goods; for though between joint merchants there is no survivorship, yet the action in this case must survive, though the interest doth not; otherwise there would be a failure of justice, because the survivor and the executors of those who are dead cannot join in action, for that their rights

rights are of several natures, and there must be several judgments.

If an executor brings an action of debt for any thing in right of the testator, it must be in the (*a*) *detinet* only.

5 Co. 32.
laid down
as a rule.

Moor, 566. Roll. Abr. 602, 603. S. P. (*a*) But if in the *debet* and *detinet*, it is aided after verdict, by 16 & 17 Car. 2. c. 8. 1 Lev. 250. Fain v. Paynton, S. C. 379.

So, if an executor brings debt upon an obligation made to the testator, where the day of payment incurred (*b*) after the death of the testator, yet the writ shall be in the *detinet* only; for he brings the action as executor.

20 H. 6. 5.
b. Roll.
Abr. 602.
S. C.

(*b*) So, if a man binds

himself to the testator to pay him 100*l*. when such a thing shall happen, if it happens after the death of the testator; yet the writ of debt by the executor shall be in the *detinet* only. Roll. Abr. 602.—So, if a rent be granted to another for years, the executor of the grantee shall have debt, for the arrears of this rent incurred after the death of the testator in the *detinet* only; for he had it as executor. Roll. Abr. 602.—So, if lessee for twenty years leases for ten years, rendering rent, and dies, his executor or administrator shall have debt for the rent incurred after the death of the testator in the *detinet* only. Roll. Abr. 603. Noy, 32. Cro. Car. 225. Lev. 250. 2 Keb. 407. Sid. 379. S. P. adjudged.—But in 2 Jon. 169. the contrary seems to be adjudged, and a diversity taken between things in action and chattels in possession; for as to things in action, the writ must always be in the *detinet*, as for the arrears of an account, &c. and they shall not be assets till recovered; but in this case the reversion of the term being in the executor immediately by the death of the testator, it is assets for the whole value, and the shewing he is executor, is only to entitle him to the term to which the rent is incident.

So, if in an account an executor recovers a debt due to his testator, in debt for the arrears thereupon, the writ shall be in the *detinet* only; for though the action is converted into a debt by the account, yet it is the same thing which was received in the life of the testator.

Cro. Eliz.
326.
5 Co. 31.
Cro. Jac.
545.
Hob. 88.

124. 272. Noy, 19. 2 Lev. 111. 2 Jon. 47.

So, if *A.* be in execution upon a judgment for *B.*, and after *B.* die, and *A.* bring an *audita querela* against *C.* the executor of *B.*, and have a *scire facias*, and thereupon put in bail by recognizance in Chancery, according to the statute of 11 H. 6. c. 10.; and after upon this *audita querela* judgment be given against *A.*, and afterwards a *scire facias* issue against the bail, and after judgment the bail be taken in execution upon the recognizance, and the sheriff suffer him to escape, upon which escape the executor bring an action of debt (*c*); this action ought to be brought in the *detinet* only, and not in the *debet* and *detinet*; for this recognizance is in nature of the first debt, this being in a legal course. &c. for the first action being in the *detinet*, and that for the escape being founded upon the same record, it ought to pursue it. Cro. Eliz. 326. Cro. Jac. 545. 685. Hob. 264. 2 Roll. Rep. 132. Style, 232. Hut. 79. Carth. 49.

Roll. Abr. 602.
Lane, 79.
(*c*) So, if one, as executor, obtains judgment in debt, and takes the defendant in execution, and the sheriff suffers him to escape,

But if an executor takes an (*d*) obligation for a debt due to his testator by contract, in debt upon this obligation the writ shall be in the *debet* and *detinet*.

Roll. Abr. 602.
(*d*) So, if the executor

sells the goods of the testator for a certain sum, he shall have debt for this in the *debet* and *detinet*. Lane, 80.—So, if an executor recovers in trespass for goods taken out of his possession, in debt for the damages recovered, the writ shall be in the *debet* and *detinet*, for he need not name himself executor. Roll. Abr. 602. Lane, 80.

So, if an executor, having lands by an extent, upon a statute made to the testator, and naming himself executor, by deed

Cro. Jac. 685.
Winch. 80
leaves

S. C. Mod. 185. S. P. leases them for three years, rendering rent, &c., if an action of debt is after brought by him for this rent, it must be in the *debet* and *detinet*, because it is founded upon his own contract.

Cro. Jac. 545. So, an executor, being lessee for years of a rectory in the right of the testator, may have debt upon 2 & 3 E. 6. c. 13. for not setting out tithes in the *debet* and *detinet*, because founded upon a wrong in his own time; and by the statute it is given to the party grieved.

6 Mod. 92. [So, in an action on a judgment obtained by them. Crawford v. Whittall, Dougl. 4. note. Bonafous v. Walker, 2 Term Rep. 128. But where the goods of the testator never were in the possession of the executors, they must declare in that character. And if the goods when recovered will be assets in their hands, they must sue for them in that character, whether the conversion happen before or after the testator's death. 4 Term Rep. 281.]

Also, executors and administrators may, if they were actually possessed of the goods of the deceased, declare that they were possessed as of their own goods and chattels, without naming themselves executors or administrators, because the violation is to the property actually in their own hands.

[So, where executors pay money which they were not obliged to pay, and afterwards bring an action to recover it back, they must declare in their own right, and not as executors.]

If a bill of exchange be indorsed to *A.* and *B.* as executors, they may declare as such in an action on the bill against the acceptor.]

It was formerly (*a*) holden, that an administrator in his declaration ought to shew how he was administrator, and likewise to produce his letters of administration: also, it was (*b*) holden, that in action against an administrator, the plaintiff ought to shew by (*c*) whom administration was granted.

(*c*) That an administrator, in his declaration, was likewise to shew in what place administration was committed to him. 25 H. 6. 31.—But this was ruled otherwise. Cro. Eliz. 283. Piers v. Turner.

Cro. Eliz. 838. 879. 907. Style, 106. But afterwards this difference was taken, that where an administrator is plaintiff, he must shew by whom administration was granted to him, because it is that which entitles him to the action; and if granted by a (*d*) peculiar jurisdiction, ought not only to shew by whom, but must add this clause, *cui commissio administrationis predict. de jure pertinuit*, which he need not do if the administration was granted by a bishop; for in such case it is sufficient to say, that it was granted to him by the bishop, *loci illius ordinarius*, because since the law takes notice of the general jurisdiction of a bishop over the whole diocese, it likewise takes notice of all acts done by virtue of that jurisdiction.

Where the administrator set forth, that administration was committed to him by *J. S.* archdeacon of *Norfolk*, and did not say *loci illius ordinarius*; and this was holden good on a general demurrer; for it is not necessary to shew the jurisdiction of an archdeacon more than of a bishop. Sid. 302. Lev. 102.—That the plaintiff need not set forth the authority of an archdeacon, because he is *oculus episcopi*, and is to commit administration *de jure ordinario*. 2 Roll. Rep. 124. 150. Cro. Jac. 556. Palm. 97. Style, 54. but for this *vide* Cro. Eliz. 431. Moor, 367. Leon. 312. Style, 236. 282. Jon. 1. 2 Mod. 65. Lutw. 9. 408.—And that such an omission will be aided after verdict. Show. 355. Mason and Hanson adjudged. 4 Mod. 133. S. C. 244. 2 Ld. Raym. 1037. Com. Rep. 17. pl. 9.

Lit. Rep. 80. Style, 282. 463. But where the plaintiff sues the defendant as administrator, he need not now set forth in his declaration by whom administration was

was committed, for it may not be in his knowledge; and therefore it hath been holden sufficient for him to declare, that administration was granted to the defendant *debita juris forma*, without shewing by what ordinary; (a) but it is said to be necessary for him to allege, that administration was granted to him in order to charge him in the action.

his declaration must aver, that the administration was committed to the defendant. But in a case is cited to have been adjudged, Mich. 1698, that though such an omission be ill upon a demurrer, yet it is aided by the defendant's pleading over, whereby he admits himself a rightful and lawful administrator. [It is sufficient to state that the defendant is administrator. *Holiday v. Fletcher*, 2 Ld. Raym. 1510. 2 Str. 781. S. C. 1 Barnard. 29. S. C. *Wade v. Wadman*, 1 Barnes, 167.]

Also, it was formerly holden absolutely necessary, that executors and administrators should (b) conclude their declarations with a *profert hic in curia literas testamentarias* or *literas administrationis*, because these were the things which entitled them to the action.

(b) That in a *scire facias* by an executor upon a judgment obtained by the testator, the *profert in curia*, &c. may be in the middle or end of the writ. Carth. 69.

But this is now but form, and aided after verdict by the express words of the statute 16 & 17 Car. 2. c. 8.; [which statute, by 4 Ann. c. 16., is extended to judgments by confession, *nihil dicit*, or *non sum informatus*. And it is further enacted by this last statute, that this omission of a *profert* shall not impede the judgment, except the same shall be specially and particularly set down and shewn for cause of demurrer.

special demurrer. Crawford v. Whittall, Dougl. 4. n.

If there are several executors named, one cannot sue alone, until the others have released.]

(P) Of Actions and Remedies against Executors and Administrators: And herein,

1. Upon what Contracts or Engagements of their Testators or Intestates Executors or Administrators are liable.

It is clearly agreed, that executors and administrators, standing in the place of those they represent, shall be answerable for all their debts, (c) covenants, &c. as far as they have assets, and that the testator's covenants shall extend to them, though not (d) expressly mentioned.

said that the testator cannot bind his executor where he is not bound himself; as if he covenants that his executor shall pay 10*l.*, no action lies for this. Cro. Eliz. 232. *Sed qu.*—If a father articles to pay *J. S.* 1000*l.* to build an house on lands of which he is seised in fee, and dies before the house is built, the heir may compel *J. S.* to build the house, and the father's executor to pay for it. 2 Vern. 322. Holt and Holt. (d) That in every case where the testator is bound by covenant, the executor shall be bound by it if it be not determined by his death. 48 E. 3. 2. bro. Covenant, 12. Cro. Eliz. 553. and Dyer, 14. pl. 69. Same rule, and what shall be a determination, *vide* And. 12. Leon. 179. Moor, 74. pl. 204. Bendl. 150. Dyer, 257. Cro. Eliz. 157. Lit. Rep. 334.—But if it be to be performed by the testator in person, the executor cannot perform it. Cro. Eliz. 553. 2 Mod. 268.

Sid. 228.
Jon. 1.
Lutw. 301.
(a) In 2
Vent. 84.
it is said,
that the
plaintiff in
Comb. 465.
Cro. Eliz.
551. 592.
Cro. Jac.
299. 409.
Bull. 200.
3 Bull. 223.
Hob. 38.

Vent. 222.
[If a plain-
tiff declare
as adminis-
trator, where
he needs not,
the want of
profert is no
objection,
even on a
Dougl. 4. n.

4 Term
Rep. 565.

Off. of
Exec. 117.
Cro. Car.
187.
Jon. 223.
Yelv. 103.
(c) But it is

Bro. Cove-
nant, 12.

And therefore where a man covenanted that *A.* should serve *B.* as an apprentice for seven years, and died, it was holden, that if *A.* departs within the term, a writ of covenant lies against the executor of the covenantor without naming.

Sid. 216.
Keb. 761.
820. Lev.
177. S. C.

If a man be bound to instruct an apprentice in a trade for seven years, and the master die, the condition is dispensed with, for it is personal; but if he were likewise bound to find him with meat, drink, cloaths, and lodging, this the executors are obliged to perform.

Carth. 519.
Tilney and
Norris.
Salk. 309.
pl. 13. 316.
S. C. Ld.
Raym. 553.

If *A.* leases to *B.*, and *B.* covenants to repair, &c., and he assigns to *J. S.*, who dies intestate; the premises being out of repair, the lessor may bring covenant against his administrator as assignee, and declare, that he made a lease to *B.*, &c. *cujus status* & *residuum termini annorum*, &c., *devenit*, &c., *per assignationem* to the administrator.

Off. of
Exec. 119.
Salk. 297. pl. 6.

The executor of a lessee for years must pay the rent reserved, though the rent be of greater value than the land.

Roll. Abr.
603. Cro.
Eliz. 711.
Moor, 566.
Brownl. 56.
Cro. Jac.
411. 546.

And if an action of debt be brought against an executor for the arrearages of a rent reserved upon a lease for years, and (a) incurred after the death of the testator, the writ (b) shall be in the *debet* and *detinet* (c), because the executor is charged of his own possession.

Bulst. 23. 2 Brownl. 206. Cro. Car. 225. Allen, 34. Mod. 186. 2 Brownl. 203. Palm. 116. S. P. (a) Where part incurred in the time of the testator, and part after his death, his executor may be charged in the *detinet* for the whole. Allen, 76. Stil. 118. (b) He may be charged in the *detinet* only, but then he shall answer only out of the testator's estate. Allen, 42. S. C. Styl. 79. Lev. 127. S. P. adjudged. (c) For though they have the land as executors, yet nothing shall be employed to the execution of the will, but such profits only as are above that which is to make the rent; and therefore, so much of the profits as is to make or answer the rent they shall take to their own use, and they shall be charged for it in the *debet* and *detinet*. Poph. 120. 5 Co. 31. Cro. Eliz. 712.—And if the land be not worth more than the rent, it is a good plea to such action in the *debet* and *detinet*; for in such case he is to be charged in the *detinet* only. Vent. 171. *per Curiam*; and for this *vide* Palm. 118. Sid. 266. Mod. 185.—But where they are to be charged upon a lease made to the testator, and have not the profits of the lease to answer it, they ought to be charged in the *detinet* only; as where debt is brought against an executor of a lessee for rent incurred after assignment of the term. Poph. 120. Sid. 266. S. C. Lev. 127. 3 Mod. 327. So, if brought against him after waiver of the term. Lev. 127. & *vide* Allen, 43.

Salk. 297.
pl. 6.
Off. of
Exec. 119.

But though he is to be charged in the *debet* and *detinet*, yet the executor may plead that he has not assets, and that the land is of less value than the rent, and demand judgment, if he ought not to be charged in the *detinet* only; but so long as he hath assets he cannot wave the term, or say that it is of less value than the rent; but after he hath discharged himself of the assets, he may wave the possession by giving notice to the reversioner.

8 Co. 159.
536.
(d) But it
hath been
holden, that if debt be brought against an administrator in the *debet* and *detinet*, for rent due before his time, where it should be only in the *detinet*, that this is aided after verdict, by 16 & 17 Car. 2. c. 8. Sid. 379.

Also, in all actions against executors and administrators, the charge must be in the (d) *detinet* only; for they are only chargeable in respect of the assets.

Roll. Abr.
603.

But if an executor obliges himself to pay a debt due by contract by the testator; in debt upon this obligation, the writ may be

be in the *debet* and *detinet*, because the obligation makes it his own debt.

So, after (a) judgment against an executor, one may in a new action of debt in the *debet* and *detinet* suggest a *devastavit*, and thereby charge him *de bonis propriis*.

against him, *vide* Roll. Abr. 603. 5 Co. 32. 2 Lev. 145. 1 Vent. 315. 321. Sid. 63. *—* See 1 Saund. 217. Carth. 2. 2 Lev. 161. 209. Upon a judgment against husband and wife executrix, if she survives, debt does not lie suggesting a *devastavit* by the husband; for though chargeable for the wasting by the husband, she shall not be charged *de bonis propriis* for costs recovered against the husband. R. 2 Lev. 161.

Sid. 398:
(a) That it must be after a judgment

2. Of Personal Torts, which are said to die with the Party.

The taking up of an executorship is an engagement to answer all debts of the deceased, and all undertakings that create a debt, as far as there are assets; but doth not embark executor in the personal (b) trusts of the deceased; nor is he obliged to answer for his several injuries; for none can tell how they might have been discharged or answered by the testator himself.

chargeable in account, because not supposed to be consant enough in the particular dealings of their testator, *vide* tit. Account.—Hence also it hath been holden, that if A. bails goods to B. to which C. hath a right, and B. dies, that the executors of B. must deliver these goods to C., and are no ways accountable for them to A., for they came to the possession by the law; and therefore must only deliver them to those persons in whom the law hath established the property. Roll. Abr. 607.

Plow. 181.
Off. of
Exec. 120.
(b) For this reason, it seems, that executors were not

Hence it hath been established as a maxim, that *actio personalis moritur cum persona*; and on this foundation it was formerly holden, that there was no remedy for the recovery of debt due by simple contract by the testator, especially by action of debt; for herein the testator might have waged his law, of which benefit his executor is deprived. 182. Leon. 165. Goldsb. 106. Moor. 366. Poph. 31.

Roll. Abr.
21. 25.
9 Co. 86.
4 Co. 93.
Cro. Eliz.
121. 302.
425. And.

But it is now agreed, that an (c) action lies against executors, where there is a duty as well as a wrong; and that they are answerable in those personal actions which arise *ex contractu*, and not *ex maleficio*; for that every contract implies a promise to perform it, in which the testator himself could not wage his law, because he could not make oath that he had discharged the duty before the *quantum* had been ascertained by a jury.

9 Co. 87.
10 Co. 77. b.
Cro. Jac.
293.
Vaugh. 101.
(c) That although debt on a simple contract cannot

be recovered against an executor by action of debt, yet it may by assumpsit. Lev. 200, 201.

So, where in case against an executor the plaintiff declared, that he prosecuted an attachment of privilege against the testator; and that the testator, in consideration that he would forbear any further proceedings, promised to pay him 50*l.*; it was holden, that the action lay against the executor, this being such a contract as bound the testator himself.

Hob. 216.
Bidwell and
Cotton.

Also, it hath been resolved, that there is no difference between a promise to pay a debt certain, and a promise to do a collateral act, which is uncertain, and rests only in damages, as a promise to give such a fortune with his daughter, to deliver up such a bond, &c., and that wherever in those cases the testator himself is liable to an action, his executors shall be liable also.

Cro. Jac.
405. 417.
571.
Jon. 16.
Fawcett and
Carter.
Palm. 329.
Cro. Jac.

662. S. C. Roll. Rep. 266. Sander and Esterlie, S. P.

Raym. 95. So, where a prohibition was prayed, because a parson libelled in the spiritual court for tithes, subtracted (a) by the testator, against an executor, upon this ground, that it was a personal tort, that died with the person; at least that the penalty given by the statute should not be recovered after the party's death who offended; the court denied the prohibition, and held, that the rule, that *quod oritur ex delicto & non ex contractu* should not charge the executor, did not extend to the case of tithes.

(a) So, where an administrator to his son brought debt for tithes, and it was moved in arrest of judgment, that this action being given for the contempt and wrong done to the intestate, does not lie for the administrator; the intent of the statute 2 & 3 E. 6. c. 13. being to give remedy only to the party grieved; but it was resolved, that it lay for the administrator of the party grieved, that here was a duty as well as a wrong. Vent. 30. Sir William Moreton and Hopkins. 2 Keb. 502. S. C. Sid. 407. S. C. in which last book it is said, that it will not lie against the executor of him who did the wrong; but *quod* and *vide* Yelv. 63. 2 Inst. 630. Roll. Abr. 912.

Fide tit.

Trover and Conversion.

[Trover will not lie

against executors upon

a conversion

by the testator, in respect of the form of the plea. Hamblly v. Trist, Cowp. 375.]

Trover lies against executors, for this action is not merely *ex maleficio*, which dies with the person, but here there is supposed an intention in the testator to restore the goods to the right owner, for the law will not presume an intention of injury in any person; and therefore the *maleficio* is in the executors, in not making restitution accordingly.

4 Mod. 403.

Salk. 314.

pl. 22. See

6 Mod. 125.

2 Ld. Raym.

971. 1502.

Salk. 12.

pl. 2.

Vent. 30.

Sid. 48. 80.

12 Mod. 71.

565. Ld.

Raym. 40. 437. 973.

And though the rule at common law, that a personal action dies with the person, hath been construed equally to extend to wrongs and injuries done by or to the testator; such as assaults and batteries, breaches of trust, &c.; yet it seems, that an executor in some cases may within the equity of 4 E. 3. cap. 7. *de bonis asportatis in vita testatoris*, maintain an action for an injury done to his testator; whereas, if it had been done by the testator, it would have come within the rule of *actio personalis moritur cum personâ*.

Gilb. Eq. Rep. 190. Stra. 60. 576.

Jon. 173.

Poph. 189.

Latch. 167.

Noy, 87.

Mason v.

Dixon, Cro.

Car. 297.

S. P. Roll.

Abr. 921.

S. P.

6 Mod. 126.

S. P. and the same diversity.

(b) So, an executor may charge another executor for a *devastavit*, to the injury of his testator; but at common law, the executor of an executor was not liable for a *devastavit* of the first executor. Salk. 314. pl. 22. 2 Ld. Raym. 971. 1502.—[See *infra*, Div. 3.]

And therefore, it hath been holden, that if a sheriff suffers a person in his custody on mesne process to escape, the executor of the party, at whose suit he was in custody, may maintain an action against him; because the body of the prisoner being a pledge for the debt, the executor might be otherwise without any remedy, which is an injury to the goods, and not to the person of the testator (b): but in this case, if the sheriff died, the party could have no remedy against his executor.

4 Mod. 403.

Williams

v. Carey,

Salk. 12.

pl. 2. S. C.

adjudged.

For by le-

aving the

goods a right

So, where to a *feri facias* the sheriff made a false return, *viz.* that he levied only so much, when in truth he had actually levied more; and the executor of the party brought an action for this false return; it was adjudged, that it lay; for this was not properly an injury done to the person of the testator, for then *moritur cum personâ*, but it was an injury to his estate.

Cro. Car. 297. S. P. but no resolution.

[Actions survive against an executor, or die with the person, either on account of the cause of action, or on account of the form of action. As to the former, where the cause of action is money due, or a contract to be performed, gain or acquisition of the testator, by the work and labour, or property of another, or a promise of the testator, express or implied; where these are the causes of action, the action survives against the executor. But where the cause of action is a tort, or ariseth *ex delicto*, supposed to be by force and against the king's peace, there the action dies; as battery, false imprisonment, trespass, words, nuisance, obstructing lights, diverting a water-course, escape against the sheriff, and many other causes of the like kind.—As to the latter—in some actions the defendant could have waged his law; and therefore, no action in that form lies against an executor. But now, other actions are substituted in their room upon the very same cause, which do survive and lie against the executor. No action where in form the declaration must be *quare vi et armis, et contra pacem*, or where the plea must be that *the testator was not guilty*, can lie against the executor. Upon the face of the record the action ariseth *ex delicto*; and all private criminal injuries or wrongs, as well as all publick crimes, are buried with the offender.]

Cowp. 375.
per Lord
Mansfield.

3. Of Remedies against Executors or Administrators of Executors.

It seems agreed, that executors or administrators of executors or administrators were not at (a) common law liable to the *de-vastavit* of those they represented, because they could not be supposed to know how their testators or intestates had disposed of the goods; and therefore this was esteemed *actio personalis quæ moritur cum personâ*.

Roll. Abr.
920.
2 Lev. 110.
133. 3 Keb.
461. 530.
Vent 202.
(a) But in
Chancery

such executors and administrators were made liable as far as they had assets. 2 Mod. 293. Chan. Ca. 302. 2 Chan. Ca. 217. 2 Stra. 716.—And that in equity creditors and legatees may follow the assets into whose hands soever they come. Chan. Ca. 57. 2 Vern. 75.

But it being found very inconvenient, that where an executor *de son tort* died, there could be no remedy at law against his executors or administrators; or that where a lawful executor made an alteration of the goods of the testator, and died, that creditors to the first testator should be disappointed of their debts, though such executor left sufficient assets;

Therefore by the act of 30 Car. 2. c. 7. "Creditors were enabled "to recover their debts of the executors and administrators of "executors in their own wrong;" and this act by the 4 & 5 W. & M. cap. 24. is made perpetual; and also by the said last mentioned act, reciting, "That it had been doubted, whether "the 30 Car. 2. extended to any executor or executors, administrator or administrators of any executor or administrator of "right, who, for want of privity in law, were not before answerable; it is enacted and declared, that all and every the "executor and executors, administrator or administrators of such

* And upon this statute the executor or administrator of a rightfulexecutor or administrator of right, who shall waste or convert to his own use goods, chattels, or estate of his testator or intestate, shall from thenceforth be liable and chargeable in the same manner as his or their testator or intestate should or might have been *."

administrator, shall be charged upon a *devastavit* of the testator or intestate, for the word (*administrator*) comprehends him. R. 3 Mod. 113. [But in the case of *Hammond v. Garliffe*, Andr. 232., the court strongly inclined to think, that an executor *de son tort* is not liable for a *devastavit* committed by the first executor *de son tort*, either at the common law, or by these statutes.]

4. Where Executors and Administrators shall be excused from Costs.

Cro. Jac. 228. Executors and administrators, when plaintiffs, pay no costs; for they sue in *auter droit*, and are but trustees for the creditors, and are not presumed to be sufficiently conuzant in the personal contracts of those they represent; and therefore are not comprehended within the statutes 23 H. 8. cap. 15. 4 Jac. 1. cap. 3. or 8 & 9 W. & M. cap. 10. which give defendants costs. Yelv. 168. N. Bendl. 19. pl. 28. Brownl. 107. Keilw. 207. Hut. 60. 79. Cro. Eliz. 69. 503. Cro. Car. 289. Winch. 10. 70. Roll. Rep. 63. Sav. 133. Carth. 281. 4 Mod. 244. 3 Lev. 375. Skin. 400. pl. 34.

Savil. 134. But if executors or administrators bring an action in their own right, as for a conversion or trespass in their own time, they shall pay costs, although they name themselves executors, for this is but surplufage: Hut. 79. Dal 9. Latch. 220. Vent. 92. 6 Mod. 94. 181. 7 Mod. 98. 118. But for this, and where the action shall be said to be in their own right, *vide tit. Costs*, letter (E).

Plow 183. So, an executor defendant shall pay costs in all cases, and the judgment is *de bonis testatoris, si, &c., & si non, tunc de bonis propriis*; also when he is defendant, and there is judgment for him, he shall have his costs. Hard. 165. Cro. Eliz. 503. Hut. 69.

Trin. 6 Ann. A judgment was had against an administrator for costs *de bonis propriis*, and error brought that it ought to have been *de bonis testatoris, & si nulla bona*, then *de bonis propriis*: this was agreed to be error; but whether this judgment for the costs might not be reversed without affecting the principal judgment was the question, they being distinct judgments; and it was holden by Holt, Chief Justice, that if judgment be given for recovery of dower and mesne profits and damages, it may be reversed for the one, and stand for the other; and he took this difference; if one part of the judgment be warranted by act of parliament, and the other by common law, this may be reversed for part, and stand for the other, but if all be at common law, it must stand or be reversed in all; and in this case the judgment for the costs was reversed, and the principal judgment affirmed.

2 Salk. 596. [In an action by an executor or administrator, the plaintiff not being liable to costs, the defendant was not allowed formerly to bring money into court; but now it is otherwise, and the effect of the rule will be not to make the plaintiff pay, but only lose his costs.] 2 Str. 796.

5. Executors and Administrators excused from putting in Special Bail.

Executors and administrators are not to be holden to (a) special bail; for the demand is not on the persons, but on the assets of the deceased; and it would be unreasonable to subject their persons to an execution for the debt of another.

Cro. Jac.
350.
Velv. 53.
Cro. Car. 59.
Lit. Rep. 2.
(a) Altho'

an attorney be plaintiff, and it was pretended he was entitled to have special bail by his privilege. Sid. 63. —So, though the cause is removed from an inferior court to a superior; for this would encourage plaintiffs to commence their actions against executors in such inferior courts. 2 Lev. 204. Sid. 413. Lev. 245. 263. 2 Jon. 82. Salk. 98. pl. 4.; but Lit. Rep. 81. cont.

Hence it hath been holden, that if there be a judgment against an executor for the debt *de bonis testatoris*, and for the damages only *de bonis propriis*, he may bring error, and have a *superfedeas*, without giving sureties, according to 3 Jac. 1. cap. 8.; for though the words of the statute are general, yet it must be intended where judgment is against the defendant himself upon his own bond, or where the judgment is general against executors; for it would be unreasonable they should find sureties to pay the whole out of their own estate.

Cro. Jac.
350
Goldsmith
v. Platt.
Cro. Jac.
59. S. P.
Lit. Rep. 2.
S. P.
Keb. 716.
S. P.

But upon a *devastavit* executors shall be holden to special bail; and herein the difference is, that upon a bare suggestion of a *devastavit*, an executor shall not be holden to special bail; but where upon a judgment against him execution is taken out, and the sheriff returns a *devastavit*, upon an action of debt upon this judgment the executor shall be holden to special bail.

1 Lev. 39.
1 Sid. 63.
Carth. 264.
Comb. 206.
1 Salk. 98.

[Where an executor hath personally promised to pay a debt or legacy, it seems, that he may be holden to bail on such promise.]

Mackenzie
v. Mackenzie, 1 Term
Rep. 716.

Extinguishment.

WHEREVER a right, title, or interest is destroyed or taken away by the act of God, operation of law, or act of the party, this in many books is called an extinguishment.

Co. Lit.
147. b.
Roll. Abr.
933.

But as it is a word of a large signification, and relative to other things elsewhere treated of, I shall here only consider it briefly as it regards the following matters, to which it seems to be most frequently applied.

- (A) Of the Extinguishment of Rents.
- (B) Of the Extinguishment of Copyholds.
- (C) Of the Extinguishment of Common.
- (D) Of the Extinguishment of Debts.

(A) Of the Extinguishment of Rents.

Pollxf. 142. **I**F a lessor purchases the tenancy from his lessee, the lessor cannot have both the rent and the land; nor can the tenant be under any obligation to pay the rent, when the land, which was the consideration thereof, is resumed by the lessor into his own hands; and this resumption or purchase of the tenancy makes what is (a) properly called an extinguishment of the rent; that is, the rent can never become due or payable by the tenant, by virtue of the donation which created the tenancy, when the land or tenancy is conveyed to the lessor, in as absolute a manner as he was seised of the rent.

(a) That the rent in this case is extinguished. **Vaugh. 199.** But if a rent be granted to *A.* for the life of *B.*, and *A.* dies, living *B.*, the rent is determined upon the death of *A.* equally as if granted to him for his own life; and in this case the rent is said more properly to be *determined* than extinguished. **Vaugh. 199.**—So, when either the rent or land are so conveyed, not absolutely or finally, but for a certain time, after which the rent will be again revived; this is properly called a *suspension* of the rent. **Vaugh. 199.**

Bro. Extinguishment, 17. Vaugh. 39. 199. Pollxf. 142. But if the conveyance to the lessor was not absolute, but upon condition; or if it were only of a particular estate, of shorter duration than the estate which the lessor had in the rent; in these cases, though there be an union of the tenancy and the rent in the same hand, yet because that union is but temporary, for upon the performance of the condition, or determination of the particular estate, the tenant is restored to the enjoyment of the land, and consequently the obligation to pay the rent revives; therefore the rent in such case is only *suspended*, and not extinguished.

1 Roll. Abr. 429. Hob. 82. Cro. Eliz. 47. Co. Lit. 148. b. (b) Tho' the lease was made by a disseisor, for the lessee came in under the sanction of a legal contract, and the peaceable enjoyment of the land during the time he held it, was a sufficient obligation on him to pay the rent. **2 Roll. Abr. 429. Hob. 6. (c)** But if the tenant be ousted by a title paramount,

mount, before the day appointed for the payment of the rent, such eviction entirely discharges the tenant from the payment of any part of the rent. 10 Co. 128. a. * ——— * But if the person having title, recovers in ejectment against the tenant, and lays his demise far enough back to include the time the tenant held, the tenant will be answerable to the person so recording for the mesne profits.

For the same reason, if part only of the land letten be evicted from the the tenant, such eviction is a discharge of the rent in proportion to the value of the land evicted. 10 Co. 128. Roll. Abr. 135. Dyer, 56. Lit. § 222.

If a man who hath a rent-service purchases part of the land out of which the rent issues, the rent-service is not extinguished, but shall be apportioned according to the value of the land ; so that such purchase is a discharge to the tenant for so much of the rent only as the value of the land purchased amounts unto.

But if a man has a rent-charge, and purchases part of the land out of which the rent issues, the whole rent is extinguished, and consequently the tenant discharged from the payment of it. Lit. § 222, 223. 8 Co. 105.

But in this case, if the grantor by deed reciting the purchase had granted that the grantee should distrain for the same rent in the residue of the land, the whole rent-charge had been preserved ; because such power of distress had amounted to a new grant. Co. Lit. 147.

But the law has carried this notion of extinguishment only to such cases where the grantee of the rent wilfully by his own act prevents the operation of the grant according to the original intention thereof ; for if part of the land descends to the grantee of the rent-charge, the rent shall be apportioned according to the value of the land ; for the grantee in this case is perfectly passive, and concurs not by an act of his to defeat the intention of the grant ; and therefore it would be unreasonable and severe, that he should be punished without his default, or concurring in that act which extinguishes the rent. Lit. § 224. Co. Lit. 149. b. Roll. Abr. 236.

Hence likewise it is, that if a man grants a rent-charge out of two acres, and afterwards the grantee recovereth one acre by title paramount the grant, the whole rent shall not be extinguished, because the law, that gives the remedy for the recovery of a man's right, will not prevent the prosecution of such right, by depriving the prosecutor of a greater profit than the thing recovered may amount to ; but in this case there shall be no apportionment, but the grantee shall have the whole rent after he has recovered the one acre ; because by the grant each acre is charged with the whole rent ; and upon the recovery it appears, that the grantor had no interest in one acre, and consequently could not charge it ; and therefore the grant being to be taken most strongly against him, the whole rent shall continue after the recovery, because the grant was originally for so much, and therefore shall issue out of that land which he had power to charge ; whereas in the former case the grantor had, at the time of the grant, power to charge all the land ; and therefore when part of the land, subject to such charge, comes to the grantee by act of law, it is reasonable at least that the charge should be apportioned. Co. Lit. 148. a. But Cro.

Also, a rent-charge may in some cases be apportioned by the act of the party ; as if the grantee releases part of his rent to the tenant. Co. Lit. 148. a. But Cro.

Eliz. 742.
seems cont.

tenant of the land, such release does not extinguish the whole rent: so, if the grantee gives part of it to a stranger, and the tenant attorns, such grant shall not extinguish the residue, which the grantee never parted with, because such release or disposition makes no alteration in the original grant, nor defeats the intention of it, as the purchase of part of the land does, for the whole rent is still issuable out of the whole land according to the original intention of the grant.

6 Co. 1.
Bnerton's
case. Co.
Lit. 149. a.
8 Co. 105.
Moore, 203.

Here also, as to the appointment of a rent-service by the purchase of the lessor of part of the tenancy, we must distinguish between services divisible in their own nature, as a rent, and such as are indivisible, as a horse, a hawk, &c. For in the last case, if the lord purchase part of the tenancy, there can be no apportionment of the service from the nature of the thing; and therefore such service is extinct, and the tenant discharged from the payment of it; for the whole tenancy being equally chargeable with the payment of such service, the lord by his own act shall not discharge part, and throw the whole burthen upon the residue, for his own private benefit and advantage.

6 Co. 1, 2.
Co. Lit. 149.

But if such entire services were for the benefit of the publick, as knight-service and castle-guard, for the defence of the realm, or for the administration of justice; or if such entire service were a work of charity or piety; in all such cases the tenant is still chargeable with the whole service; for there can be no apportionment, because the thing in its nature is indivisible; and the whole shall not be extinguished, because the publick has an interest in such services, and therefore shall not be prejudiced by the private transactions of the parties.

Co. Lit.
149. a.

So, where the tenure is by a service in its nature indivisible, as by a horse, or a hawk, &c., which are only for the private benefit or pleasure of the lord; yet if part of the tenancy comes to the lord by descent, the service is not extinguished; because here is no consent or concurrence of the lord to the division.

2 Inst. 504.
Roll. Abr.
234. Cro.
Eliz. 651.
851. Co.
Lit. 148.
8 Co. 79.
Dyer, 326.
Flores. 177.
13 Co. 57.
58. Moore,
pl. 255.
260.

It was formerly doubted, whether a rent-service incident to a reversion could be apportioned, or was not utterly extinguished by a grant of part of the reversion; for since the reversion and rent incident thereto were entire in their creation, it was thought hard, that by the act of the lessor they should be divided, and thereby the tenant made liable to several actions and distresses for the recovery of them; but it was at length resolved, that the reversion, being a thing in its nature severable, the rent as incident to it may be divided too, because that being made in retribution for the land, ought from the nature of it, to be paid to those who are to have the land upon the expiration of the lease; and hence it is that the rent passes incidently with the reversion, without any express mention of it in the grant: besides, the tenant has really no prejudice from such grant, because it is in his power, and it is his duty to prevent the several suits and distresses by a punctual payment of the rent; and therefore he ought not to complain of a mischief which he wilfully brings upon himself: besides that, (a) formerly such grants could not take effect with-

(a) Viz. be-
fore the 4 &c

out

out the attornment and consent of the tenant; but on the other hand it would be extremely prejudicial, if upon such grants the rent should not be apportioned, because then the lord could not out of his estate make a provision for his younger children, or answer the contingencies of his family which are in view.

If lessee for life or years surrender part, or if he commit a forfeiture of part by making a feoffment, or doing waste, there can be no colour to construe these acts an extinguishment of the whole rent; but in these cases the rent shall be apportioned, because the rent is a retribution for the land, and therefore must necessarily cease according to the proportion of the land resumed by the lessor; for it were absurd, that the lessor should have both the land and retribution for it; but the whole rent is not extinguished, because from the nature of the contract the rent is to be paid in consideration of the enjoyment of the land, and therefore the tenant shall be obliged to pay the rent in proportion to the land which he enjoys: so, if the lessor grant the reversion of part to the lessee, the rent shall be apportioned.

There seems to have been variety of opinions, whether the lessor's entering wrongfully into part of the lands demised did not suspend the whole rent during such tortious entry, or whether the rent ought not to be apportioned; and it is now settled, that such tortious entry suspends the whole rent; for if any apportionment were allowed in this case, it would be in the power of the lord or lessor to resume any part of the land against his own engagement and contract, and so, by taking that which lies most commodiously for the tenant, render the remainder in effect useless, or put him to the expence to restore himself to such part by course of law; and therefore to prevent these inconveniencies, and that no man may be encouraged to injure or disturb his tenant, whom he ought to protect and defend, it hath been resolved, that such disseisin or tortious entry suspends the whole rent, and that the tenant or lessee is discharged from the payment of any part of it till he is restored to the whole possession.

(B) Of the Extinguishment of Copyholds.

AS to the extinguishment of copyholds it is laid down as a general rule, that any act of the copyholder's, which denotes his intention to hold no longer of his lord, and amounts to a determination of his will, is an extinguishment of his copyhold.

As (a) if a copyholder in fee accepts a lease for years of the (b) same land from the lord, this determines his copyhold estate; or (c) if the lord leases the copyhold to another, and the copyholder accepts an assignment from the lessee, his copyhold is extinct.

Lease for years of the manor, that is only a suspension of his copyhold during the term. Sav. 70.—But in other books it is said to be extinguished, as in Cro. Eliz. 7., Moor, 185. And in 4 Co. 31. it is said, that the lessee may in this case re-grant the copyhold again to whom he pleases. (c) 2 Co. 17. Leon. 70. And. 191. Goulf. 34. Roll. Abr. 510. S. C.

So,

5 Ann.
c. 16. § 9.

Co. Lit.
148. a.
Roll. Abr.
235.
Dyer, 5. a.
13 Co. 58.
Moor, pl.
255.

Co. Lit.
148. b.
Bro. tit.
Extinguishment, 48.
Roll. Abr.
938.
4 Co. 52.
9 Co. 135.
3 Keb. 455.
497.
Pollex. 142.
144.
Vent. 277.

Hut. 81.
Cro. Eliz.
21. Jon. 41.
vide tit.
Copyhold,
letter (K).
(a) Moor,
184.
2 Co. 16. b.
Godb. 11.
101.
(b) But if
he takes a

Cro. Jac. 84.
185. And in

(a) Hut. 65. So, (a) if a copyholder bargains and sells his copyhold to the
 Jon. 41. lessee for years of the manor, his copyhold is thereby extin-
 S. C. guished, or (b) if he joins with his lord in a feoffment of the
 (b) Godb. manor, his copyhold is thereby extinct; for these are acts which
 11. denote his intention to hold no longer by copy.

And. 199. So, if a copyholder accepts to hold of his lord, by bill under
 Latch. 213. the lord's hand, this determines his copyhold: so, if he accepts
 an estate for life by parol, if there be livery, this is an extinguish-
 ment; otherwise not; for without livery nothing but an estate at
 will passes, which cannot merge or extinguish an estate at will.

Cro. Eliz. If one seised of a manor in right of his wife lets lands by in-
 459. denture for years; this doth not destroy the custom as to the
 (c) So, if a wife; for (c) after the death of her husband she may demise it
 copyholder again by copy.
 intermarries with the

feme seigniores; this is no extinguishment, but only a suspension. Sav. 66. Co. Copyholder, 172.
 —So, if the copyholder hath the manor in execution. Co. Copyholder, 172.

2 Sid. 82. So, if a copyhold is in the hands of a subject, who after
 4 Co. 24. becomes king, the copyhold is extinct, for it is below the majesty
 Cro. Eliz. of a king to perform such servile services; yet after his de-
 252. ad- cease the next that hath right shall be admitted, and the tenure
 judged; and revived.
 vide 2 Leon. 208.

4 Co. 26. b. Cro. Eliz. 103.

(C) Of the Extinguishment of Common.

Co. Lit. 122. IF a commoner, who hath common appurtenant, purchases part
 Heb. 235. of the land in which he hath such common, this is an ex-
 2 Co. 78. tinguishment of the common; but if such purchase had been
 Owen, 122. made by one who had common appendant, this being of com-
 4 Co. 37. mon right must be apportioned: also, both common appendant
 and appurtenant shall be apportioned by alienation of part of the
 land to which the common is appendant or appurtenant.

But for this A release of common in one acre is an extinguishment of the
 4 Co. 37. whole common.
 8 Co. 136.

Show. 350. 4 Mod. 365. and vide title *Common*, letter (E). And where there may be relief in equity
 against an extinguishment. 2 Vern. 250.

(D) Of the Extinguishment of Debts.

13 H. 4. 1. IT seems to be agreed as a general rule, that a creditor's accept-
 Roll. Abr. ing a higher security than he had before, is an extinguishment
 470, 471. of the first debt; as if a creditor by simple contract accepts an
 604. obligation, this extinguishes the simple contract debt.

6 Co. 44. So, if a man accepts a bond for a legacy, he cannot after sue
 Yelv. 38. for his legacy in the spiritual court; for by the deed the legacy is
 extinct, and it is become a mere debt at common law.

6 Co. 44. b. So, if a bond creditor obtains judgment on the bond, or has
 judgment acknowledged to him, he cannot afterwards bring an
 action

action on the bond; for the debt is drowned in the judgment, which is a security of a higher nature than the bond.

But these cases must be understood where the debtor himself enters into these securities; and therefore, if a stranger give bond for a simple contract debt due by another, this does not extinguish the simple contract debt; but if upon making the contract, a stranger gives bond for it, or being present, promises to give bond for it, and after does so, the debt by simple contract is extinguished, the obligation being made upon, or pursuant to the contract.

But the accepting of a security of an inferior nature is by no means an extinguishment of the first debt; as if a bond be given in satisfaction of a judgment.

649, 650. Like point adjudged, where it was pleaded, that an annuity was granted in discharge of a bond.

Also, the accepting of a security of equal degree is no extinguishment of the first debt; as where an obligee has a second bond given to him; for one deed cannot determine the duty upon another.

Lit. Rep. 58. Cro. Car. 86. [1 Ld. Raym. 680. 1 Burr. 9.]

Also, it is said to have been adjudged, that if the condition of an obligation be to pay 10*l.* at a day, which is not paid at the day, but after the day the obligee accepts a statute-staple from the obligor for the same debt, in full satisfaction of the obligation; yet this is not any satisfaction; for though the statute be a matter of record and higher than the obligation, yet the obligation remains in force, and the obligee hath his election to sue the one or the other.

If an infant becomes indebted for necessaries, and the party takes bond of the infant; this shall not extinguish the simple contract; for the bond has no force.

Debts are also said to be extinguished where a creditor makes his debtor executor; for in this case he cannot sue himself; but where notwithstanding such debts remain assets, *vide tit. Executors and Administrators*, letter (A).

So, where the obligor marries the obligee, this is said to be an extinguishment of the debt; for by the intermarriage they become one person, and cannot sue each other; but for this *vide tit. Baron and Feme*, letter (E).

2 Leon. 110.

Cro. Jac.

649.

Brownl. 29.

Cro. Jac.

Cro. Eliz.

304. 716.

727.

Brownl. 74.

1 Burr. 9.]

6 Co. 44.

Braithwaite's case cited in Higgen's case.

Roll. Abr.

470. Cro.

Car. 86.

S. C. cited.

Cro. Eliz.

920.

Hob. 10.

Roll. Abr.

920.

Extortion.

EXTORTION is said by my Lord *Coke* to signify any oppression by colour or pretence of right, and in this respect it is said to be more heinous than robbery itself; as also, that it is usually attended with the aggravating sin of perjury.

Co. Lit. 368. b.
10 Co. 102. a.
1 Hawk.
P. C. c. 63. Cro. Car. 438. 448.

Co. Lit. 368.
10 Co. 102.
But in a strict sense it is defined, the taking of money by any officer, by colour of his office, either where none at all is due, or not so much is due, or where it is not yet due.

2 Inst. 209.
Co. Lit. 368.
By the common law, as also by the statute of *Westm. 1. cap. 26.* it is declared and enacted to be extortion, for any sheriff or other minister of the king, whose office anyways concerns the administration or execution of justice, or the common good of the subject, to take any reward whatsoever, except what he received from the king.

(a) 43 E. 3.
4. b. 5. a.
2 Roll. Abr. 226.
(b) Moor, 523.
2 Inst. 209.
4 Inst. 274.
And this institution hath been thought so conducive to the good of the publick, that all (a) prescriptions whatsoever, which have been contrary to it, have been holden to be void: as (b) where the clerk of the market claimed certain fees as due time out of mind, for the examination of weights and measures; this was adjudged to be void.

21 H. 7. 17.
Co. Lit. 368.
But the stated and known fees allowed by the courts of justice to their respective officers for their labour and trouble, are not restrained by the common law, or by the said statute of *Westm. 1. c. 16.*, and, therefore, such fees may be legally demanded and insisted upon, without any danger of extortion.

21 H. 7. 17.
2 Inst. 176.
210.
Staund.
P. C. 49.
And for this reason it is holden, that the fee of 20d., called the bar-fee, taken time out of mind by the sheriff for every prisoner that is acquitted, and the fee of a penny claimed by the coroner for every *visne*, when he came before the justices in eyre, are not within this statute; as also because they are due of course as perquisites, whether any thing be done by such sheriff or coroner, or not.

2 Inst. 210.
3 Inst. 149.
Co. Lit. 368.
Also, it seems that an officer, who takes a reward which is voluntarily given to him, and which has been usual in certain cases, for the more diligent or expeditious performance of his duty, cannot be said to be guilty of extortion; for without such a *premium* it would be impossible in many cases to have the laws executed with vigour and success.

Roll. Abr. 16.
Rep. 313.
Noy, 70.
Jon. 65.
Cro. Eliz.
But it has been always holden, that a promise to pay an officer money for the doing of a thing, which the law will not suffer him to take any thing for, is merely void, however freely and voluntarily it may appear to have been made.

654. Moor, 468. Cro. Jac. 103. 2 Burr. 924. 1 Bl. Rep. 204.

This

This offence of extortion is punishable at common law by fine and imprisonment, and also by a removal from the office in the execution whereof it was committed; and there is a farther additional punishment by the statute of *Westm. 1. c. 16.*, with regard to the persons to which the statute extends, by which it is enacted, "That no sheriff nor other king's officer shall take any reward to do his office, but shall be paid of that which they take of the king; and that he who so doth shall yield twice as much, and shall be punished at the king's pleasure."

If an indictment of extortion charges *J. S.* with the taking of 50*s.* as bailiff of an hundred *colore officii*, without (a) shewing for what he took it; this is good, at least after verdict; for perhaps he might claim it generally, as being due to him as bailiff, in which case the taking could not be otherwise expressed.

forth the time when the offence was committed. 4 Mod 101. 103. — That the court of King's Bench will not quash an indictment for extortion or oppression, though erroneous, but oblige the party to plead or demur to it. 5 Mod. 13. — If the chancellor and registrar of a diocese compel an executor to prove a will in the Bishop's court, knowing it had been proved in the Prerogative, and take fees, this is extortion at the common law, *Rex v. Loggan*, H. 4 Geo. Stra. 73. — If a bailiff bargains for money to be paid him by *A.*, to accept *A.* and *B.* as bail for *C.* whom he has arrested, this is extortion at the common law. *Stotesbury v. Smith*, H. 33 Geo. 2. 2 Burr. 924. — As to fees, — A receiver of *fee-farm* rents can only take 4*d.* for one acquittance (though for several years), and if the party brings the acquittance ready written, he must sign it *gratis*; and if the party tenders his rent, and refuses to pay for the acquittance, the receiver cannot distrain for both. *Roberts v. Middleton*, Bunb. 343.

Sid. 91.
The King
and Cover.
(a) That an
information
for extortion
must set

Fairs and Markets.

(A) Of the Right to a Fair or Market: And herein,

1. How a Right to a Fair or Market must commence.
2. Of the Owner's Remedy for a Disturbance in the Enjoyment of them.

(B) Of the Manner of holding Fairs and Markets: And herein,

1. In what Place they are to be holden.
2. At what Time they are to be holden.
3. How long to continue.

(C) Of the Duty and Power of Owners of Fairs and Markets in Things incident to them.

(D) Of

(D) Of the Toll and other Duties which Owners of Fairs and Markets are entitled to: And herein,

1. Where such Tolls, &c. shall be said to be reasonable and legally due.
2. What Persons are exempt from Payment thereof.

(E) How far a Sale in a Fair or Market-overt changes the Property of a Thing sold therein.

(A) Of the Right to a Fair or Market: And herein,

1. How a Right to a Fair or Market must commence.

2 Inst. 220.
(a) *Vide* the
1 & 2 P. &
M. c. 7.
which as-
signs the
reason of
the decay of
trade in
cities and
towns, to
persons not
selling their
goods in fairs and markets, and enacts, that all country people shall sell in some open market, &c. But it does not prohibit inhabitants of one market town to sell in another. *Davis v. Leving*, 2 Lev. 89. *Lee v. White*, Dougl. 259. [(b) The reason why a fair or market cannot be otherwise claimed, is not merely for the sake of promoting traffick and commerce; but also, for the like reason as in the Roman law; for the preservation of order, and prevention of irregular behaviour. "*Jus Nundinarum erit ut a principe, quia ubi est multitudo, ibi debet esse rector.*" *Per Wilmot, J.* 3 Burr. 1812. 1 Bl. Rep. 580. *Vide* l. 1. ff. de nund. l. 1. C. de nund. et mercat.]

THE first institution of fairs and markets seems plainly to be for the better regulation of trade and commerce, and that merchants and traders may be furnished with such commodities as they want at (a) a particular mart, without that trouble and loss of time which must necessarily attend travelling about from place to place; and therefore, as this is a matter of universal concern to the commonwealth, so it hath always been holden, that no person can claim a fair or market, unless it be by grant from the king, or by prescription, which supposes such a grant (b).

3 Mod. 127.
Sed vide
R. v. Marf-
den, 3 Burr.
1812. 1 Bl.
Rep. 579.

And therefore if any person sets up any such fair or market without the king's authority, a *quo warranto* lies against him, and the persons who frequent such fair, &c., may be punished by fine to the king.

3 Lev. 222.
(c) Or by
affise of nui-
sance, *quod*
permittat,
&c. as well
as by *seire*
facias, for
which *vide*
Dyer, 197.
276. 2 Inst. 406.

Also it seems, that if the king grants a patent for holding a fair or market, without a writ *ad quod damnum* executed and returned, that the same may be repealed by (c) *scire facias*; for though such fairs and markets are a benefit to the commonwealth, yet too great a number of them may become nuisances to the publick, as well as a detriment to those who have more ancient grants.

3 Lev. 220,
221. The
King v. Sir

So, where a writ of *ad quod damnum* is deceitfully executed; as where *J. S.*, intending to get a patent for a market every Tues-
day

day in *Chatham*, which is within a mile and a half of *Rochester*, in which there is a market every *Wednesday* and *Friday*, took out a writ of *ad quod damnum*, which was executed the same day it bore *teste*, and thirty miles from *Rochester*, without notice to the mayor, &c. of *Rochester*; the patent obtained thereupon was repealed by *scire facias*. Oliver Butler, 2 Vent. 344. S. C.

2. Of the Owner's Remedy for a Disturbance in the Enjoyment of them.

It seems clearly agreed, that if a person hath a right to a fair or market, and another erects a fair or market so near his, that it becomes a nuisance to his fair, &c., that for this detriment and injury done him, an action on the case lies; for it is implied in the (a) king's grant, that it should be no prejudice to another. 22 H. 6. 14. b. 41 E. 3. 24. b. 2 Roll. Abr. 140. (a) That where a patent is granted to the prejudice of the subject, the king of right is to permit him, upon his petition, to use his name for the repeal of it in a *scire facias* at the king's suit, and to hinder multiplicity of actions upon the case. 2 Vent. 344.

Also, although the new market be holden on a different day, yet an action on the case lies; for this, by forestalling the ancient market, may be a greater injury to the owner than if holden on the same day with his. 2 Saund. 172. Yard and Ford, adjudged. Mod. 69. S. C. 10 Mod. 258. 260. 354. 11 Mod. 67. pl. 8.

If a man hath a fair or market, and a stranger disturbs those who are coming to buy or sell there, by which he loses his toll, or receives some (b) prejudice in the profits arising from his fair, &c., an action on the case lies. Roll. Abr. 106. 2 Vent. 26. 28. S. C. cited, and admitted to

be law. (b) In case, the plaintiff declared, that he was lord of the manor of, &c., and had a market, &c., and that all butchers, &c. ought to sell in the high street upon the stalls of the plaintiff, paying 1 d.; and that the defendant was a butcher, and sold, &c. in his own house *occulte*; and the defendant pleaded, that he was an householder, and that time out of mind every householder in, &c. had used to sell, &c. in his own house. 8 Co. 127. cited, and held no good plea.

So, if upon a sale in a fair a stranger disturbs the lord in taking the toll, an action upon the case lies. 9 H. 6. 45. Roll. Abr. 106. S. C.

(B) Of the Manner of holding Fairs and Markets : And herein,

1. In what Place they are to be holden.

THE king is the sole judge where fairs and markets ought to be kept; and therefore it is said, that if he grants a market to be kept in such a place, which happens not to be convenient for the country, yet the subjects can go to no other; and if they do, the owner of the soil where they meet is liable to an action at the suit of the grantee of the market. 3 Mod. 127. See 2 Roll. Abr. 140.

But if no place be limited for keeping a fair by the king's grant, the grantees may keep it where they please, or rather where they can 3 Mod. 103. said by Ch. Just. 10 Mod. 355.

can most conveniently ; and if it be so limited, they may keep it in what part of such place they will.

By the 13 *E. 1. cap. 5.* “ No fairs or markets shall be kept in “ church-yards.”

2. At what Time they are to be holden.

(a) But *vide* By the 27 *H. 6. cap. 5.* “ Fairs and markets on the principal the statute “ feasts, *viz.* *Ascension-day, Corpus-Christi-day, Whitunday, Tri-*
1 *Car. 1.* “ *nity-Sunday*, and all other *Sundays*, the *Assumption of our Lady,*
c. 1. and “ *All-Saints*, and *Good-Friday*, shall cease from all shewing of
27 *Car. 2.* “ goods and merchandizes, necessary victuals only excepted ;
c. 7., by “ upon pain of forfeiture of their goods shewed, (a) the four
which it is “ *Sundays* in harvest excepted ; and the fairs or markets, which
enacted, “ are granted to be holden on these festivals, may be holden
that no per- “ within three days before or after.”
sons what-
soever, above
fourteen

years old, shall exercise any worldly labour, business, or work of their ordinary calling, on the Lord's day, (except works of necessity and charity, and the dressing and selling of meat in an inn and victualling-house, for those who cannot otherwise be provided,) on pain of forfeiting five shillings ; and no person shall publicly cry or expose to sale any goods whatsoever on this day (except milk, which may be sold before nine in the morning and four in the afternoon), on pain of forfeiting the same. *Vide 11 & 12 W. 3. c. 24. § 14.*, whereby mackarel may be sold before or after divine service ; and by 9 *Ann. c. 23.* coachmen or chairmen may ply on the Lord's day ; and 34 *Geo. 3. c. 61.*, respecting bakers.

3. How long to continue.

By the 2 *E. 3. cap. 15.* it is established, “ That it shall be
“ commanded to all the sheriffs of *England*, and elsewhere,
“ where need shall require, to cry and publish, within liberties
“ and without, that all the lords which have fairs, be it for
“ yielding certain ferm for the same to the king, or otherwise,
“ shall hold the same for the time they ought to hold it, and no
“ longer, that is to say, such as have them by the king's charter
“ granted them, for the time limited by the said charters ; and
“ also they that have them without charter, for the time that
“ they ought to hold them of right ; and that every lord, at the
“ beginning of his fair, shall there do, cry, and publish, how
“ long the fair shall endure, to the intent that merchants shall
“ not be at the same fairs over the time so published ; upon pain
“ to be grievously punished towards the king ; nor the said lords
“ shall not hold them over the due time, upon pain to seize the
“ fairs into the king's hands, there to remain till they have
“ made a fine to the king for the offence, after it be duly found,
“ that the lords held the same fairs longer than they ought, or
“ that the merchants have continued above the time so cryed and
“ published.”

And by the 5 *E. 3. cap. 5.*, reciting, that by the above-men-
tioned statute 2 *E. 3.*, called the statute of *Northampton*, there is
no certain punishment ordained against the merchants if they sell
after the time, it is accorded, “ That the said merchants, after
“ the said time, shall close their booths and stalls, without put-
“ ting any manner of ware or merchandize to sell there ; and if

" it be found that any merchant from henceforth sell any ware
 " or merchandize at the said fairs, after the said time, such mer-
 " chant shall forfeit to our lord the king the double value of that
 " which is sold, and every man that will sue for our lord the
 " king shall be received, and also have the fourth part of that
 " which shall be lost at his suit."

(C) Of the Duty and Power of Owners of Fairs and Markets in Things incident to them.

IF the king grants unto one a fair or market, he shall have, without any words to that purpose, a court of record, called a court of (a) pie-powders, as incident thereunto, for that is for advancement and expedition of justice, and for the supporting and maintenance of the fair or market.

may be a court of piepowders by custom, without a fair or market, as there may be a market without an owner. 4 Inst. 272.---For the jurisdiction of this court, *vide* under tit. *Courts and their Jurisdiction in general*.

Owners and governors of fairs are to take care that every thing be sold according to just (b) weight and measure, who for that and other purposes may appoint a clerk of the fair or market, who is to mark and allow all such weights, and for his duty herein can only take his reasonable and just (c) fees.

weight and one measure of corn, wine, beer and ale, and one yard throughout the whole realm; but for the several statutes regulating weights and measures, *vide* 14 E. 3. c. 12. 25 E. 3. c. 10. 27 E. 3. c. 10. 34 E. 3. c. 5. 13 Rich. 2. c. 9. 8 H. 6. c. 5. 7 H. 7. c. 4. 11 H. 7. c. 4. 12 H. 7. c. 5. the statute called 17 Car. 1. c. 19. and 22 Car. 2. c. 8. and *vide* Dalt. Just. c. 112. (c) For this *vide* 4 Inst. 274. Moor, 523.

Fairs and markets are such franchises as may be forfeited; as if the owner of them hold them contrary to their charter, as by continuing them a longer time than the charter admits, by disuser, and by extorting fee and duties where none are due, or more than are justly due.

(D) Of Toll and other Duties which Owners of Fairs and Markets are entitled to: And herein,

1. Where such Tolls shall be said to be reasonable and legally due.

(d) TOLL payable at a fair or market is a reasonable sum of money due to the owner of the fair or market, upon sale of things tollable within the fair or market, or for stallage, pittance, or the like.

duties and payments at a fair or market, and therefore a grant to be discharged of toll discharges a man from pittance and stallage. Palm. 78. 2 Lutw. 1519.—Pittance is a sum of money paid for leave to dig the ground to erect a stall. Palm. 77.—Stallage is a sum of money paid for leave to erect a stall, or to remove a stall from one part of the fair to another. Palm. 77. [But pittance and stallage seem rather improperly called *tolls*. Toll can only be due by grant, custom, or prescription: it is not incident of common right to a fair; it will not pass under general words in a grant of a new fair, nor will custom

2 Inst. 220.

(a) That it is as well incident to a fair as to a market, but there

(b) That according to *Magna Charta*, cap. 25., there shall be but one

2 Inst. 220.

Finch. 164.

3 Mod. 108.

10 Mod. 355.

2 Inst. 222.

2 Jon. 207.

(d) Toll is a general word which comprehends all

support it in such a fair 2 Str. 1171. It is certain, and payable only on a sale, unless by special custom, by the buyer; but piccage and stallage are uncertain, payable whether the goods are sold or not, and the owner of the soil is entitled to them of common right. These are paid as a satisfaction for the use of the soil: Toll, properly so called, goes only, though not necessarily, with the right of market; but the right of market and the right of soil are things totally distinct. Stallage and piccage go with the soil to the youngest son where it is borough-english; whilst the market descends to the heir at common law. Moor, 474. 1 Wils. 115. 2 Str. 1238. 2 Inst. 220. Trespass, therefore, will lie at the suit of the owner of the soil against any one who erects a stall without his licence, 1 Wils. 107. 2 Str. 1238. 2 Bl. Rep. 1116.; but he cannot, in such case, distrain the goods, as damage feasant. 2 Ld. Raym. 1589. 1 Wils. 115.]

Cro. Eliz. Toll is a matter of private benefit to the owner of the fair or market, and not incident to them; therefore, if the king grants a fair or market, and grants no toll, the patentee can have none, and such fair or market is counted a free fair or market.
558. Huddy and Wheelhouse,
2 Inst. 220. S. P.
2 Lutw. 1336. S. P. resolved. 7 Mod. 12. 2 Stra. 1171.

2 Inst. 220. Also, if the king, at the time he grants a fair or market,
2 Lutw. grants a toll, and the same is (a) outrageous and excessive, the grant of the toll is void, and the same becomes a free fair or market.
1336.
(a) That the reasonable-
ness of every toll must be determined by the discretion of the judge. 2 Inst. 222.

2 Inst. 221. But the king, after he has granted a fair or market, may grant that the patentee may have a reasonable toll; but this must be in consideration of some benefit accruing from it to those who trade and merchandize in such fair or market.

2 Inst. 221. No toll shall be paid for any thing brought to the fair or market, before the same is sold, unless it be by custom time out of mind, and upon such sale the toll is to be paid by the buyer; and therefore my Lord Coke says, that a fair or market by prescription is better than one by grant.

And by *Westm. 1. cap. 31.*, touching them that take outrageous toll, contrary to the common custom of the realm in market-towns, it is provided, "That if any do so in the king's town, which is let in fee-farm, the king shall (b) seize into his own hand the franchise of the market; and if it be another's town, and the same be done by the lord of the town, the king shall do in like manner; and if it be done by a bailiff or any mean officer, without the commandment of his lord, he shall restore to the plaintiff as much more, for the outrageous taking, as he had of him, if he had carried away his toll, and shall have forty days imprisonment."

Roll. Abr. But where by custom a toll is due upon the sale of any goods in a fair or market, and he who ought to pay it refuses, an (b) action on the case lies against him. [And this is the proper remedy where goods are fraudulently sold out of the market to avoid the tolls; for in such case there can be no distress.]
103, 104.
106. Blak-
ey v. Dinf-
dale, Cowp.
661.

(c) *Vide*
3 Lev. 400. Toll is *quasi* a debt, for which debt or an *assumpsit* lies. [A claim of toll in specie for goods sold in a market is supported, it seems, by evidence of a right to toll for goods brought into the market, and there sold; without shewing any right to toll for goods sold in the market, but not brought there. *Moseley v. Pierfon*, 4 Term Rep. 104.]

2. What Persons are exempt from payment of Toll.

If the king, or any of his progenitors have granted to any one to be discharged of toll, either generally or specially; this grant is good to discharge him of all tolls to the king's own fairs or markets, and of the tolls, which together with any fair or market have been granted after such grant or discharge; but cannot discharge tolls formerly due to subjects either by grant or prescription.

Also, the king himself shall not pay toll for any of his goods; and if any be taken, it is punishable within the statute *Westm.* 1. cap. 31.

So, tenants in ancient demesne are free and quit from all manner of tolls in fairs and markets, whether such tenants hold in fee, for life, years, or at will.

But this privilege does not extend to him who is a merchant, and gets his living by buying and selling, but is annexed to the person in respect of the land, and to those things which grow, and are the produce of the land.

321-2. — And how this exemption must be set forth in pleading, *vide* 2

(E) How far a Sale in a Fair or Market-overt changes the Property of a Thing sold therein.

FOR the encouragement of trade, and to render contracts in fairs and markets secure, by the common law, every sale made in a (a) fair or (b) market-overt transfers a complete property in the thing sold to the vendee; so that however injurious or illegal the title of the vendor may be, yet the vendee's is good against all men.

fair where no toll is paid, is as effectual to change the property as in any other. 2 Inst. 714. (b) The city of London is a market-overt every day in the week, except *Sundays*, so that a sale on any of those days has the same effect as if on a fair or market day in another place. 2 Inst. 713. Moor, 360. S. P. 2 Brownl. 288. Godb. 131. 8 Co. 127. a. S. P. [And in London every shop, in which goods are exposed publicly to sale, is market-overt, for such things as the owner professeth to trade in; but in the country, the market-overt is confined to the particular place or spot of ground set apart by custom for the sale of particular goods. See cases *supr.* 2 Bl. Comm. 449. However, where the transaction is perfectly fair on the part of the vendee, though the dealing is out of the precincts of London, great allowances shall be made in analogy to the above-mentioned customs. Therefore, it seems, the property of goods may be changed, and effectually transferred to the buyer, by a *bonâ fide* sale, in a shop out of London, and that whether the shop-keeper is the vendor or vendee, if the goods are of the kind in which he trades. *Harris v. Shaw*, Ca. temp. Hardw. 349.—But the custom of London doth not extend to the case of a pawn. *Hartop v. Hoare*, 3 Atk. 44. 1 Will. 8. S. C. 2 Str. 1187. S. C.]

But this general rule, that a sale in a market changes the property, must be understood with the following restrictions:

1. That this sale in a market-overt shall not bind the king, although it bindeth all others, as infants, feme covert, idiots or lunatics, men beyond sea, or in prison, and whether they were possessed of them in their own right, or as executors or administrators.

2. That though all fairs and markets are overt, yet the sale must be in some open place, as in a shop, and not in a warehouse.

case. And. house or other private part of the house, so that people who go
 344. S. C. along may see what is a doing; and therefore if the shop-door or
 and S. P. windows be so shut, that the goods cannot be seen, this alters
 Moor, 360. no property.
 S. C. and
 S. P. Poph. 84. S. C. and S. P. Cro. Eliz. 454. S. P. 3 Co. 127. S. P.

5 Co. 83. 3. The things bought must be of the nature and quality of
 Cafe of those which the buyer deals in, and therefore if plate, &c. are
 Market- bought in (a) a scrivener's shop in *London*, this alters no property,
 overt de- and the true owner may maintain trover for them.
 terminated at
 the Old Bai-

ley, by Popham, Egerton, Anderson, Brian, and others. Poph. 84. S. C. and S. P. Cro. Eliz. 454.
 S. C. and S. P. by the name of the Bishop of Worcester's case. And. 344. S. C. and S. P. Moor, 360.
 S. C. and S. P. and there said that the law is the same, if hories are sold in *Chapside*, or shop goods in
Smithfield. Cro. Jac. 68, 69. Taylor and Chamber, S. P. adjudged. (a) And by the 1 Jac. 1.
 c. 21. it is enacted, that no sale, exchange, pawn, or mortgage of any jewels, plate, apparel, household-
 stuff, or other goods of what kind, nature, or quality soever the same shall be, and that shall be wrong-
 fully or unjustly purloined, taken, robbed, or stolen from any person or persons, or bodies politick, and
 which at any time hereafter shall be sold, uttered, delivered, exchanged, pawned, or done away within
 the city of *London* or liberties thereof, or within the city of *Westminster* in the county of *Middlesex*, or
 within *Southwark* in the county of *Surry*, or within two miles of the said city of *London*, to any broker
 or brokers, or pawn-takers, by any ways or means whatsoever, directly or indirectly, shall work or make
 any change or alteration of the property or interest of and from any person and persons, or body politick,
 from whom the same jewels, plate, apparel, household-stuff, or goods were or shall be wrongfully pur-
 loined, taken, robbed, or stolen. *Vide supra*, *Bailment*, B.

2 Inst. 713. 4. The goods must be sold, and a valuable consideration ac-
 tually paid for them.

2 Inst. 713. 5. If the buyer knows at the time of the sale that the vendor
 and And. 115. hath not the absolute property; this will not bar the right owner.
 and 3 Co.
 78. b. S. P.

2 Inst. 713. 6. The sale must be without covin, or any combination be-
 and And. 315. tween the buyer and seller, to defraud the true owner.
 and 3 Co.
 78. b. S. P.

2 Inst. 713. 7. If a sale be made of goods by a stranger in a market-overt,
 whereby the right of *A.* is bound; yet if the seller acquire the
 goods again, *A.* may take them again, because he was the wrong-
 doer, and he shall not take advantage of his own wrong.

2 Inst. 713. 8. There must be a sale and contract, and therefore a sale to
 Perk. § 93. a man of his own goods in market-overt bindeth not; and like-
 wise a sale in market-overt by an infant of such tendernefs of
 age, as it may appear to the buyer that he is within age, or by
 a feme covert, if the buyer know her to be a feme covert, unless
 for such things as she usually trades for, or by the consent of her
 husband, bindeth not.

2 Inst. 713, 714. 9. The contract must be originally and wholly made in the
 market-overt, and not to have the inception out of the market,
 and the consummation in the market.

2 Inst. 714. 10. The sale must not be in the night, but between sun-rising
 and sun-set; though a sale made in the night is good to bind the
 parties, but not a stranger.

4 H. 7. 5. Here also we must observe, that at common law there was no
 Fitz. Coron. restitution of goods stolen on any prosecution whatsoever, except
 62. 460. on an (b) appeal of larceny; but to remedy this inconveniency,
 Staundf. and to encourage the prosecuting of felons,
 P. C. 66.

Hale's P. C. 212. Latch. 144. (b) For this *vide* 2 Hawk. P. C. c. 23. § 53.

By the 21 H. 8. cap. 11. it is enacted, " That if any felon or felons do rob, or take away any money, goods, or chattels, from any of the king's subjects, from their persons, or otherwise within this realm, and thereof the said felon or felons be indicted, and after arraigned of the said felony, and found guilty thereof, or otherwise attainted by reason of evidence given by the party so robbed, or owner of the said money, goods, or chattels, or by any other by their procurement, that then the party so robbed, or owner, shall be restored to his said money, goods, and chattels, and that as well the justices of gaol-delivery, as other justices before whom any such felon shall be found guilty, or otherwise attainted by reason of evidence given by the party so robbed, or owner, or by any other by their procurement, have power by the said act to award from time to time writs (a) of restitution for the said money, goods, and chattels, in like manner as though any such felon or felons were attainted at the suit of the party on appeal."

Harris v. Shaw, Ca. Temp. Hardw. 347.

[(a) There hath been no writ of restitution sued out these 200 years.]

Since this statute it hath been the practice to restore the goods stolen, upon the conviction of the offender, to the prosecutor of the indictment, notwithstanding any sale of them in a market-overt; but he can be restored to no goods but those mentioned in the indictment (b).

Kelynge, 35. 48. 2 Inst. 714. [(b) If the goods are produced at the trial,

and not restored, the owner may recover them by action of trover. Loft. 88. And though they should not be the very identical goods stolen, yet if they are the produce of those goods, the prosecutor is entitled to them. *Ibid.* Noy, 128. Cro. El. 661. But if stolen goods, before conviction of the felon, be sold *bonâ fide* in market-overt, the property is thereby changed; and though conviction reverts the original ownership, and the owner has a right to restitution if he can find the possessor, and ascertain the specifick articles, yet he cannot maintain trover against one who was not in possession of them at the time of the conviction. Harwood v. Smith, 2 Term Rep. 750.]

As to changing the property of horses by a sale in a fair or market-overt, the same is provided against by the 2 & 3 P. & M. cap. 7. and 31 Eliz.

But more especially by the 31 Eliz. cap. 12., by which it is enacted, " That no person shall, in any fair or market, sell, give, exchange, or put away any horse, mare, gelding, colt, or filly, unless the toll-taker there or (where no toll-taker is paid) the book-keeper, bailiff, or the chief officer of the same fair or market, shall and will take upon him perfect knowledge of the person that so shall sell, or offer to sell, give or exchange any horse, &c., and of his true christian name, surname, and place of dwelling or residency, and shall enter all the same his knowledge in a book there kept for sale of horses, or else that he so selling or offering to sell, give, exchange, or put away any horse, &c., shall bring unto the toll-taker, or other officer aforesaid, of the same fair or market, one sufficient and credible person, that can, shall, or will testify and declare unto, and before such toll-taker, book-keeper, or other office, that he knoweth the party that so selleth, giveth, exchangeth, or putteth away such horse, &c., and his true name, surname, mystery, and dwelling place, and there enter, or cause to be entered in the book of the said toll-taker or officer, as well the

" true

(a) For this
vide Palm.
 484.
 Jon. 163.

“ true christian name, surname, mystery, and place of dwelling
 “ or resiancy of him that so selleth, giveth, exchangeth, or put-
 “ teth away such horse, &c., as of (a) him that so shall testify or
 “ avouch his knowledge of the same person, and shall also cause
 “ to be entered the very true price or value that he shall have
 “ for the same horse, &c., and that no person shall take upon
 “ him to avouch, testify, or declare, that he knoweth the party
 “ that so shall offer to sell, give, exchange, or put away such
 “ horse, &c., unless he do indeed truly know the same party and
 “ shall truly declare to the toll-taker or other officer, as well the
 “ christian name, surname, mystery, and place of dwelling and
 “ resiancy of himself, as of him, of and for whom he maketh
 “ such testimony and avouchment, and that no toll-taker, or
 “ other person keeping any book of entry of any sale, gift, ex-
 “ change, or putting away of any horse, &c., unless he knoweth
 “ the party that so selleth, giveth, exchangeth, or putteth away any
 “ such horse, &c., and his true christian name, surname, mys-
 “ tery, and place of his dwelling or resiancy, or the party that
 “ shall and will testify and avouch his knowledge of the same
 “ person so selling, &c., any such horse, &c., and his true
 “ christian name, &c., and shall make a perfect entry into the
 “ said book, of such his knowledge of the person and of the
 “ name, &c., and also the true price or value that shall be *bona*
 “ *fide* taken or had for any such horse, &c. so sold, given, &c.,
 “ so far as he can understand the same; and then give to the
 “ party so buying, &c. such horse, &c., requiring, and paying
 “ two pence for the same, a true and perfect note in writing, of
 “ all the full contents of the same, subscribed with his hand, on
 “ pain that every person that so shall sell, &c. any horse, &c.,
 “ without being known to the toll-taker, or other officer, or
 “ without bringing such a voucher or witness, causing the same
 “ to be entered as aforesaid, and every toll-taker, book-keeper,
 “ or other officer of fair or market offending in the premises,
 “ contrary to the true meaning aforesaid, shall forfeit, for every
 “ such default, the sum of 5*l.*; but also that every sale, gift, &c.
 “ of any horse, &c., not used in all points according to the true
 “ meaning aforesaid, shall be void, the one half of all which for-
 “ feiture to be to the queen’s majesty, her heirs and successors,
 “ and the other half to him or them that will sue for the same.
 “ And by *sect.* 4. it is enacted, “ That if any horse, &c. shall
 “ be stolen, and afterwards shall be sold in open fair or market,
 “ and the same shall be used in all points and circumstances as
 “ aforesaid, that yet nevertheless the sale of any such horse, &c.
 “ within six months next after the felony done, shall not take
 “ away the property of the owner from whom the same was
 “ stolen, so as claim be made within six months by the party
 “ from whom the same was stolen, or by his executors or admi-
 “ nistrators, or by any other by any of their appointment, at or
 “ in the town or parish where the same horse, &c. shall be
 “ found, before the mayor or other head officer of the same
 “ town or parish, if the same horse, &c. happen to be found, in
 “ any

“ any town corporote or market town, or else before any justice
 “ of peace of that county near to the place where such horse,
 “ &c. shall be found, if it be out of a town corporote or market-
 “ town, and so as proof be made within forty days then next
 “ ensuing, by two sufficient witnesses to be produced and de-
 “ posed before such head officer or justice, (who by virtue of
 “ this act shall have authority to minister an oath in that behalf,)
 “ that the property of the same horse, &c. so claimed, was in
 “ the party, by or from whom such claim is made, and was
 “ stolen from him within six months next before such claim or
 “ any such horse, &c., but that the party, from whom the said
 “ horse, &c. was stolen, his executors or administrators, shall
 “ and may, at all times after, notwithstanding any such sale or
 “ sales in any fair or market thereof made, have property and
 “ and power to have, take again, and enjoy the said horse, &c.,
 “ upon payment or readiness or offer to pay the party, that
 “ shall have the possession and interest of the same horse, &c., if
 “ he will receive and accept it, so much money as the same
 “ party shall depose and swear before such head officer or justice
 “ of peace, (who by virtue of this act shall have authority to
 “ minister, and give an oath in that behalf,) that he paid for
 “ the same *bona fide*, without fraud or collusion.”

Fees.

FEEES are certain perquisites allowed to officers who have to
 do with the administration of justice, as recompence for
 their labour and trouble; and these are either ascertained by acts
 of parliament, or established by ancient usage, which gives them
 an equal sanction with an act of parliament.

Of these there are several kinds; but we shall only consider
 those about which there hath been most controversy in our books,
 under the following heads:

- (A) In what Cases a Fee shall be said to be due.
- (B) How much shall be said to be due.
- (C) At what Time it shall be said to be due.
- (D) In what Court Fees are to be recovered.

(A) In what Cases a Fee shall be said to be due.

Co. Lit. 368.
2 Inst. 176.
208-9.

A T common law no officer, whose office related to the administration of justice, could take any reward for doing his duty, but what he was to receive from the king.

(a) That this comprehends escheators, coroners, bailiffs, gaolers, the king's clerk

And this fundamental maxim of the common law is confirmed by *Westm. 1. cap. 26.*, which enacts, "That no sheriff, nor other (a) king's officer, shall take any reward to do his office, but shall be paid of that which they take of the king; and that he who so doth shall yield twice as much, and shall be punished at the king's pleasure."

of the market, aulneger, and other inferior ministers and officers of the king, whose offices do any way concern the administration or execution of justice. 2 Inst. 209. — And according to my Lord Coke, by some opinions, it extends to the king's heralds, for they are the king's ministers, and were long before this act. 2 Inst. 209.

4 Inst. 274.
Moor, 523.
2 Inst. 209.
2 Roll. Abr. 226.

And so much hath this law been thought to conduce to the honour of the king and welfare of the subject, that all prescriptions whatsoever, which have been contrary to it, have been holden void; as where by prescription, the clerk of the market claimed certain fees for the view and examination of all weights and measures.

21 H. 7. 17.
2 Inst. 210.
Stamf. P. C.

But it hath been holden, that the fee of 20*d.*, commonly called the bar-fee, which hath been taken, time out of mind, by the sheriff, of every prisoner who is acquitted; and also the fee of one penny, which was claimed by the coroner of every visne, when he came before the justices in eyre, are not within the meaning of the statute, because they are not demanded of the sheriff or coroner for doing any thing relating to their offices, but claimed as perquisites of right belonging to them.

2 Inst. 533.
[(b) But an ancient fee may attach on a modern act of parliament; such, for instance, as a fee on an oath taken before a justice of the peace, or a judge at chambers; per Heath J. 2 H. Bl. 223.]

Also, it is holden by my Lord Coke, that within the words of the statute 34 E. 1., which are *nullum tallagium vel auxilium, per nos vel per heredem nostrum, in regno nostro, ponatur seu levetur, sine voluntate & assensu archiepiscoporum, episcoporum, comitum, baronum, militum, burgensum & aliorum liberorum com. de regno nostro*, no new offices can be erected with new fees (b), or old offices with new fees; for that is a tallage upon the subject, which cannot be done without common assent by act of parliament.

(c) Moor, 808.
pl. 1094.
Bishop of Sarum's case.

(c) But yet it is holden, that an office erected for the publick good, though no fee is annexed to it, is a good office; and (d) that the party, for the labour and pains which he takes in executing it, may maintain a (e) *quantum meruit*, if not as a fee, yet as a competent recompence for his trouble.

(d) Hard.

351. Veale and Priour, adjudged. (e) Where *A.* was libelled against in the ecclesiastical court for fees, and upon motion a prohibition was granted; for no court has a power to establish fees; the judge of the court may think them reasonable, but that is not binding; but if in a *quantum meruit* a jury think them reasonable, then they become established fees. Salk. 333. pl. 11. Giffard's case.

All fees allowed by acts of parliament become established fees, and the several officers entitled to them may maintain actions of debt for them. 2 Inst. 210. [If an act of parliament recognizes a right to a fee, the quantum may be ascertained by usage, though not of ancient date. Fleetwood v. Finch, 2 H. Bl. 226.]

Also, such fees as have been allowed by the courts of justice to their officers, as a recompence for their labour and attendance, are established fees; and the parties (a) cannot be deprived of them without an act of parliament. 21 H. 7. 17. Co. Lit. 368. (a) Preced. Chan. 551.

Where a fee is due by custom, such custom, like all others, must be reasonable; and therefore where a parson libelled in the spiritual court for a burying-fee due to him for every one who died in his parish, though buried in another; the court held this unreasonable, and granted a prohibition. Hob. 175. Roll. Abr. 557. 559. S. C. adjudged.

So, where a French protestant had his child baptized at the French church in the Savoy, and the vicar of St. Martin's, in which parish it is, together with the clerk, libelled against him for a fee of 2s. 6d. due to him, and 1s. for the clerk; a prohibition was granted: and in this case it was holden by Holt, that no fee could be due but by custom, and that a custom for any person to take a fee for christening a child, when he does not christen him, is not good; and that the vicar, if he had a right to christen, should have libelled for that right. Salk. 332. pl. 9. Burdeaux v. Dr. Lancaster, 12 Mod. 171.

(B) How much shall be said to be due.

HERE we must observe in general, that it is extortion for any officer to take more for executing his office than is allowed by act of parliament, or is the known and settled fee in such case. 10 Co. 102. a. Co. Lit. 368.

But in this place we shall only take notice of the fees of sheriffs for executions, about which there seem to have been the most controversies in our books.

And for this purpose we shall recite the (b) 28 Eliz. cap. 4., by which it is enacted, "That it shall not be lawful to or for any sheriff, under-sheriff, bailiff of franchises or liberties, nor for any of their or either of their officers, ministers, servants, bailiffs, or deputies, nor for any of them, by reason or colour of their or either of their office or offices, to have, receive, or take of any person or persons whatsoever, directly or indirectly, for the serving and executing of any extent or execution upon the body, lands, goods, or chattels of any person or persons whatsoever, more or other consideration or recompence than in this present act is and shall be limited and appointed, which shall be lawful to be had, received, and taken; that is to say, twelve pence of and for every twenty shillings, where the sum exceedeth not one hundred pounds; and six pence of and for every twenty shillings, being over and above the said sum of 100l., that he or they shall so levy or extend, and

(b) In the printed statutes, this act is called 29 Eliz.; but by the parliament roll it is the 28th, and so ought to be recited. Salk. 331. pl. 4. Skin. 363. pl. 7. And this observation is right, because the roll has been searched in a mo-

dern case,
and found
to be the
28th. [By
7 Geo. 3.
c. 29., it is
provided,
"That this
act shall
not ex-
tend to
allow any
sheriff,
&c. any
poundage,
for taking
the body
of any
person in
execution upon any process at the suit of any sheriff, or other officer or minister of the crown, upon
any bail-bond entered into for the appearance of any person prosecuted, either for any duties due or
payable to his majesty, or for any penalty inflicted by any act for the preventing of the clandestine
running or receiving any customable or prohibited goods; or in any case where the sheriff, &c. would
not be entitled to poundage if the proceedings were or had been carried on directly in the name of the
crown."]

"and deliver in execution, or take the body in execution for,
"by virtue and force of any such extent or execution whatso-
"ever; upon pain and penalty that all and every sheriff, under-
"sheriff, bailiff of franchises and liberties, their and every of
"their ministers, servants, officers, bailiffs, or deputies, which
"at any time shall directly or indirectly do the contrary, shall
"lose and forfeit to the party grieved his treble damages; and
"shall forfeit the sum of 40*l.* for every time that he, they, or
"any of them shall do the contrary; the one moiety thereof to
"be to our sovereign lady the queen, her heirs and successors;
"and the other moiety thereof to the party or parties that will
"sue for the same by any plaint, action, suit, bill, or informa-
"tion, wherein no effoign, wager of law, or protection shall be
"allowed.

"Provided always, That this act, or any thing therein con-
"tained, shall not extend to any fees to be taken or had for any
"execution within any city or town corporate."

In the construction of this statute the following points have been holden:

Woodgate
v. Knatch-
bull, 2 Term
Rep. 148.
Ibid.

[1. That under this statute, the sheriff cannot take any other charge but that for the poundage.

2. That an action lies against the sheriff for the penalty though the extortion were by the bailiff.

Alchin v.
Wells,
5 Term
Rep. 470.

3. That if the sheriff levy under a *fi. fa.*, he is entitled to poundage, though the parties should compromise before he sells any of the goods.]

Moor, 853.
pl. 1166.
Proby and
Lumley,
adjudged.
Latch. 19.
Poph. 175.
Palm. 400.
Salk. 331.
S. P. ad-
mitted; and
vide Cro. Eliz. 335. 2 Term Rep. 155. (a) But he cannot take a bond for his fees, though he takes it for no more than the statute allows, and bring debt on that. Winch. 51, 52. Cro. Jac. 103. Cro. Car. 286.

4. That though the words of the statute are, that it shall not be lawful for the sheriff to take any more, or greater fee, than by the act is limited, &c., that herein by implication at least, if not by express words, a right is given the sheriff to demand those fees mentioned in the statute; and consequently that he may, as in all cases where the statute creates a debt or duty, (a) maintain an action of debt for them: [but the action must be in the name of the sheriff, and not of the bailiff.]

Poph. 173.
Welden v.
Vesey, Hill.
1 Car. 1.
Latch. 17.
18. 52.
Palm. 399.
400.
Bendl. 165.
Noy, 75.

5. It hath been adjudged, that the sheriff shall have a shilling *per* pound for the first hundred, and sixpence *per* pound for every other pound exceeding a hundred; and not sixpence for every pound where the whole debt happens to exceed a hundred pound; for by this construction the sheriff would have less where the debt was 199*l.* than if it were but 100*l.*, and the intention of the statute was to allow sheriffs such reasonable fees as would encourage them

them to discharge this branch of their duty so much favoured by the law, with vigour and success, who before were backward and intimidated, by reason of the dangers they run from escapes, &c., from engaging herein; and therefore it has been holden the most reasonable construction to allow them their fees in proportion to such danger.

S. P. adjudged. Trin. 8 Car. 1. 1 Jones, 307. S. C. adjudged and affirmed on a writ of error. Salk. 331. S. P. admitted to be law; and *vide* Cro. Eliz. 263-4.

S. C. adjudged by three judges against Cro. C. J. Cro. Car. 286-7. Lister and Bromley,

6. It hath been resolved, on the proviso of the said statute, that it shall not extend to any fees to be taken for any execution within any city or town corporate; that this must be intended of executions on judgments given in those courts; and that therefore where a sheriff executes a judgment given in *Westminster-hall* in a city or town corporate, he is as much entitled to his fees, pursuant to this statute, as if the execution had been done in any part of the county at large; for herein the sheriff runs as great a risque, and his trouble is as great; but where both the judgment and execution are within a limited jurisdiction, it cannot be presumed to be attended with equal difficulty; and therefore the proviso in the statute excludes them.

the place court of the Bishop of *Rochester* for fees, upon execution of a judgment in that court, pursuant to this statute; and after verdict for the plaintiff, the judgment was staid, although it was objected, that the proviso in the statute could not extend to it, being neither a city nor town corporate where the execution was made; nor was it within the reason thereof, because the bishop's jurisdiction is as large as his diocese; and the reason of the proviso, that no execution fees should be taken in cities and towns corporate, is from the narrowness of those jurisdictions, which renders executions in them more easy and less dangerous. Salk. 331. Brockwell and Lock, S. C. but no judgment.

Latch. 17. 18. Poph. 173. Palm. 399, 400. Dalt. Sheriff, 527. cont. Cro. Eliz. 263-4. and *vide* 5 Mod. 97. where an action of debt was brought by the bailiff of the pa-

7. It hath been resolved, that the bailiff of (a) a liberty, who executes a judgment given in *Westminster-hall*, is entitled to the fees, within the words and meaning of the statute; and not the sheriff of the county, who directs his precept to him.

S. P. And there said, that the constant practice was so; and Noy, 27. Cooper and Lies, S. P. adjudged, for he shall answer for the escape, &c. and therefore ought to have the fees. (a) So, if the execution of a judgment in *Westminster* be in a city, which is a county of itself, the sheriff there shall have his full fees, for he is the proper officer to the courts above. Latch. 19. Palm. 401. Dalt. 527. Cro. Eliz. 263-4.

Latch. 19. 52. Poph. 175. Salk. 331. pl. 4. Dalt. Sheriff, 526.

8. It seems agreed, that if a sheriff makes an *extent*, and before the *liberate* a new sheriff is chosen, the new sheriff shall have the fees appointed by the statute.

riff, 526. *Vide* stat. 3 Geo. 1. c. 15. § 9., which directs an apportionment of the fees in such case between the precedent and subsequent sheriff.

Winch. 50. 51. per Hebb. C. J. Dalt. Sheriff, 526.

9. It hath been resolved, that the statute does not extend to real executions, such as *habere facias seisinam*, or *possessionem*, but only to executions in personal actions; also it is said, that the statute does not extend to executions upon statutes merchant, recognizances, &c., and that the act is to be understood of cases where the judgment *redditur in invitum*, and not by the voluntary confession of the party*.

Salk. 331. pl. 6. Peacock and Harris. * Certainly the sheriff is entitled to his fees on a judgment by confession.

10. That for executing a *capias utlagatum*, or for a warrant to execute it, or for a return of it, no fee is due to the sheriff, because this is at the suit of the king.

Hedley, 52. 2 Brownl. 283.

Salk. 331.

pl. 6.

[(a) By ft.

3 Geo. 1.

c. 15. § 17.

the sheriff

shall not

11. It seems to have been resolved, that upon a *capias ad satisfaciendum*, the sheriff shall have his fees for the (a) whole debt ; also (b) if one in execution dies, and a *feri facias* issues against his goods, the sheriff shall have his fees upon executing the *feri facias*, for his trouble was as great as at first.

take poundage for executing any *ca. fa.*, where part of the debt hath been paid, for any greater sum than what remains due to the plaintiff, who is to mark the same on the back of the writ, and the sheriff, &c. is guilty of extortion, and shall forfeit to the party grieved treble damages, and double the sum so extorted, and also 200*l.*] But that upon executing an elegit where perhaps the land is not worth 40*s.* it is unreasonable that the sheriff should have 6*d.* for every pound of the debt. Cro. Jac. 103. *per Curiam*, and *vide* Salk. 331. pl. 6., where, by Treby, Ch. J. in such case he shall have fees according to the sum levied, and not according to the debt recovered.—— But this is denied by Powel, because the party might detain the land till he was satisfied the entire debt ; and the plaintiff is, by having made his election, barred of all other executions. [By stat. 3 Geo. 1. c. 15. § 16., no sheriff, under-sheriff, deputy-sheriff, or their bailiffs, or the bailiff of any franchise or liberty, by reason of any writ of *habere facias possessionem aut seisinam*, shall take above 1*s.* per pound of the yearly value of any manor, &c. where the whole exceeds not 100*l.* per annum, and 6*d.* only for every 20*s.* above such yearly value. And by 8 Geo. 1. c. 25. § 5. no more is to be taken on an *extent* and *liberate*.] (b) *Vide* Skin. 363. pl. 7.

[By ft. 3 Geo. 1. c. 15. § 3. Sheriff's levying debts, &c. (except post fines) due to the crown, by process of the pipe, or *levari facias*, shall have 12*d.* per pound for any sum not exceeding 100*l.* levied, and 6*d.* for every 20*s.* above that sum ; and on process by *fi. fa.* and *extent*, shall have 1*s.* 6*d.* per pound for any sum not exceeding 100*l.* levied ; and 1*s.* per pound above that sum ; provided they answer the same on their accounts by a day to be fixed by warrant of the barons.

By § 13. No sheriff or other person employed in levying, &c. debts to the crown, shall take any fee except 4*d.* only for an acquittance ; and if a sheriff, &c. demand or take any money for executing, or forbearing to execute such process, he forfeits treble damages and costs to the party aggrieved, and double the sum so extorted ; which damages and penalties shall be given by the barons of the Exchequer in such summary way as they shall deem proper ; provided the conviction be within two years after the offence committed. Nevertheless, by § 14., the sheriff may take such poundage and allowance as are given by this act, and such allowance as may be made by the Treasury or Exchequer for any extraordinary service to the crown.

R. v. Bur-

rell, Bunb.

305.

R. v. Tho-

mas Jetherell,

Parker, 177.

R. v. Wade,

Skin. 12.

Sir Thomas

Jones, 185.

The sheriff may retain poundage, without waiting for an allowance of it in his account, and this upon an extent in aid. And his right to poundage may be determined upon motion.

The sheriff hath been allowed poundage out of a fine (imposed after conviction upon an indictment of battery in K. B.,) levied upon a *fi. fa.* ; for the barons of the Exchequer always make such allowance after monies paid there by the clerk of the crown.]

(C) At what Time it shall be said to be due.

Co. Lit.

368. 16Co.

102. a.

(c) Salk.

HERE also we must observe, that it is extortion for an officer to take his fee before it is due ; and therefore (c) where an under-sheriff refused to execute a *capias ad satisfaciendum* till he had

had his fee, the court held that the plaintiff might bring an action against him for not doing his duty, or might pay him his fees, and then indict him for (a) extortion.

that an under-sheriff might attend for refusing to execute a *feri facias* till his shilling and pence were paid, the court would not grant the rule, but said it was extortion, for which he might be indicted. Salk. 331. pl. 5.

If a *habeas corpus ad subjiciendum* be directed to a gaoler, he must bring up the prisoner although his fees were not paid him; and he cannot excuse himself of the contempt to the court, by alleging, that the prisoner did not tender him his fees.

Also, it is no excuse for not obeying a writ of *habeas corpus ad faciendum & recipiendum*, that the prisoner did not tender him his fees.

But if the gaoler brings up the prisoner by virtue of such *habeas corpus*, the court will not turn him over till the gaoler be paid all his fees; nor, according to some opinions, till he be paid all that is due to him for the prisoner's diet; for that a gaoler is not compellable to find his prisoner sustenance.

If a person pleads his pardon, the judges may insist on the usual fee of gloves to themselves and officers, before they allow it.

If an erroneous writ be delivered to the sheriff, and he executes it, he shall have his fees, though the writ be erroneous.

It seems to be laid down in the old books as a distinction, that upon an extent of land upon a statute, the sheriff is to have his fees, so much *per pound*, according to the statute immediately; but that upon an *elegit* he is not to have them (b) till the *liberate*.

lary, appointed by the statute, till a complete execution, viz. till the *liberate*; for the words of the statute are in the negative, and do not establish the fees, but only tolerate them. (b) And therefore if the conuzee sue an extent, and then refuse to sue the *liberate*, to the intent to defraud the sheriff of his fees, the sheriff may have his remedy by action on the case. Winch. 51. *per* Hobart.

But where the sheriff, having executed an *elegit*, brought an action of debt for his fees; and it was objected, that this was not within the statute, the execution not being complete, for the plaintiff could not enter, but must bring his ejectment; it was holden by *Holt*, that there was the same reason for fees for executing an *elegit* as an extent; for upon an *elegit* the sheriff returns, that he has taken an inquisition, extended the lands, and delivered them to the plaintiff, and that there is a *liberate* in the body of the writ of *elegit*, on the return of which the plaintiff may enter; for by the return he becomes tenant by *elegit*, and may maintain an ejectment, and assign his interest upon the land; but the defendant's continuing in possession after the return of the writ turns the plaintiff's estate to a right, and therefore he must enter to assign; and his being put to an ejectment is no reason, for in case of an extent upon a statute, where the *liberate* is distinct, he cannot enter by force; it is true he may without force, and so he may here; and *Powell* said, that extent generally

generally is the word of the statute 28 *Eliz. cap. 4.*, and that an extent upon an elegit was an extent within the statute, as well as an extent upon a statute.

(D) In what Court Fees are to be recovered.

Vern. 203.
2 Chan. Ca.
153.

A Solicitor in Chancery may exhibit his bill for his fees for business done in that court; and so he may where the business is done in another court, if it relates to another demand the plaintiff makes in Chancery.

Vide 3 Leon.
268.
2 Roll. Rep.
59.
Mod. 167.
2 Keb. 615.
3 Keb. 303.
Raym. 703.

But it hath been holden, that chancellors, registrars, and proctors, who are officers of temporal profit, and whose fees do not relate to the jurisdiction of the spiritual court, cannot sue for them in the spiritual court.

441. 516. 4 Mod. 254. 5 Mod. 242. 10 Mod. 261. 440. 12 Mod. 583. Lord
Com. Rep. 18. pl. 11. So, parish clerks, 2 Str. 1108. and apparitors, Dougl. 629.

Salk. 333.
pl. 10.
Ballard and
Gerrard.

As where the registrar in the ecclesiastical court libelled there for 4s. 6d. for his fees, and proceeded to excommunication; and the defendant suggested, that the office of registrar was a temporal office, and a freehold, and moved for a prohibition, which was granted; for the court hath no power to compel the party to pay fees to their officers, but they must bring their *quantum meruit*; or if the office be a freehold, they may bring an assize, for the denial of just fees is a disseisin; although it was objected, that this case differed from that of a proctor, because a registrar is a mere officer of the court, and the court may appoint a reasonable fee to the officers that attend them.

Salk. 333.
pl. 2.
Goslin and
Ellison.

So, a prohibition was granted to stay a suit in the archdeacon of *Litchfield's* court, against churchwardens for a fee for swearing them and taking their presentments, because no fees could be due but by custom, or for work done, in which case a *quantum meruit* lay.

Hil. 5 Ann.
Dean and
Chapter of
Exeter v.
Drue.
Salk. 334.
pl. 13. S. C.

Again, the dean and chapter of the cathedral church of *Exeter*, having the freehold and inheritance of the said church, had by prescription 10*l.* for every corpse that was buried in the said church; and the defendant's testator being buried there, without their licence, the defendant refused to pay the 10*l.*, for which they sued him in the ecclesiastical court: on shewing cause why a prohibition should not go, it was urged, that none can prescribe to have a burying-place in a cathedral church, for the parishioners have nothing to do with it, nor pay any tithes to it; but in the parish church to which they pay tithes and other duties, there such a prescription may be good, and in the church-yard they have a right to be buried without any prescription: but the court held, admitting that no person could prescribe to bury in a cathedral church, and admitting that this fee, like that of 20*l.* which is usually paid for burying in the cathedral church of *Westminster*, is reasonable, yet it is not of spiritual cognizance, but is in nature of a licence, on which a *quantum meruit* may be brought, and the constant usage to pay so much given in evidence; and therefore the prohibition was granted.

Felony.

WHOEVER becomes infamous by the commission of a crime which subjects him to a capital punishment, is said to be guilty of felony; which *ex vi termini*, says my Lord Coke, signifies *quodlibet crimen felleo animo perpetratum*, and can be expressed by no periphrasis or word equivalent, without the word *felonice*.

Spelm.
Gloss.
verbo feloniam. Co.
Lit. 391.
[Sir Wm. Blackstone defines fe-

lony to be an offence which occasions a total forfeiture of either lands, or goods, or both, at the common law; and to which capital or other punishment may be superadded, according to the degree of guilt. 4 Bl. Comm. 95. He therefore derives the word felony, from the *Saxon* *felo*, or *feoh*, fee, or feud; and the *German* *son*, price, as being a crime punishable with the loss of the feud or benefice. *Ibid*. But as in petit larceny, the lands are not liable to escheat; and petit larceny hath always been ranked among felonies; a later writer seems inclined to derive it from *pælen*, in the sense of offending. 2 Wooddet. 510. It is to be observed, that the *Saxon* *felo*, or *feoh*, in its primitive sense, signified money or goods; that it is, in a translated sense, an inheritance or feud. Lye's Sax. Dict. voc. *Feo*. Spelm. Gloss. *ubi supr.*]

Felony is included in (a) high treason, murder, robbery, burglary, rape, sodomy, &c., but for these we shall refer to their proper heads, and in this place chiefly consider it as it is a violation of a man's property, known by the name of larceny.

(a) And consequently a pardon of felony discharges an indictment

of high treason, if it wants the word *proditorie*. H. P. C. 11. 3 Inst. 151. 1 Hawk. P. C. c. 25. § 1.

For the better understanding whereof we shall consider,

- (A) Of what Nature the Things taken must be, to constitute the Offence Felony.
- (B) How far the Goods ought to belong to another.
- (C) What shall be said to be a felonious and fraudulent Taking.
- (D) What shall be said to be a carrying away.
- (E) By whom the Offence may be committed.
- (F) Of what Value the Goods must be; and herein of the Difference between Grand and Petit Larceny.
- (G) Where the Offender is or is not excluded his Clergy.
- (H) Where the Offender is to be transported.

(A) Of

(A) Of what Nature the Things taken must be, to constitute the Offence Felony.

HERE it may be proper to take notice, that in the times of the military tenures every tenant was obliged to attend in the camp; and there being no provision made out of the publick stock for them, as there is now-a-days for our mercenary soldiery, it was necessary for every freeman to carry with him his own provision; which induced the necessity of a very severe and rigid justice upon all persons who should violate any man's property; otherwise camps would have been scenes of intolerable violence, and every man would have perished by his neighbour's sword, and not by his enemies. Hence was learned the institution of punishing theft by death, and thence derived into the civil state, which consisting of the same orders and conditions of men, it was necessary that the same measures of justice should be used both at home and in the camp; for they could not understand that a freeman should be punished otherwise in the camp than in the civil state, as they thought justice was the same, and could not alter with the distinction of countries and places; and therefore it is that in this punishment our law differs from the (a) *Roman* and *Mosaick* laws, which only oblige those sort of offenders to the restitution of four-fold; and custom hath approved the method; for should we admit a restitution from such profligate offenders, we should have no end of rapine and violence.

(a) S. P. C.
25. See
Exod. 22.

(b) 12 Aff.
32. Bro.
Coron. 77.
Cromp. 37.
18 H. 8. 2.
S. P. C. 25.
b. Mod. 89.
Allen, 83.
2 Keb. 875.
Vent. 187.

Hence we have the reason of the distinction between the real and personal property, and why our law does not punish the stealing (b) of corn or grafs growing, or apples on a tree, or (c) lead on a church or house with death; because these never came under the camp discipline; and therefore it was not necessary to guard this sort of property with such sanguinary laws, where the redress might be by a civil action.

(c) But now by the 4 Geo. 2. c. 32. every person who shall steal or rip, cut or break, with intent to steal, any lead, iron bar, iron gate, iron palisade, or iron rail whatsoever, being fixed to any dwelling-house, out-house, coach-house, stable, or other building used or occupied with such dwelling-house, or thereunto belonging, or to any other building whatsoever; or fixed in any garden, orchard, court-yard, fence, or outlet belonging to any dwelling-house, or other building, shall be deemed and construed to be guilty of felony; and the court, before whom such persons shall be tried, shall and hereby have power to transport such felons for seven years; as also such persons who shall be aiding, abetting, or assisting in stealing, &c. or who shall buy or receive any such lead, &c. knowing the same to be stolen. [By 21 Geo. 3. c. 68., "Whoever shall rip, cut, break, or remove, with intent to steal any copper, brass, bell-metal, utensil, or fixture being fixed to any dwelling-house, out-house, coach-house, stable, or other building used or occupied with such dwelling-house, or thereunto belonging, or to any other building whatsoever, or fixed in any garden, orchard, court-yard, fence, or outlet belonging to any dwelling-house or other building, or any iron rails or fencing set up, or fixed in any square, court, or other place, (such person having no title, or claim of title thereto); or whoever shall be aiding, abetting, or assisting therein, or shall knowingly buy or receive the same, although the principal felon hath not been convicted of stealing the same, shall be guilty of felony, &c."], By 25 Geo. 2. c. 10. stealing black lead in the mine is felony.

Vent. 187.
2 Hawk.
P. C. c. 33.
§ 21.

But if they are severed from the freehold, whether by the owner, or even by the thief himself, if he sever them at one time and then come again at another time and take them, it is felony.

If

If a man take away a box of charters, this is not felony, because they are the muniments of the freehold, and relate to the estate at home, and not to the provisions that were used in supplying the camp abroad. 3 Inst. 109.
H.P.C. 66.

But it is said, in (a) *Hale*, to be felony to take away an obligation for money, and the reason hereof may be, because securities might be taken to answer money at the camp from a neighbouring freeholder; and therefore there was the same reason they should be within this provision, as that other chattels should be protected by the obligation, being equally valuable. (a) H.P.C.
67.

But *per Hawkins*, the things taken ought to have some worth in themselves, and not to derive their whole value from the relation they bear to some other thing, which cannot be stolen, as paper or parchment, on which are written assurances concerning lands, or obligations, or covenants, or other securities for a debt or other *chose* in action; and the reason, he says, wherefore there can be no felony in taking away any such things, seems to be, because generally speaking they, being of no manner of use to any but the owner, are not supposed to be so much in danger of being stolen, and therefore, need not be provided for in so strict a manner as those things which are of a known price, and every body's money; and for the like reason, it is no felony to take away a villein or an infant in ward. 1 Hawk.
P. C. c. 33.
§ 22., for
which are
cited H. P.
C. 66, 67.
3 Inst. 109.
Bro. Coron.
155. S.P.C.
25. b.
Coron. 27.

But now by the (b) 2 *Geo. 2. cap. 25.* it is enacted, "That if any person or persons shall steal, or take by robbery, any Exchequer orders or tallies, or other orders, entitling any other person or persons to any annuity or share in any parliamentary fund, or any Exchequer bills, Bank notes, *South-Sea* bonds, *East-India* bonds, dividend warrants of the Bank, *South-Sea* Company, *East-India* Company, or any other company, society, or corporation, bills of exchange, navy bills or debentures, goldsmiths' notes for payment of any money, or other bonds or warrants, bills or promissory notes for the payment of any money, being the property of any other person or persons, or of any corporation; notwithstanding any of the said particulars are termed in law a *chose* in action, it shall be deemed and construed to be felony, of the same nature and in the same degree, and with or without the benefit of the clergy, in the same manner as it would have been if the offender had stolen or taken by robbery any other goods of like value with the money due on such orders, tallies, bills, bonds, warrants, debentures, or notes, or secured thereby, and remaining unsatisfied; and such offender shall suffer such punishment, as he or she should or might have done, if he or she had stolen other goods of the like value with the money due on such orders, tallies, bonds, bills, warrants, debentures, or notes, respectively, or secured thereby, and remaining unsatisfied."

(b) Made perpetual by 9 *Geo. 2. c. 18.* By 7 *Geo. 2. c. 22.* If any person or persons shall falsely make, alter, forge, or counterfeit, or cause or procure to be falsely made, &c. any acceptance of any bill of exchange, or the number or principal sum of any accountable receipt for any note, bill, or other security for payment of money; or any warrant or order for payment of money, or

delivery of goods, with intention to defraud any person whatsoever; or utter, or publish as true any false, altered, forged or counterfeited acceptance of any bill of exchange &c. with intention to defraud, knowing the same to be false, &c. he or they shall be guilty of felony without benefit of clergy.

[And by 5 Geo. 3. c. 25. § 17. and 7 Geo. 3. c. 50. § 2. "Whoever shall rob any mail in which letters are sent or conveyed by the post, of any letter, packet, or bag of letters, or shall steal and take from any such mail, or from any bag of letters sent or conveyed by the post, or from or out of any post-office, or house or place for the receipt or delivery of letters or packets sent, or to be sent by the post, any letter or packet, although such robbery, stealing, or taking shall not appear or be proved to be a taking from the person, or upon the king's highway, or to be a robbery committed in any dwelling-house, or any coach-house, stable, barn, or any out-house belonging to a dwelling-house; and although it should not appear that any persons were put in fear by such robbery, stealing, or taking, yet such offenders shall be deemed guilty of felony, and suffer death without the benefit of clergy."]

H.P.C. 66. It is also from the strict discipline that was observed in the
7 Co. 18. camp, that the distinction is raised concerning beasts that are
3 H. 8. 3 b. *feræ naturæ*; for those that are for the provision of man, when
Crom. 36. reclaimed, are within the protection of the law, and it is felony
Dalt. c. 103. to steal them, because they answered the use of the camp for
3 Inst. 109. their necessary food and sustentation; but dogs, cats, bears, foxes,
Hawk. P.C. monkeys, ferrets, and the like, that are not used for provision,
c. 33. § 23. may be stolen without any danger of death, for they are not
within the inconveniency for which the law was provided.

3 Inst. 109. But to steal hawks reclaimed is felony, (a) because they were
(a) And this used for the entertainment of noble and generous persons, and
is also made were carried into the camp for diversion there; and therefore
felony by 37 were construed within the same provision.
E. 3. c. 19.

3 Inst. 109. Wherever it is felony to steal beasts, it is so in relation to the
H.P.C. 68. (b) young of such beasts, because they by right of accession follow
(b) But it is the condition of the dams.

to steal eggs of swans and hawks, but a particular punishment is prescribed by the statute 11 H. 7. c. 17.
H. P. C. 68.

(B) How far the Goods ought to belong to another.

3 Inst. 109. THE taking of goods, whereof no one had a property at the
H.P.C. 67. time, cannot be felony; and therefore he who takes away
Hawk. P.C. treasure trove, or a wreck, * waif, or stray, before they have been
c. 33. § 24. seized by the persons who have a right thereto, shall only be
punished by fine, &c.

* Plundering ship-wrecked goods, or beating, &c. with intent to kill, or otherwise obstructing the escape of any person from such ship, or putting out false lights, with intent to bring any ship into danger, felony without benefit of clergy. 26 Geo. 2. c. 19.

Owen, 20. If one takes fish in a river, or other great water, wherein they
3 Inst. 109. are at their natural liberty, he is not guilty of felony; but he
H.P.C. 97. who takes them out of a trunk or pond is guilty of felony, because being thus secured, the party hath the full dominion of them.

H.P.C. 68. And for this reason there can be no doubt but that the taking
3 Inst. 109. of domestick beasts, as horses, mares, colts, &c., or of any
Hawk. P.C. creatures

creatures whatsoever, which are *domite naturæ*, and fit for food, as ducks, hens, geese, turkies, peacocks, or their eggs, or young ones, is felony.

But a man cannot commit a felony by taking (a) deer, hare, or conies in a forest, chase, or warren, or old pigeons being out of the house.

c. 10. an act for the more effectual discovery and punishment of deer stealers; and 5 Geo. c. 15. an act by which such offenders are liable to transportation; and 9 Geo. 1. c. 22. commonly called the Black Act, made perpetual by 31 Geo. 2. c. 42. § 2. by which persons going armed, having their faces blacked, or disguised, and hunting deer, robbing any warren, fish-pond, &c. are guilty of felony, and excluded the benefit of their clergy.

Hawk. P.C. c. 33. § 26. (a) Vide 3 W. & M.

But a person, who takes any other creatures, though *feræ naturæ*, if they be fit for food, and reduced to tameness, and known by him to be so, is guilty of felony: also, by the better opinion, it is felony to steal wild pigeons in a dove-house shut up, or hares or deer in a house, or even in a park, inclosed in such a manner, that the owner may take them whenever he pleases, without the least danger of their escaping; in which case they are as much in his power as fish in a pond, or young pigeons or hawks in a nest, &c., the taking of which seems agreed to be felony.

3 Inst. 107. 7 Co. 17. H.P.C. 86. Hawk. P.C. c. 33. § 26.

Also, the taking away of swans marked or pinioned, or those which are unmarked, if kept in a pond or private river, is felony.

Hal. P.C. 68. Hawk. P.C. c. 33. § 27.

Also, it is said, that there may be felony in taking goods, the owner whereof is unknown; in which case the king shall have the goods, and the offender shall be indicted for taking *bona cuiusdam hominis ignoti*; and it seems that, in some cases, the law will rather feign a property, where in strictness there is none, than suffer an offender to escape; and therefore it is said, that he who takes away the goods of a chapel, or abbey, in time of vacation, may be indicted in the first case for stealing *bona capellæ*, being in the custody of such and such; and in the second, for stealing *bona domus & ecclesiæ*, &c., and a *fortiori* therefore it follows, that he who steals goods belonging to a parish church may be indicted for stealing *bona parochianorum*; and it hath been adjudged, that he who takes off a shroud from a dead corpse may be indicted, as having stolen it from him who was the owner thereof when it was put on, for a dead man can have no property.

Hawk. P.C. c. 33. § 29. and several authorities there cited. See too Hickman's case, O. B. 1785, in 6th edit. of Hawk. P.C. Append. first, Sect. 13. note.

There is also a special case, in which a man may be guilty of felony in stealing goods, the absolute property whereof is in himself; as where one, who has delivered goods to a carrier or taylor, &c., afterwards, with an intent to charge such carrier or taylor, fraudulently and secretly takes them away.

Cro. Eliz. 536. Moor, pl. 981. Keilw. 70.

(C) What shall be said to be a felonious and fraudulent Taking.

Keling, 24.
H.P.C. 61.
Hawk. P.C.
c. 33.
(a) But the bare intention to commit was

TO constitute an offence felony, it is not sufficient that there be a fraud and (a) intent to steal, unless there be also a taking, for all felony includes trespass, and every indictment for larceny must have both the words *cepit & asportavit*; and therefore if there be no trespass in taking the goods, there can be no felony in carrying them away.

holden so very criminal, that at common law it was punishable as felony, when it missed its effect through some accident, no way lessening the guilt of the offender. S. P. C. 17. And though at this day felony shall not be imputed to a bare intention to commit it; yet the party may be severely fined for such an intention. Lev. 46. Sid. 23. 5 Mod. 206. and by a statute 7 Geo. 2. c. 21. an assault with an intent to rob is felony; but the offender may choose transportation.

3 Inst. 103.
H.P.C. 61.
S.P.C. 25.
a.
3 Inst. 108.

Therefore if a person finds goods, and converts them to his own use *animo furandi*, yet he is not guilty of felony.

So, if a person who has a limited property in the goods, as one who has goods delivered to him to keep, a carrier who has a box delivered to him to carry to a certain place, or a taylor who has cloth delivered to him to make into a suit of clothes; for here the party injured must seek redress by civil action, and must abide the folly of his own act in placing confidence in the person who was guilty of the breach of trust.

But though if I send a box to the carrier, and the carrier sells it, this is not felony; yet if the box be broke open, and the goods in it carried away, it is (b) felony; for he hath property in the box to carry it to the place appointed, but he hath no property in the goods in the inside, for that I have reserved in my own power, having locked it up out of the power of the carrier to whom it is sent; for no man hath property that is shut out from the command of the thing to which he pretends. So, if a carrier carries the goods to the place, and then steals them, this is felony; because the property is determined when the goods are come to the place appointed; besides, it is for publick convenience, that the inside of the box should be thus secured: otherwise the carrier might steal the things contained in the box, and yet deliver the box itself, which would not be of very easy discovery.

13 E. 4.
9, 10.
S.P.C. 25.
a.
Kelyng, 35.
Roll. Abr.
73. (b) So, where a weaver who has received silk to work, or a miller who has corn to grind, fraudulently and clandestinely take and embezzle part, it is felony; for in such case, the possession of such part, distinct from the whole, was gained by their own wrong, and in a manner more base than if they had been strangers. Hawk. P. C. c. 33. § 5.—[Where A. intending to go a distant journey, hires a horse, fairly and *bonâ fide*, for that purpose, and evidences the truth of such intention by actually proceeding on his way, and afterwards rides off with the horse, it is no theft; because the felonious design was hatched subsequent to the delivery, and the delivery being obtained without fraud or design, the owner parted with his possession as well as his property; O. B. 1784, p. 1294, and thereby gave to A. dominion over the horse, upon trust, that he would return him when the journey was performed. O. B. 1786, p. 333-4. But if the delivery of property be obtained with a pre-concerted design to steal the thing delivered, although the owner, in this case, parts with the thing itself, he still retains, in law, the constructive possession of it. And where the delivery of property is made for a certain, special, and particular purpose, the possession, except for such purpose, is still supposed to reside, unparted with, in the first proprietor. See several instances, a Hawk. P. C. c. 33. § 5. note 6th edition.]

He who has the bare charge of goods, as a shepherd has of sheep, or a butler of plate, or that has only the special use of goods, as a guest in an inn, and not the possession, may be guilty of larceny, in fraudulently taking them away; for the offence comes as properly under the word *cepit*, and the fraud is as secret, and the villany more base than if it had been done by a stranger.

If he who intending to steal goods obtains a delivery of them from the sheriff, by virtue of a replevin, or by way of execution of a judgment obtained by imposition on a court, without any colour of title, by false affidavits, &c., he may be indicted as having feloniously taken them, for the law will not endure to have its justice eluded by such shameful evasions.

Also he, who steals goods from one who had stolen them from me, may be indicted as having stolen them from me; because in judgment of law both the possession and property of them was always in me; and for this cause, he that steals goods in the county of *A.*, and carries them into that of *B.*, may be indicted in (*a*) either.

cannot be indicted at law, as having taken the goods at land, because the original taking was not such, whereof the common law takes cognisance. 3 Inst. 113. but for this *vide tit. Piracy.*

It was formerly a doubt, whether a lodger, by reason of the special property he had in the furniture of his lodgings, could be guilty of felony in taking them away; but now by the 3 & 4 *W. & M. cap. 9.* it is enacted, "That if any person or persons shall take away, with an intent to steal, embezzle, or purloin any chattel, bedding, or furniture, which by contract or agreement he or they are to use, or shall be let to him or them to use in or with such lodging, such taking, embezzling, or purloining, shall be, to all intents and purposes, taken, reputed, and adjudged to be larceny and felony, and the offender shall suffer as in case of felony."

ment also must set forth the name of the person by whom the lodgings were let. *O. B. 1784. No. 747.* And the property stolen must be such as may reasonably be construed the furniture of the sort of lodging taken. 1 Hawk. P. C. c. 33. § 10. note.]

By the 7 *Jac. 1. cap. 7.* it is enacted, "That if any sorter or kember, &c. of wool, or weaver of yarn, &c., shall embezzle it, &c., and shall be convicted before two justices of peace, he shall be whipped."

By the (*b*) 21 *H. 8. cap. 7.* if a servant (being of the age of eighteen years, and not an apprentice,) shall have a (*c*) casket, jewel, or money, or goods, or chattel of the master delivered to him by the (*d*) master to (*e*) keep, and such servant withdraw himself from the master, and go away with such casket, &c., to the intent to steal the (*f*) same and defraud the master, &c., or else being in the (*g*) service, without assent of the master, embezzle the same casket, &c., or any part thereof, or otherwise (*b*) convert the same to his own use, with like purpose to steal it, he shall be guilty of felony, if such casket, &c. be of the value of 40s.

all such as shall be committed in a dwelling-house or out-house. (*c*) Extend not to choses in action.

Moor, 246.
Poph. 84.
Hawk. P. C.
c. 33. § 6.
and note in
6th edit.

3 Inst. 108.
H. P. C. 63.
Kelyng. 43.
Sid. 254.
Raym. 276.

Hawk. P. C.
c. 33. § 9.
(a) But a
pirate carry-
ing to land
the goods
taken at sea
by piracy

Kelyng. 24.
Show. 50.
57. Hawk.
P. C. c. 33.
§ 10. [The
offender
must be a
lodger at
the time
the larceny
is com-
mitted.
*O. B. 1785.
No. 74.*
The indict-

See too
17 Geo. 3.
c. 56.

(b) The be-
nefit of
clergy was
taken away
from all fe-
lonies within
this statute
by 27 H. 8.
c. 17, and
restored by
1 E. 6. c. 12.
but taken
away again
by 12 Ann.
c. 7. from

Dyer,

Dyer, 5. Hawk. P. C. c. 33. § 14. (d) If delivered by a servant to a servant to keep, it is within the statute; for the delivery of such servant is the delivery of the master. Hawk. P. C. c. 33. § 13. (e) Therefore a receiver, who receives his master's rents, and runs away with them; or a servant, who being entrusted to sell goods, or to receive money due on a bond, sells the goods, &c. are not within the statute. Dyer, 5. pl. 2, 3. H. P. C. 62, 63. 3 Inst. 105. (f) Includes not the wasting or consuming of goods howsoever wilful it may be. H. P. C. 63. (g) Must be servant both at the time when the goods were delivered and when they were stolen. H. P. C. 63. (h) It hath been holden, that if a servant, who hath corn or money delivered to him by the master to keep, of his own head make the corn into malt, or melt down the money into plate, and then go away with it, he is not within the statute, because the property was altered. 5 H. 7. 16. a. Crom. 50. Dalt. c. 102. but *qu.* for Hawkins seems to be of a contrary opinion, and says, that it comes within the reason of those cases which have been adjudged within the statute; as where a servant makes up his master's cloth, delivered to him to keep, into a suit of clothes, or his leather into shoes, and then goes away with them; so, where the servant changed his master's money delivered to him to keep, from silver into gold, and then goes away with it. Hawk. P. C. c. 33. § 15.

[To the foregoing larcenies by breach of trust by lodgers and menial servants, the legislature has added two others, *viz.* by officers or servants employed to transact the business of the bank of England, stat. 15 Geo. 2. c. 13. § 12.; and by officers or servants employed in the post office, stat. 5 Geo. 3. c. 25. § 17. and 7 Geo. 3. c. 50.]

(D) What shall be said to be a carrying away.

(a) 3 Inst. 108.
2 Vent. 215.
(b) 27 Aff.
39. S. P. C.
26. 2. Bro.
Coron. 107.
Hawk. P. C.
c. 33. § 13.
2 Inst. 109.
Dalt. c. 102.
Hawk. P. C.
c. 33. § 13.

ALTHOUGH the word *asportavit* be (a) necessary in every indictment for this species of felony, (b) yet the felony lies in the very first act of removing the property; for if the felon be caught in the act of carrying the goods away before he is out of the house, it is felony; for the act of the mind declared by subsequent facts makes the crime.

Hence it hath been adjudged, that where a guest who had taken off the sheets from his bed with an intent to steal them, and carried them into the hall, but was apprehended before he could get out of the house, was guilty of larceny.

3 Inst. 109.

So, where a person having taken a horse in a close, with an intent to steal him, was apprehended before he could get him out of the close.

Dalt. 21.
Crom. 36.
By 14
Geo. 2.

So, if a person pulls off the wool from another's sheep, or strips their skins, with an intent to steal them, he is guilty of felony*.

c. 6 whoever steals, or kills with intent to steal, any part of any sheep or other cattle, or assists in so doing, is guilty of felony, without clergy. — Ten pounds reward on every conviction to be paid by the sheriff in a month; on default he forfeits double the sum, and treble costs. — By 15 Geo. 2. c. 24. the word cattle in the above act declared to extend to bull, cow, ox, steer, bullock, heifer, calf, and lamb, as well as sheep, and to no other cattle whatsoever.

Kelyng. 31.
[A man was
detected in
taking a

Also, where a person intending to steal plate, took it out of a trunk, wherein it was, and laid it on the floor, but was surprized before he could carry it away; it was adjudged felony.

bale of goods in a waggon. It appeared that the bale lay horizontally, and that he had set it on its end. As it had not been removed from the *spot*, it was holden, on a case reserved, that it was not a sufficient carrying away. But where a man, with a felonious intention, had removed goods from the head to the tail of a waggon, it was adjudged to be a sufficient removal to constitute a carrying away. O. B. 1784. So, a diamond ear-ring snatched from a lady's ear, but lodging in the curls of her hair, and not taken by the thief, was holden to be a sufficient asportation. O. B. 1784. 1 Hawk. P. C. c. 33. § 18. note, 6th edition.]

(E) By whom the Offence may be committed.

ALL those who are under a natural disability of distinguishing between good and evil, as infants under the age of discretion *, idiots, and lunatics, are not punishable by any criminal prosecution whatsoever, and consequently cannot be guilty of felony.

H.P.C. 10. Hawk. P.C. c. 1. But for this wide the heads of Infancy and Age, and of Ideots and Lunatics.——* But a court and jury will, from circumstances, judge, whether he is or is not of discretion. See Foster, fo. 70., &c. the case of William Yorke.

Also, a feme covert is so much favoured, in respect of that power and authority which her husband has over her, that she shall not suffer any punishment for committing a bare theft in company with, or by coercion of her husband.

Kelyng. 31. S.P.C. 26. Hawk. P.C. c. 1. § 9.

But if she be guilty of treason, murder, or (a) robbery, in company with, or by coercion of her husband, she is punishable as much as if she were sole. (a) But not if she be guilty of burglary with him.

S. P. C. 65. Hawk. P.C. c. 1. § Kelyng. 31.

Also, a feme covert may be guilty of larceny, if she of her own voluntary act, or by the bare command of her husband, steal the goods of a stranger, but not if she steal her husband's, because a husband and wife are considered but as one person in law; and the husband by endowing his wife at the marriage with all his worldly goods, gives her a kind of interest in them; for which cause, even a stranger cannot commit larceny in taking the goods of the husband by the delivery of the wife, as he may by taking away the wife by force, and against her will, together with the goods of the husband.

S.P.C. 65. Hawk. P.C. c. 1. § 11. c. 33. § 19.

(F) Of what Value the Things must be; and herein of the Difference between Grand and Petit Larceny.

A Person who steals the goods of another, let the value of them be never (b) so small, is guilty of felony; but it is (c) said to be no felony for one reduced to extreme necessity to take so much of another's victuals as will save him from starving*.

(b) Hal. P. C. 69. (c) Crom. 33. Dalt. c. 99. But if such necessity be

owing to his unthriftiness, it is far from being an excuse. Hawk. P. C. c. 33. § 20.——* This doctrine is now antiquated, the law of England admitting of no such excuse at present. Black. Com. 4 V. 31. and cites 1 Hal. P. C. 54.

But here we must observe the difference between grand and petit larceny, which is again divided into simple and mixt larceny.

Simple grand larceny is the felonious and fraudulent taking and carrying away the personal goods of another, not from his person, nor out of his house, where the goods are above the value of twelve pence, but if of that value, or under, then it is petit

S.P.C. 27. Crom. 33. H.P.C. 74. Hawk. P.C. c. 33. § 31.

petit larceny; if from his person, or out of his house, it is called mixt larceny, but hath no greater degree of guilt attending it at common law than simple larceny, for in both cases the offender was allowed the benefit of his clergy, but is at this time in several instances excluded by acts of parliament.

S.P.C. 24. If two or more persons together steal goods above the value of
Crom. 36. 12*d.*, every one of them is guilty of grand larceny, for each
H.P.C. 70. person is as much an offender as if he had committed the fact alone.

S.P.C. 24. Also, if one at several times steal several parcels of goods,
Crom. 36. each under the value of 12*d.*, but amounting in the whole to
H.P.C. 7. more, from the same person, and be found guilty thereof on the
But this fe- same indictment, he shall have judgment of death as for grand
verity is sel- larceny.
dom used.
Hawk. P.C.

c. 33. § 33. [But it is now settled, that the stealing must be to that amount at one and the same particular time.]

Hetl. 66. If one be indicted for stealing goods to the value of ten shil-
Hawk. P.C. lings, and the jury find specially that he is guilty, but that the
c. 33. § 35. goods are worth but ten pence, he shall not have judgment of
(a) Petit death, but (a) only as for petit larceny.
larceny is
not punished

with the loss of life or lands, but only with the forfeiture of goods and whipping, or other corporal punishment. H. P. C. 70. Hawk. P. C. c. 33. § 36. It is now, by 4 Geo. 1. c. 11. and 6 Geo. 1. c. 23. punishable by transportation for seven years.

(G) Where the Offender is or is not excluded his Clergy.

11 Co. 29. BY the common law a person guilty of any crime, which sub-
2 Inst. 634. jected him to the loss of life or member, was allowed his
For the more accurate (b) clergy, except in high * treason and sacrilege.

knowledge hereof, *vide* 2 Hawk. P. C. c. 23. (b) None were entitled to this privilege but ecclesiasticks; but as the clergy were judges hereof, they extended this privilege to the clerk that set the psalm, the door-keeper, the exorcist, the subdeacon, the reader, &c. and as they extended it too far, it was necessary to restrain them; and therefore the temporal and ecclesiastical power joined in making the reading before the secular and spiritual judge the test of their being ecclesiasticks; for it was a strong presumption, in those times of ignorance, that a man was an ecclesiastick if he could read; and therefore the reading was before the secular judge; but the attestation, that he could read, was by the ordinary. — By the 21 Jac. 1. c. 16. and 3 & 4 W. & M. c. 9. women (the better half of the human race. *Fost. Cr. Law*, 305.) shall have this privilege in such cases as men; but by 4 & 5 W. & M. c. 24. § 15. only once. — By the 1 E. 6. c. 12. a lord of parliament shall have this privilege, though he cannot read, without burning in the hand. — And by 5 Ann. c. 6., if any person, convicted of such felony for which he ought to have his clergy, pray the benefit of that act, he shall not be required to read, but shall be punished as a clerk convicted. — A person is not entitled to this privilege more than once. 4 H. 7. c. 13. — Where it may still, in certain cases, be allowed to one actually in holy orders, *vide* 28 H. 8. c. 1. 32 H. 8. c. 3. 1 E. 6. c. 12. — And how a former allowance thereof is to be proved and certified, *vide* 34 & 35 H. 8. c. 14. 2 & 3 E. 6. c. 33. & 3 & 4 W. & M. c. 9. — (*) But see *Fost. Cr. Law*, 190.

H.P.C. 232. And therefore it may be laid down as a good general rule, that
2 Hawk. wherever a person is denied the benefit of his clergy, as he is in
P. C. c. 33. petit treason, murder, robbery, burglary, arson, &c., such denial
§ 23. must be grounded on some act of parliament, which excludes him from the benefit of it.

It

It is also a general rule, that where an offence is made felony by statute, it shall have the benefit of clergy, unless expressly excluded. H. P. C. 230. 2 H. H. P. C. 330. 334. c. 33. § 24. 335. 3 Inst. 39. 73. Kel. 104. 2 Hawk. P. C.

So, wherever a person is denied the benefit of the clergy in respect of a statute excluding it from the crime charged against him, the indictment or appeal, and the evidence thereon, must expressly bring his case within the words of such statute. 2 Hawk. P. C. c. 33. § 25.

A statute, by excluding principals from their clergy, doth not thereby exclude the accessaries before or after, & *sic e converso*; and a statute generally excluding those who shall be found guilty of murder, robbery, or burglary, or other crime, without saying any thing of accessaries, shall be construed to intend principals only. 2 Hawk. P. C. c. 33. § 26.

Where clergy is allowable, those who stand mute or challenge above twenty, or are outlawed, are as much entitled to it, as those who are convicted. 2 Hawk. P. C. c. 33. § 27.

Also, a statute, by taking away clergy from those who shall be found guilty, doth not thereby take it from those who stand mute, or challenge above twenty, or are outlawed; but a statute taking it from those who shall be found guilty, extends as well to those who shall confess themselves guilty upon record, as to those who shall be found guilty by verdict. 2 Hawk. P. C. c. 33. § 28.

But what we are chiefly to take notice of here are the several cases in which by statute the benefit of the clergy is taken away from this species of felony called larceny.

And first by the 8 *Eliz. cap. 4.* it is enacted, "That no person, who shall be indicted or appealed for felonious taking
" (a) any money, goods, or chattels from the person of any
" other, (b) privily without his knowledge, in any place whatsoever, and thereupon found guilty by verdict of twelve men,
" or shall confess the same upon his or their arraignment, or will
" not answer directly to the same, according to the laws of the
" realm, or shall stand wilfully, or of malice, or obstinately
" mute, or challenge peremptorily above the number of twenty,
" or shall be upon such indictment or appeal outlawed, shall be
" admitted to his clergy." (a) Yet if the jury find the offender guilty under the value of 12d. he shall not have judgment of death, but only as of petit larceny. Hawk. P. C. c. 36. § 4.

H. P. C. 75. (b) The offence must be laid to be done *clam* and *secretè*, in exact pursuance of the statute, otherwise the party shall have the benefit of his clergy. H. P. C. 75. Hawk. P. C. c. 36. § 3. — And therefore if a man takes off another's hat from his head and runs away with it, or comes into a shop and cheapens goods, and runs away with them without paying for them, it is not within the statute, nor indeed an offence indictable as a felony, but rather a trespass, unless the offender were either unknown, or immediately fled the country if he were known. Dyer, 224. 2 Roll. Rep. 154. H. P. C. 73. Raym. 275.

By the 1 *E. 6. cap. 12.* and 2 & 3 *E. 6. cap. 33.* horse stealers are excluded the benefit of their clergy, and by the latter of these statutes it is enacted, "That all persons feloniously taking or
" stealing any horse, gelding, or mare, shall not be admitted to
" the privilege of the clergy, but shall be put from the same in
" like manner and form as though they had been indicted or ap-
" pealed for felonious stealing of two horses, two geldings, or
" two mares, of any other, and thereupon found guilty by ver-
" dict

“dict of twelve men, or confessed the same upon their arraignment, or stand wilfully or of malice mute.”

See Observations on the Statutes, p. 288. ed. 1766.

* By 3 *W. & M. c. 9.* “If any one shall steal goods from any shop or warehouse belonging to a dwelling house to the value of 5s., he shall not be entitled to his clergy, *although no person shall happen to be within.*” Stat. 10 & 11 *W. 3. c. 23.*, besides including coach houses and stables, does not make it necessary, that the shop or warehouse shall be belonging to the dwelling house, which is required by 3 & 4 *W. & M. c. 9.*—and I the rather take notice of this distinction between the two laws, as Mr. Justice Foster has reported in his *Crown Law*, fol. 78., a decision at the Old Bailey in July 1751, that this statute does not extend to any warehouse which is a mere repository for goods, but only where merchants and traders deal with, and sell to their customers. It should seem however, that these distant warehouses were those expressly, which were intended to be protected by this statute; as the shop or warehouse belonging to a dwelling house was before protected by 3 & 4 *W. & M. cap. 9.*, and the more distant the warehouse, the more probable it is that it should be broke open.*

By the 10 & 11 *W. 3. cap. 23.* (commonly called the *shop-lifting act*,) “All persons, who by night or day shall in any shop, warehouse, coach house, or stable privately and feloniously steal any goods, wares, and merchandizes of the value of 5s., or more, though such shop, &c. be not broke open, and though the owner or any other person be not in such shop, &c., or that shall assist, hire, or command any person to commit such offence, being thereof convicted, or attainted by verdict or confession, or being indicted thereof shall stand mute, or challenge above twenty of the jury, shall be excluded from the benefit of the clergy.”

And by the 12 *Ann. cap. 7.* it is enacted, “That every person, who shall feloniously steal any money, goods, or chattels, wares or merchandizes of the value of 40s., or more, being in a dwelling house, or outhouse thereunto belonging, although such house or outhouse be not actually broken by such offender, and although the owner of such goods, or any other person or persons, be or be not in such house or outhouse, or shall assist or aid any person or persons to commit any such offence, being thereof convicted or attainted by verdict or confession, or being indicted thereof shall stand mute, or shall peremptorily challenge above the number of twenty returned to be of the jury, shall be absolutely debarred of and from the benefit of the clergy, &c. *Provided*, that nothing in this act shall extend to apprentices under the age of fifteen years, who shall rob their masters as aforesaid.”

By the 22 *Car. 2. cap. 5.* it is enacted, “That no person who shall be indicted for feloniously cutting and taking, stealing or carrying away any cloth or woollen manufactures from the rack or tenter in the night-time, and thereupon found guilty by verdict of twelve men, or shall confess the same on arraignment, or will not answer directly to the same according to the

“law

“law of the realm, or shall stand wilfully of malice mute, or
 “challenge peremptorily above the number of twenty, or shall
 “be upon such indictment outlawed, shall be admitted to the
 “benefit of the clergy; and by the same act to steal or embezzle
 “any of his majesty’s fail, cordage, or any other his majesty’s
 “naval store, is excluded the benefit of the clergy.”

That all persons, who shall steal any goods out of any parish church, or other church of chapel, are in all cases excluded the benefit of the clergy.

Vide 2
Hawk. P.C.
c. 33. § 72,
3, 4, 5, 6.

(H) Where the Offender is to be transported.

IT is enacted by 4 *Geo. 1. cap. 11.* and 6 *Geo. 1. cap. 23.* “That
 “where any person or persons shall be convicted of grand or
 “petit larceny, or any felonious stealing or taking of money,
 “goods, or chattels, either from the person or in the house of
 “any other, or in any other manner, and who by the law shall
 “be entitled to the benefit of the clergy, and liable only to the
 “penalties of burning in the hand or whipping, (except persons
 “convicted for receiving or buying stolen goods, knowing them
 “to be stolen,) it shall and may be lawful for the court before
 “whom they were convicted, or any court, held at the same or
 “any other place, with the like authority, if they think fit, in-
 “stead of ordering any such offenders to be burnt in the hand,
 “or whipt, to order and direct that such offenders shall be sent,
 “as soon as conveniently may, to some of his majesty’s colonies
 “and plantations in *America* for the space of seven years; and
 “that court before whom they were convicted, or any subse-
 “quent court, with like authority as the former, shall have power
 “to convey, transfer, and make over such offenders, by order of
 “court, to the use of any person or persons who shall contract
 “for the performance of such transportation to him or them,
 “and his and their assigns, for such term of seven years; and
 “where any person shall be convicted for any crimes, for which
 “they are excluded their clergy, and the king shall extend his
 “mercy to them upon condition of transportation to any part of
 “*America*, and such intention of mercy be signified by a princi-
 “pal secretary of state, it shall be lawful for any court, having
 “proper authority to allow such offenders the benefit of a par-
 “don, to order and direct the like transportation to any person,
 “who will contract for the performance thereof, of any such of-
 “fenders; as also of any person convict of receiving or buying
 “stolen goods, knowing them to be stolen, for the term of four-
 “teen years, in case such condition of transportation be general,
 “or else for such other term as shall be made part of such con-
 “dition; and such person so contracting, and his assigns, shall
 “have an interest in the service of the said offenders for such
 “term of years; and if any such offender return into *Great*
 “*Britain* or *Ireland*, before the end of his term, he shall be
 “liable

[Though transportation was not established by legislative authority before 4 *Geo. 1.*, yet long before that time, (probably from the original planting of colonies in the *West Indies*,) transportation was frequent, as appears from the introduction to Kelynge’s Reports. *Per Gould, J. 2 H. Bl. Rep. 223.*]

“ liable to be punished as any person attainted of felony, without the benefit of clergy, &c. Provided, That the king may pardon and dispense with any such transportation, and allow of the return of such offender, paying his owner, at the time, such sum as shall be adjudged reasonable by any two justices of the peace, where such owner dwells, and where any such offenders shall be transported, and shall have served their terms, such services shall have the effect of a pardon, as for the crimes for which they were transported.”

And it is further enacted, “ That every such person, to whom any such court shall order any such offenders shall be transferred or conveyed, shall, before such offenders shall be delivered to them, contract with such person as shall be appointed by such court, and shall give sufficient security, to the satisfaction of such court, for the transporting such offenders to some plantation in *America*, to be ordered by such court, and the procuring an authentic certificate from the governor, or chief custom-house officer, of the place of the landing of such offenders, &c., and their not returning by the wilful default of such contractor.”

And it is further enacted, by 6 Geo. 1. cap. 23., “ That the court may nominate two or more justices of the peace, for the place where such offenders shall be convicted, who shall have power to contract with any person or persons for the performance of the transportation of such offenders, and to order such and the like security, as the said former act directs, to be taken by order of court, and to cause such felons to be delivered to such contractors; which said contracts and security shall be certified by the said justices to the next court, held with like authority, to be filed, &c.”

And it is further enacted, “ That all charges, in or about such contracts, &c., shall be borne by each county, &c. for which the court was held, and that the respective treasurers shall pay the same; and that all securities for transportation shall be by bond in the names of the clerks of the peace, &c., and the money recovered shall be to the use of the respective counties.”

And it is further enacted, “ That the persons so contracting, &c. may carry such offenders towards the sea-port, &c., and that if any person shall rescue such offenders, or aid them in making their escape, &c., they shall be deemed guilty of felony without clergy; and that if any felon ordered for transportation shall be afterwards at large within any part of *Great Britain*, without some lawful cause, before the expiration of his term, and be lawfully convicted thereof, he shall suffer death without clergy, and may be tried before justices of assize, *oyer and terminer*, or gaol-delivery, for the county where he shall be apprehended, &c., or from whence he was ordered to be transported, &c., and that the clerk of assize, and clerk of the peace, where such orders of transportation shall be made, shall, on request of the prosecutor, &c., certify briefly a transcript, “ containing

See further
16 Geo. 2.
c. 15. 24
Geo. 3.
Sess. 2.
c. 56. § 5.

"containing the tenor of every indictment, conviction, and
"order of transportation, to the justices of assize, &c., which
"shall be sufficient proof of such conviction and order of trans-
"portation."

[It is provided by the 8 Geo. 3. c. 15. that where any offender shall be convicted without benefit of clergy, and the judge shall grant a reprieve, if the king shall afterwards pardon such offender on condition of transportation, and such intention shall be signified by a secretary of state to the judge recommending mercy, such judge may make an order for the immediate transportation of the offender, in like manner as if such intention had been signified during the continuance of the assizes at which the offender was convicted.]

In consequence of the defection of the *American* colonies, the laws upon this subject have undergone considerable alterations, for which see the statutes of 19 Geo. 3. c. 74. 24 Geo. 3. sess. 2. c. 56. 25 Geo. 3. c. 46. 27 Geo. 3. c. 2. 28 Geo. 3. c. 24. 30 Geo. 3. c. 4. and 34 Geo. 3. c. 60.]

Felo de se.

A Person who wilfully destroys himself is termed a *felo de se*, and is said to be guilty of the worst sort of (a) murder, as he acts against the first principle of reason, which is that of self-preservation.

Plow. 261.
Dame
Hales's case.
(a) Yet in
some cases
it is con-

sidered as a different offence; and therefore if the king pardons all crimes, except murder, this offence shall be pardoned; for though in a strict sense it may be called murder, yet according to the common acceptation of words, the offence of a person who murders another, and that of *felo de se*, are considered as distinct offences, and as such are distinctly treated of by authors who have written of these matters; as Stam. P. C. 183. &c. Besides, the end of excepting murder seems to be, that the offender might be brought to justice, and that the law of God and Nature, which require blood for blood, might be satisfied; but the discharging a chattel, or pardoning a forfeiture, is not of any such consequence; also it hath been held by divines, that pardoning murder draws *periculum animarum* with it, as being contrary to the law of God, which requires blood for blood. The King v. Ward, Lev. 8. Sid. 150. Keb 66. 543. S. C. adjudged. — It is also in common parlance taken as a distinct offence from other felonies; and therefore a grant of *bona & catalla felonum* will not carry the goods of a *felo de se*. Sid. 420. Vent. 32. Saund. 274. adjudged.

In treating of this Offence, it will be necessary to consider,

- (A) Where a Person shall be said to be a *Felo de se*.
- (B) Of the Manner of finding him such.
- (C) What he shall forfeit for this Offence.

(A) Where a Person shall be said to be *Felo de se*.

NO person can be *felo de se*, who is under the age of discretion, or *non compos* at the time he commits the fact; and therefore if an infant kill himself under the age of discretion, or a (a) lunatic during his lunacy, he cannot be a *felo de se*.

it is said to be the prevailing opinion, that a person who kills himself must be *non compos* of course, on this supposition, that it is impossible a man in his senses should do a thing so repugnant to nature and reason; but in Hawk. P. C. c. 27. § 3. this notion is justly exploded. 4 Bl. Comm. 189.

Not only he who deliberately kills himself, but also he who maliciously attempting to kill another happens to kill himself, is a *felo de se*; as if *A.* discharge a gun at *B.*, with an intent to kill him, and the gun burst and kill *A.*, or if *A.* strike *B.* to the ground, and then hastily falling upon him, wound himself with a knife which *B.* happens to have in his hand, and die; in both these cases *A.* is *felo de se*, for he is the only agent.

But if a man be killed by hastily running on a knife or sword which a person assaulted by him, and driven to the wall, holds up in his defence, he shall not be adjudged a *felo de se*, but the other shall be judged to have killed him *se defendendo*.

If one person kills another, though by his desire and entreaty, yet the person so killed is not a *felo de se*, but he who killed him is as much a murderer as if he had acted out of his own head; for every assent of that kind is void, being against the laws of God and man.

But if two persons agree to die together, and one of them, at the persuasion of the other, buys ratbane, and mixes it in a potion, and both drink of it, and he who bought and made the potion survives, by using proper remedies, and the other dies, it seems the better opinion, that he who dies shall be adjudged a *felo de se*, because all that happened was originally owing to his own wicked purpose, and the other only put it in his power to execute it in that particular manner.

(B) Of the Manner of finding him such.

NO person can be a *felo de se* before he is found such by some inquisition, which ought regularly to be by the coroner *super visum corporis*, if the body can be found.

But if the body cannot be found, so that the coroner, who has authority only *super visum corporis*, cannot proceed, the inquiry may be by justices of the peace, who by their commission have a general power to enquire of all felonies; or in the *King's Bench*, if the felony were committed in the county where the said court sits; and such inquisitions are traversable by the executors, &c.

But it was formerly holden, that, with regard to the high credit which the law gives to inquests found before the coroner, no

no such inquest found before him could be traversed; but this has been ruled otherwise of late, and it seems now settled, that such inquest being moved into the *King's Bench* by *certiorari*, may be there traversed by the executor or administrator of the person deceased, or by the king or lord of the manor, &c.

2 Keb. 859.
2 Jon. 198.
Vent. 278.
3 Keb. 564.
566. 604.
800. Skin.
45. pl. 16.
Salk. 377.
pl. 21.

All inquisitions of this offence, being in the nature of indictments, ought particularly and certainly to set forth the circumstances of the fact, as the particular manner of the wound, and that it was mortal, &c., and in the conclusion add, that the party in such manner murdered himself.

And therefore if either the premises be insufficient, as if it be found that the party flung himself into the water, & *sic seipsum emergit*, which is nonsense, because *emergeo* signifies only to rise out of the water; or if there be wanting the proper conclusion, & *sic seipsum murdravit*, the inquisition is not good.

3 Lev. 140.
12 Mod.
112.

Yet if it be full in substance, the coroner may be served with rule to amend a defect in form.

Vide 2 Lev.
152. Sid.
225. 259.
Fitzgib. 6.

Keb. 907. 3 Mod. 101. Salk. 377. pl. 21.

(C) What he shall forfeit for this Offence.

A *Felo de se* forfeits all chattels real or personal which he hath in his own right, and also all such chattels real whereof he is possessed, either jointly with his wife, or in her right; and also all bonds, and other personal things in action, belonging solely to himself; and also all personal things in action, and, as some say, entire chattels in possession, to which he was entitled jointly with another, on any account, except that of merchandize; but it is said, that he shall forfeit a moiety only of such joint chattels as may be severed, and nothing at all of what he was possessed as executor or administrator.

Stamf.
P. C. 183,
189.
H. P. C. 29.
Plow. 243.
262.
Crom. 31. a.
3 Inst. 55.
19 H. 6.
47. a.
8 E. 4. 24. b.
Raym. 7.

But the blood of a *felo de se* is not corrupted, nor his lands of inheritance forfeited, nor his wife barred of her dower.

Also, no part of the personal estate is vested in the king before the self-murder is found by some inquisition, and consequently the forfeiture thereof is saved by a pardon of the offence before such finding.

162. 2 Mod. 53. 3 Mod. 100. 241. cont. Lev. 8. Keb. 67, 68.

But if there be no such pardon, the whole is forfeited immediately after such inquisition, from the time such mortal wound was given, and all intermediate alienations are avoided.

Plow. 260.
5 Co. 110.
For process
from the

crown-office against a debtor of *felo de se*, *vide* Saund. 273.

Feoffment.

Spelm.
Gloss. 5^{re}.

AS all property in lands began by occupancy, so it seems the first method of transferring property was by investiture; for as no man could originally appropriate, but by settling himself in the possession and application of it to his own use, so no man could transfer but by a solemn and publick delivering over the possession, and the ceremony used in such act of delivery is in our law called livery and seisin, and is thus defined, *solemnis rei feudalis traditio sub præstatione fidei coram testibus vassallo facta*.

The end and design of this institution was, by this sort of ceremony or solemnity, to give notice of the translation of the feud from one hand to another; because if the possession might be changed by the private agreement of the parties, such secret contracts would make it difficult and uncertain to discover in whom the estate was lodged, and consequently the lord would be at a loss of whom to demand his services; and strangers equally perplexed to discover against whom to commence their actions for the prosecution and recovery of their right: to prevent therefore this uncertainty, the ceremony of livery and seisin was instituted.

This method of conveyance was made use of before men were acquainted with letters, and therefore it was required to be on the land, or near the land, that the other tenants of the manor might be witnesses of it, who in those days were called to the lord's court, to determine all controversies relating to such translation; and though after the use of letters a charter of feoffment was introduced, yet was not this necessary, but only tended to the authentication or evidence of it; and so our law determined, before the statute of frauds and perjuries, as is observed hereafter.

For the better understanding this method of conveyance, we shall consider,

(A) The several Sorts of Livery in our Law: And herein,

1. Of Livery in Deed.
2. Of Livery within View, or in Law.

(B) The Effect and Operation of Livery: And herein,

1. The Effect thereof to pass a future Interest.

2. The

2. The Operation thereof, where the Feoffor is out of Possession.
3. In what Cases several Parcels will pass by one Livery, or where several Parties may take by Livery to one.

(C) Of the Charter of Feoffment; and herein what Things are necessary to the making of a perfect Charter, and how far the Charter governs the Livery which is relative to it.

(D) Who may make a Feoffment.

(E) Of making it by Letter of Attorney.

(A) The several Sorts of Livery in our Law: And herein,

1. Of Livery in Deed.

THE livery in deed is the actual tradition of the land, and is made either by the delivery of a branch of a tree, or a turf of the land, or some other thing, in the name of all the lands and tenements contained in the deed; or it may be made by words only, without the delivery of any thing; as if the feoffor being upon the land, or at the door of the house, says to the feoffee, I am content that you should enjoy it according to the deed, or enter into this house or land, and enjoy this land according to the deed; this is a good livery to pass the freehold, because in all these cases, the charter of feoffment makes the limitation of the estate, and then the words spoken by the feoffor, on the land, are a sufficient *indicium* to the people present, to determine in whom the freehold resides during the extent of the limitation; besides, the words, being relative to the charter of feoffment, plainly denote an intention to enfeoff.

But if a man without any charter, being in his house, says, I here demise you this house, as long as I live, paying 20*l.* per ann., this passes no freehold, but only an estate at will, because the word *demise* denotes only the extent of the limitation of the estate intended to be conveyed; but bare words of limitation, without some act or words to discover the intention of the feoffor to deliver over the possession, are not sufficient to convey the freehold; for if a charter of feoffment be made to a man and his heirs, this, without some other act or words to give the possession, only passes an estate at will, because the act of delivery is requisite to the perfection of the charter; but besides the charter of feoffment, there must be some act or words to deliver over the possession before the feoffee can enjoy it pursuant to the charter.

Co. Lit.
48. a.
6 Co. 137. b.
Thorough-
good's case.
6 Co. 26.
Sharp's case.
2 Roll. Abr.
7. and *vide*
Cro. Jac.
80. which
seems *cont.*

6 Co. 26.
2 Roll. Abr.
7. Co.
Lit. 48.
Cro. Eliz.
482.
9 Co. 138.
Moor, pl.
632.

9 Co. 137.
b. 138. a.
Co. Lit.
48. a. 57. a.
2 Roll.
Abr. 7.
6 Co. 26.

But if the feoffor had delivered the charter *upon the land* in the name of feisin of all the lands comprized in the deed, this had been good to execute the deed, and to give livery also; because the bare delivery of the deed is good to execute it as a deed, and the delivery of the deed or any other thing, in the name of feisin of the land, is sufficient to give livery, because the intention of those solemn acts is only to discover to all persons in whom the freehold is lodged; and this end is as effectually answered by the delivery of a deed, or any thing else in the name of a feisin, as of a turf or a twig, the one being equally visible and notorious as the other.

Moor, pl.
286.
Keale's case.
Cro. Eliz.
25.

A., being seised of lands in fee, borrowed 20*l.* of *B.*, and for re-payment agreed to assure him the land; and thereupon they both went to the land, where *A.* said to *B.*, I am indebted to you 20*l.*, and if I do not pay you before *Michaelmas*, then I bargain and sell this land to you, and if I pay you then, I shall have my land again; and then put *B.* in possession of the land; this was holden a good livery, because here the possession was actually delivered pursuant to the agreement of assuring the land for the security of the money, which possession was to be reverted on the payment of the money by *A.* the feoffor.

2. Of the Livery within View, or the Livery in Law.

Pollex. 47.

The livery within view, or the livery in law, is when the feoffor is not actually on the land, or in the house, but, being in sight of it, says to the feoffee, I give you yonder house or land, go and enter into the same, and take possession of it accordingly: this sort of livery seems to have been made at first only at the court barons, which were anciently holden *sub dio* in some open part of the manor, from whence a general survey, or view, might have been taken of the whole manor, and the *pares curiæ* easily distinguished that part which was then to be transferred.

Co. Lit.
48. b.
2 Roll.
Abr. 3. 7.
Vent. 186.
Moor, 85.
Pollex. 43.

But this sort of livery is not perfect to carry the freehold till an actual entry made by the feoffee, because the possession is not actually delivered to him, but only a licence or power given him by the feoffor to take possession of it; and therefore, if either the feoffor or feoffee die before an entry made by the feoffee, the livery within the view becomes ineffectual and void; for if the feoffor dies before entry, the feoffee cannot afterwards enter, because then the land immediately descends upon his heir, and consequently no person can take possession of his land without an authority delegated from him who is the proprietor; nor can the heir of the feoffee enter, because he is not the person to whom the feoffor intended to convey his land, nor had he any authority from the feoffor to take the possession; besides, if the heir of the feoffee were admitted to take possession after his father's death, he would come in as a purchaser, whereas he was mentioned in the feoffment to take as the representative of his ancestor, which he cannot do since the estate was never vested in his ancestor.

But

But if the feoffee, in such case, dare not enter into the land without peril of his life, he may claim the land, as near as he may safely venture to go, and this shall be sufficient to vest the possession in him, and render the livery within view perfect and complete; for nobody is obliged to expose his life for the security of his property; but when he has gone as far as he may with safety, the law very reasonably looks upon such intention to be as effectual as the act itself; for otherwise it might be in the power of a man, by his own act of violence, to deprive another of his right, and thereby to receive an advantage from an unlawful act.

2 Roll.
Abr. 3.
Co. Lit.
48. b.

If a man delivers a charter of feoffment to his feoffee, within view, and says, I will that you have the lands that you see there, the which are comprised in this charter, according to the purport of the charter, this is a good livery within view; for the charter of feoffment fully denotes the intention to enfeoff, and the words are a licence to the feoffee to enter into the land, and to take the possession thereof, according to the charter.

2 Roll.
Abr. 7.

But if the feoffor had only delivered the charter of feoffment within view, and only shewed the feoffee the lands, without saying any thing, though the feoffee had actually entered into the land, and the feoffor had afterwards agreed to the entry, yet this it seems is no good feoffment; because the bare shewing of the lands to the feoffee implies no authority or licence from the feoffor to take possession; and consequently the entry being without any authority cannot vest the freehold in him, because there was no solemn act, nor publick declaration, made by the feoffor, by which the *pares* might discover a real intention to charge the possession, and the subsequent agreement of the feoffor can never support an act which was originally void; for though the feoffee, after the delivery of the charter, might take the usufructuary possession as tenant at will, yet the freehold still continued in the feoffor, for that cannot pass from one to another, without some solemn or publick declaration, that the *pares* may, upon any dispute, determine in whom the freehold resides.

2 Roll.
Abr. 7.
2 Co. 55. b.

If a man makes livery within view, to a woman, and before she enters, the feoffor marries her, and afterwards never claims any thing but in right of his wife, this is a good execution of the livery; for the husband claiming the land, in right of his wife, shall be sufficient to reduce the lands actually into her possession, since he is the proper person to transact for her; and therefore shall be presumed to have parted with and delivered up the possession to her, since after the coverture he claimed the land only in her right.

Perk.
§ 214.
2 Roll.
Abr. 3.
Bro. Feoff.
ment, 57.
Vent. 186.
Pollex. 53.

So, where two women were jointenants in fee, and one of them made a feoffment to a man, and livery within view, by saying, go, enter, and take possession; and before the man entered, he married the feoffor; his entry after the marriage was a good execution of the livery, because, by the livery within the view, an interest passed to the feoffee, which is not revocable by the feme; and his entry after the coverture makes the utmost

Mod. 91.
2 Keb. 872.
880.
Vent. 186.
Parlons and
Perus.
Pollex. 45
to 53.

notoriety the thing is capable of, to discover in whom the freehold is lodged, and his entry shall be intended for his benefit; and therefore shall have a retrospect to the livery in view to make it a perfect feoffment.

Co. Lit. 48.
b.

The livery within view may be made of lands in another county than where the lands lie, because the translation of the feud was often made at the court baron, in the presence of *pares curiæ*; and these courts being holden *sub dio*, the *pares* could have a distinct view of every part of the manor; and therefore were proper to attest this sort of investiture though the lands were in a different county, for notwithstanding that, they might have been part of the same manor for which the court was holden.

(B) The Effect and Operation of Livery: And herein,

1. Of the Effect thereof to pass a future Interest.

Cro. Eliz.
451.
2 Vent. 204.
Co. Lit.
217.
5 Co. 94. b.

THIS ceremony was first instituted, that the *pares* of the county might, upon any dispute relating to the freehold, determine in whom it was lodged, and thence be the better enabled to determine in whom the right was. Hence therefore it is, that if a man makes a feoffment, or lease for life, to commence *in futuro*, and makes livery immediately, the livery is void, and only an estate at will passes to the feoffee; for the design of the institution would fail, if such livery were effectual to pass the freehold; for it would be no evidence or notoriety of the change of the freehold, if, after the livery made, the freehold still remained in the feoffor; the use of the investiture would rather create than prevent the uncertainty of the freehold, and in many cases would put men to fruitless trouble and expence in pursuit of their right; for by that means, after a man had brought his *præcipe* against a person, whom he supposed to be tenant to the freehold, and had proceeded in it a considerable time, the writ might abate by the freehold's vesting in another, by virtue of a livery made before the purchase of the writ. Another reason why such future interests cannot be allowed to pass by any act of livery was, because no man would be safe in his purchase, if the operation of livery might create an estate, to commence many years after the livery was made; and though they have allowed a future interest, to commence by way of lease, yet that had no such ill effect in making purchases uncertain, because anciently they were under the power of the freeholder, who by recovery might destroy them; and now, unless such leases were made upon good considerations, they are fraudulent against a purchaser; and it is not to be presumed, that leases at great distances should be purchased for value.

2 Co. 55.
Buckler's
case.

Hence, by the way, we may account why a freehold in reversion or remainder cannot be granted *in futuro*, though there no livery

livery is necessary to pass it; as where *A.* was tenant for life, remainder to *B.* in fee; *A.* made a lease for years to *C.*, and afterwards granted the land to *D. habend.* from *Mich.* next ensuing, for life; this grant to *D.* was adjudged void, though *C.* attorned to it after *Michaelmas*, because such future grants create an uncertainty of the freehold, and the tenant of the freehold being the person who is to answer the stranger's *præcipe*, and was answerable to the lord for the services, it were unreasonable to permit him, by any act of his own, to prevent or delay the prosecution of their right.

But where a man makes a lease to commence from *Michaelmas*, and after *Michaelmas* makes a livery and seisin, this is sufficient to pass the freehold, because in this case, at the time of the livery made, the possession and freehold were actually transferred to the lessee, and did not remain in the lessor, after the notoriety made, which gives notice of transferring the freehold.

Yet if the feoffor had made a letter of attorney to give livery, the attorney could not give livery after *Michaelmas*, unless an express authority were therein contained for it, because the natural import of such authority is to give livery immediately, and the authority of the representative cannot extend beyond the delegation.

A. by indenture demised to *B. habend. a die datûs* (which was the 10th of *June*) *indenture prædictâ.* for his life, with a letter of attorney to make livery; the attorney made livery the 23d of *July* following, and the livery was holden to be void, because the estate for life being by the indenture to commence the 10th of *June*, the attorney had no authority to change the commencement of the estate; and therefore not having pursued his authority, by not giving livery to let the freehold commence, according to the deed, what he did afterwards was without any authority, and consequently void; but in this case, if the deed had not been delivered till after the day of the date, and the attorney had given livery *at the time of the delivery of the deed*, this had been a good livery, because the deed of feoffment was to govern the livery, but the deed itself had no effect till the delivery; and therefore the attorney making the livery at the time the deed of feoffment began to operate, which was to govern it, he seems thereby to have executed his authority well enough.

If a man makes a feoffment to commence after his own death, or makes a feoffment in this manner, being upon the land, *I do here, reserving an estate for my own and my wife's lives, give you these my lands to you and your heirs*, these are void feoffments, because the possession is not delivered at the time of the notoriety made; and therefore, if such feoffments were allowed, the investiture would be so far from being an evidence, to discover in whom the freehold is lodged, that it would often mislead the juries in such inquiries; besides, it were absurd to suffer a man to reserve a particular estate to himself, and thereby in the same contract be both feoffor and feoffee.

2 And. 29.
Moor, 423.
Cro. Eliz.
450. 585.
Hob. 170,
171.
5 Co. 94.
Roll. Rep.
261.

Hob. 314.
Cro. Jac.
563. Green-
wood v.
Tyler, Cro.
Jac. 458.
3 Bull. 290.
Smith and Bole.

Cro. Jac.
563.
Hob. 314.

Cro. Jac.
153. Hen-
nings and
Panchardin,
Moor, pl.
876. Cro.
Eliz. 873.

Cro. Eliz.
344. 345.
Poph. 47.
48. 2 Roll.
Abr. 7.
Callard and
Callard,
Hob. 170.
Co. Lit. 48.
Moor, 687.

Lit. § 60. If a lease for years is made to *A.*, the remainder to *B.* for life,
 5 Co. 94. b. and livery is made, the freehold is well conveyed to *B.*, but this
 Co. Lit. 49. livery cannot be made to *B.* himself, because the possession cannot
 2 Roll. be delivered to him, for that belongs to *A.* during the term;
 Abr. 8. the livery therefore must be made to *A.*, who is to receive the
 possession, and such livery actually vests the freehold in *B.*, be-
 cause the presumption is, that every man accepts of a gift which
 is for his interest; and *A.* is looked upon as the attorney of *B.* to
 take the livery, because he, having an immediate interest in the
 land, is the only person to whom the possession can be delivered;
 for *B.* has no immediate right to the possession, and therefore, as
 he cannot receive it himself, by consequence, he cannot depute
 another to take it.

Co. Lit. 40. But this livery must be made to *A.* upon the land, for a livery
 b. 2 Roll. within the view will not pass the freehold to *B.*; for this livery
 Abr. 6. within the view, being anciently made in court, could only be
 made by the immediate homagers of the court from the one to
 the other; but *A.* in this case being no homager to the court,
 since he was only lessee for years, was not capable of such livery
 within view.

Lit. § 60. And this livery to *A.* must be made to him before he actually
 Co. Lit. 49. enters and takes possession, by virtue of the lease, because if the
 5 Co. 94. possession be once filled by the lessee for years, there is no vacant
 Moor, 14. possession to be transferred by the livery, for *quod semel meum est,*
 Co. Lit. *amplius meum esse non potest*; no man can receive that from another
 216. a. which is already in his possession.
 Plow. 156. a.

Co. Lit. 49. If a lease for years be made to *A.* and *B.*, the remainder to *C.*
 5 Co. 94. in fee, and livery be made to *A.* in the absence of *B.*, whether
 2 Roll. Abr. the conveyance be by deed or without, the livery is good to vest
 8. the remainder in *C.*, because by the bare demise, *A.* and *B.* have
 an interest in the land, during the term, without any further
 ceremony, and each being equally entitled to the whole possession,
 either may invest himself in the whole possession by entry, or re-
 ceive the possession from the lessor by the solemnity of livery;
 and, therefore, when the whole possession is delivered by the
 lessor, and livery made to *A.* in the absence of *B.* in the name of
 both, this livery is sufficient to vest the remainder in *C.*, because
A. had as much power to receive the possession of the whole,
 as if the lease for years had been made to him only, he and *B.* be-
 ing jointenants by the demise, and thereby seised *per my & per tout*.

Co. Lit. But if a lease for life had been made to *C.* to commence im-
 49. b. mediately, and *C.* had appointed *A.* and *B.* his attorneys to take
 5 Co. 94. b. livery from the lessor; the livery made to one of them alone had
 Palm. 23. been ineffectual and void, because one only, without the other,
 had no authority from the delegation to receive the possession,
 and consequently what is done by a representative, without an
 authority from the principal, is a nullity, and void; but other-
 wise it is, if the letter of attorney had been jointly and severally,
 to receive livery.

Co. Lit. If a lease for years be made to *A.*, remainder to the right heirs
 217. a. of *B.*, and livery and seisin be made to *A.*, yet the freehold does
 not

not pass from the lessor; and therefore the livery is void, because there was no person in being at the time of the livery made, in whom the freehold could vest, for *nemo est habes viventis*; and the law will not endure such future operation of the investiture, because it would create an uncertainty of the freehold, which would necessarily perplex and delay all prosecutions against the freehold.

If a lease for years be made to begin at *Michaelmas*, remainder to *J. S.* in fee, and livery be made before *Michaelmas*, the livery is void for the former reason; but a lease for years may be made to commence *in futuro*, because the freeholder, who is to answer the stranger's *præcipe*, is, notwithstanding such future interest, certain and known, and therefore not within the reason of the former case.

Plow. 156.
2. Co.
Lit. 217.

If *A.* makes a lease for five years to *B.*, upon condition, that if *B.* pays him 10*l.* within two years, that then he shall have a fee-simple in the lands, and makes livery and seisin to *B.*; this passes the freehold immediately, and *B.* has a fee conditional, because if the freehold were not to vest in *B.* till the condition performed, it would be difficult to determine in whom the freehold is, for such conditions may be inserted in deeds, which are perfected privately between the parties, and therefore not so proper to govern the possession and seisin of the freehold, as the solemn investiture by livery, which is made in the public view of the whole county; therefore, as this solemnity was first appointed to give notice of the transferring the freehold, it follows, that from the reason of the investiture the freehold must pass at the time of the solemnity made, or not at all: but if *A.* had made a lease for life, upon like condition, to have fee, the livery made thereon should not carry the inheritance till after the condition performed, because there passed a certain freehold, at all events, to the lessee, and the livery gave notice in whom it was lodged, so that no man can pretend ignorance against whom to bring his *præcipe*, which would be the mischief in the former case, if the freehold did not pass at the time of the livery made.

Lit. § 350.
Co. Lit.
217.

2. The Effect of Livery when the Feoffor is out of Possession;

It is regularly true, that the feoffor must be actually in the possession of the land at the time of the livery made, or otherwise the livery will be ineffectual and void; because the design of the livery is to give notice of the change made of the possession, and therefore it must be a vacant possession that is delivered; but it were absurd, that a man should be permitted to transfer to another what he has not in himself; wherefore, if a man makes a lease for years, or life, of his land, or has his land extended by virtue of a statute merchant, &c., and makes a feoffment and livery, the conuzee or lessee being in possession of the land, the livery is void; because the land is filled by the lessee; and consequently, during the continuance of his interest, the feoffee cannot deliver a vacant possession; and therefore the livery, which is

Co. Lit.
48. b.
2 Roll.
Abr. 3, 4.
7 H. 4.
19. b.
Dyer, 37.
Cro. Eliz.
322.

a solemnity instituted to give notice of the change of the possession, must be void.

2 Co. 31.
b. Betty-
worth's
case, Moor,
pl. 397.
2 Roll.
Abr. 4. Co.
Lit. 48. b.
Dyer, 18. b.

Thus, if there be lessee for years of a house and several closes, and the lessee and all his servants being in the house, the lessor enter into one of the closes, and make a feoffment of it, and give livery, this is a void feoffment; because the possession of part of the thing demised is possession of the whole, for the impossibility that a man should be in the actual possession of every part of the land at the same time; and consequently the lessor cannot take possession of the close, which was filled by his lessee; and therefore the livery must be void, because the feoffor had no vacant possession to transfer at the time of the livery made.

Co. Lit. 48.
2 Roll.
Abr. 4.
Dyer, 18.
Bro. tit.
Feoffment,
66. but
Moor, 11.
cont.

So it is, if the lessee for years himself had not been in the house, or any part of the land, yet if his wife, children, or servants had been on any part of the land, that were sufficient; but the cattle of the lessee grazing upon the land, without either wife or servant on the land, does not fill the possession so as to prevent the lessor from entering, and making a good livery to pass the freehold, because the cattle cannot be said to continue upon the land, *animo possidendi*, for the benefit of their master, as a servant may, and in duty ought to do.

2 Roll.
Abr. 4.
Dyer, 18.
Shepherd
and Greg.
Bro. tit.
Surrender,
48.

But if a man makes a lease for life of lands, and afterwards makes a feoffment of the same lands, and makes livery and seisin upon the land, by the assent of the lessee, and in his presence, this is a good livery to pass the inheritance; because the lessee's permitting the feoffor to come upon the land, and make livery, is a sufficient quitting of the possession to him, either by way of surrender, or to create a tenancy at will in the feoffor, to make the feoffment and livery more effectual and valid.

2 Roll.
Abr. 5.

But if the servant of the lessee were only on the land, the livery made by the feoffor, though with the servant's permission, had been void if the servant continued in possession at the time of the livery made, for while the servant continued in possession, it must be only for the use and benefit of him that placed him there; and consequently the possession of the servant must be looked upon as the possession of the master; and therefore the livery must be void, because it could not deliver a possession which was still filled by the master, and which the master never consented to part with; and the permission of the servant will not admit of such a construction as was made in the precedent case, because the servant having no interest, but in right of his master, could neither make a surrender, nor a tenancy at will to the feoffor.

Dyer, 363.
a. 2 Roll.
Abr. 5.
Moor, 91.

But it has been holden, where a man made a lease for years of a house, and afterwards made a feoffment of it, with a letter of attorney to make livery, and the attorney came to the house to make livery in the absence of the lessee, and found nobody in the house but the servant of the lessee, who quitted the possession of the house at the desire of the attorney, and then the attorney made livery, which the master approved of at his return, saving his term; that this was a good livery, because here the servant actually

actually quitted the house, and thereby the attorney had a vacant possession to deliver to the feoffee: so, if the attorney had found the lessee himself upon the land, and had entered and ousted him, and then made livery, that had been good to pass the freehold; for though the ouster had been a tortious act, yet the possession became thereby vacant, and, consequently, by the livery, might be delivered to the feoffee.

If there be *A.* lessee for years of six acres, and he make a lease for years of three acres to *J. S.*, and he in reversion enter upon *J. S.*, and make a feoffment with livery, this shall pass the three acres; because, by the demise of *A.* for years, the possession became separate and divided, which was united and one under the lease to *A.* himself; and therefore *A.*'s continuing in possession of his own three acres could never be a possession of the other three, which he had no right to during the demise to *J. S.*: but if *A.* had only made a lease at will to *J. S.* of those three acres, the entry and livery of the reversioner had not passed them, because *A.* is still supposed to be in possession of those three acres, since he may enter into them when he pleases, by the determination of his own will; for as no man can be actually upon every parcel of the land, the possession of one acre is very reasonably construed to be the possession of the whole.

2 Co. 12. a.
2 Roll.
Abr. 4.
Dyer, 18. b.

So it is in case of a tenant at sufferance; as if tenant in tail makes a feoffment in fee to the use of himself in fee, and afterwards makes a lease for years, and dies, by which the issue is remitted before entry, and, consequently, the estate of the lessee for years is determined and changed into a tenancy at sufferance, because the fee simple, out of which it was derived, is vanished by the remitter; and the issue enters into part of the land descended, and makes a feoffment of the whole, and gives livery of that part into which he entered, in the name of the whole, this shall pass all the lands to which the issue was remitted, though the tenant at sufferance was in possession of part; because that possession may be reasonably supposed to be in me, which I may actually place myself in at my pleasure; and therefore the livery in that part, in which the issue had actually entered in the name of the whole, shall pass all the lands.

2 Roll.
Abr. 5.
2 Roll.
Rep: 260.
Bridgeman
and Charle-
ton, Moor,
pl. 1143.

A. seized of land in fee, holden of the queen in socage, died, and it was found by office, that he died without heir, by which the lands were seized as the escheat of the queen, and *B.* the heir of *A.* traversed the office, upon which issue was joined; and pending the issue, *B.* made a deed of feoffment, with a letter of attorney; and afterwards the issue being for *B.*, judgment was given *que les mains le R. soient amovee*, and then the attorney made livery, after which the *amoveas manus* was executed; this was holden a good feoffment and livery; because, by the judgment against the queen, her possession was defeated, and *B.* was restored to his right of possession, which he might have placed himself in at his pleasure; and therefore might transfer that to another which he might actually invest himself in at pleasure.

2 Roll.
Abr. 5, 6.
Terry v.
Brown.

Thus,

2 Roll.
Abr. 5.

Thus, if land descends to *J. S.*, who enters but into part of it, and makes a feoffment of the whole, and livery in that part in which he entered in the name of the whole, all the land shall pass; for besides that, in this case, an entry into part may be construed an entry into the whole, the feoffor having a power to reduce the whole into his actual possession at his will, the very act of feoffment, with the livery, in all these cases may reasonably be taken to be a determination of his will to take the possession, since the livery and feoffment would be invalid, unless he were in possession.

2 Roll.
Abr. 5.
Perk.
§ 223.

If husband and wife be seised of land in fee, and the husband make a feoffment of the whole, the wife being upon the land, yet the livery shall pass the land, because the husband had the whole possession, either in his own right, or in right of his wife, and therefore could deliver it over by the investiture, though the wife should disagree to it.

2 Roll.
Abr. 5.
vide
2 Co. 53.

If the queen be lessee for years, and he in reversion enter upon the land, and make a feoffment in fee, this is void; because the law preserves the possession for the queen, who, by constantly attending the business of the publick, is presumed not to have leisure to take care of her private concerns; but if the queen had made a lease for years to *J. S.*, and he in reversion had entered and ousted him, and made a feoffment, that had been good; because the queen had no right to the possession during the lease to *J. S.*, and the reversioner having gained the possession by his ousting *J. S.* might, consequently, deliver it by the investiture.

2 Roll.
Abr. 495.
Dyer, 358.
Moor, 636.

If a man makes a lease for life to *A.*, and after makes a feoffment and livery to *A.* of the land in lease, this is a good livery and feoffment; for though the land was in lease to *A.*, yet his acceptance of the feoffment and livery amounts to a surrender, *ut res magis valeat*, and, consequently, the feoffor has thereby possession to transfer by the livery to the feoffee.

Co. Lit.
49. a.
2 Roll.
Abr. 56.
Plow. 162.

If a man be seised of two acres, and make a lease for years of one of them, and after make a feoffment of both acres, and livery of the acre in his own possession, in the name of both; the livery is void and ineffectual to pass the acre in lease, because that being full of the lessee, the feoffor had not the possession to transfer by the livery; yet *such feoffment is a good grant of the reversion of the leasehold acre, if the termor attorns*; because every man's act is construed most strongly against himself; and therefore the feoffor shall not be admitted to claim any thing in either of the acres, since the possession of the one was actually transferred by the livery, and the reversion of the other in lease by the deed of feoffment, which, with the attornment of the tenant, amounts to a grant.

2 Roll. Abr.
4. 56.
Roll. Abr.
482. Eedes
and Knot-
ford.

But if there be a lease, for years to *A.*, remainder to *B.* for life, and *C.* the reversioner in fee make a feoffment in fee, with livery to *A.*, this is void as a feoffment, because *C.* had no possession to transfer by the livery, that being already in *A.*, and the freehold in *B.*, by the former lease; and the acceptance of the livery by *A.* was neither a surrender, nor an attornment; as in the

the former case it would not amount to a surrender, because of the intermediate freehold which was in *B.*, nor did the feoffment amount to a grant and attornment; for though, according to the former case, every man's conveyance is construed most strongly against the grantor; yet in this case the grant is ineffectual, for want of attornment; for *A.*'s acceptance is no attornment, because he shall not bring *B.* within his fealty, by an act which was not in its original intention designed to be prejudicial and injurious to *B.*, by displacing his remainder.

If a man be seised of two acres, and, being disseised of one, make a feoffment of both, and livery in the acre in possession, in the name of both, yet the acre of which he was disseised does not pass, because he could not deliver that possession to the feoffee, which the disseisor had. So it is, if the disseisor had made a lease at will, and then the disseisee had made a feoffment of the acre in his possession, in the name of both, this had not passed both the acres, because the possession of one acre was still out of him, and the feoffment could not be any determination of the will of the disseisor.

2 Roll.
Abr. 6.
Dyer, 18.

But if a man be seised of two acres, and make a lease at will of one, and after enfeoff *J. S.* of both acres, this shall pass both; because the very feoffment and livery is a determination of the estate at will, and, consequently, the feoffor has thereby resumed the possession, in order to convey it by livery: otherwise, of a lease for years, because the possession is in the termor during the lease.

Dyer, 18.
2 Roll.
Abr. 5.

If *A.* be lessee for life of *Black-Acre*, and being likewise seised in fee of *White-Acre* make a feoffment of both, and give livery in *White-Acre*, in the name of both, this is a good feoffment of both acres, because *A.* had the freehold and possession of both acres, and therefore might well deliver them over by the investiture: otherwise, if *A.* had been only possessed of *Black-Acre* for years, for then it should not pass by the feoffment, because the charter of feoffment passes the interest in the term before the livery made, and a less estate by right shall be supposed to pass, rather than a greater by wrong: but in the first case, where *A.* had the freehold in both acres, nothing passes till the livery was made; and therefore the livery must operate to pass the fee in both acres, *secundum formam chartæ*, else it can pass nothing.

2 Roll.
Abr. 6.
9 H. 7.
25. b.

But if *A.* had been possessed of *Black-Acre* for years in *auter droit*, as guardian to an infant, and had made a feoffment of both acres, and given livery in *White-Acre*, in the name of both, that had passed both acres to the feoffee; because the term being vested in the infant, the guardian could lawfully transfer it as if he had been in possession of it in his own right, and therefore the livery must operate to *oust the infant* of the term, and *disseise him in reversion*, else it will have no effect at all.

2 Roll.
Abr. 4.

3. In what Cases several Parcels will pass by one Livery, or where several Parties may take by Livery to one.

It seems, that anciently the feoffment and giving livery was performed before the *pares* of the manor where the lands lay; but this being found too much to streighten the transferring the possession, it was found necessary to admit the testimony of strangers; and this came afterwards to be established for the conveniency of it; and because all men of the county assembled at the county-court, in order to determine disputes relating to the whole county, as the tenants of the manor did at their court baron; and because there lay an appeal from the court baron to the county court, so that the *pares* of the county were thereby ultimately to determine of all things relating to the particular manors, it seemed the more reasonable to admit the *pares comitatus* to attest the investiture, through any particular manor, and indifferently through the whole county; and hence it came to be admitted, and so the law continues, that if a man seized of lands in several villages in one county, makes a feoffment of the whole, and gives seisin of parcel of the lands in one town, in the name of all the lands in that town and in the other towns, that all the lands of the feoffor lying in that county shall pass, as well as if there had been livery given in each town.

Co. Lit.
253. a.
2 Roll.
Abr. 11.

Perk. 227.
2 Roll.
Abr. 11.

But if a man having lands in two counties makes a feoffment of both, and gives livery of the land in one county, in the name of all, the land in the other county shall not pass, because there was no relation or dependance between one county and another, as there was between the several manors and county court; for one county having no power or jurisdiction over another, the *pares* of one were reasonably presumed to be ignorant of what was transacted in the other; and therefore the investiture, which passed the land in one county, was ineffectual to carry the lands in the other, because that investiture could be only a notoriety to the *pares* of the county where it was made; and consequently, there having been no notice given to the *pares* of the other county, by any solemnity of the transferring of the possession, the possession must reside where it was placed by the last investiture.

Perk.
§ 229.

But if a manor extend into two counties, and the feoffment be made of the whole manor, and livery only in the part lying in one county, in the name of the whole manor, yet the whole manor shall pass, because the investiture is a notoriety equally to all the *pares* of that manor of the transmutation of the possession; and though they live in different counties, yet they reside in *eodem territorio ab eodem feudum habentes*; and therefore are presumed to be conuzant of every thing done within the territory or manor to which they belong.

Perk.
§ 228.

But if the manor of *Dale* extend into the counties of *D.* and *S.*, and a feoffment be made of the manor of *Dale* in *D.*, and livery and seisin in *D.*, nothing passes by this livery but that part of the manor which lies in *D.*, because the feoffment being confined

fined to the manor of *Dale* in *D.*, nothing can pass that does not lie in the county of *D.*

If a feoffment be made to *A.* and *B.* by deed, and livery be made to *A.*, in the absence of *B.*, in the name of both, the livery is good to pass the estate to both; but if the feoffment had been made without deed, and the livery given to one, in the name of both, it should operate to him only, because *the parties are united in a deed*, they all take as one; therefore livery to one, in the name of the rest, is an actual delivery to them all, but *without deed they are not so united*; and therefore the delivery to one, in the name of several, is no actual delivery to the rest, but the whole estate must reside in him to whom it is delivered, and a subsequent assent cannot take it out of him, such assent being not so solemn as the feoffment; besides, in the case of the feoffment by deed, *A.* may be looked upon as the attorney of *B.* to receive livery; and therefore the estate shall immediately vest in *B.*, because every man is presumed to assent to a grant for his advantage; but the feoffment without deed will admit of no such construction, because no man can receive livery as attorney to another, without an appointment by deed.

Co. Lit.
49. 359.
2 Vent. 202.
205.
5 Co. 95.
2 Roll.
Abr. 9.
2 Leon. 23.
Mutton's
case.

(C) Of the Charter of Feoffment: And herein, what Things are necessary to the making of a perfect Charter, and how far the Charter governs the Livery which is relative to it.

THE things, which are essentially necessary to the making a perfect charter, are but sealing and delivery; for if a man gives land to another and his heirs, and seals and delivers the deed, and gives livery, it is a good charter, and the inheritance shall pass as well as if it had all the formal parts which are generally used in deeds of conveyance.

2 Roll.
Abr. 21.
Co. Lit. 7.

But since by the statute of frauds and perjuries, the charter of feoffment is made equally necessary with the livery and seisin, to pass the freehold or inheritance, it being thereby (a) enacted, "That all leases, estates, interests of freehold in any lands, tenements, or hereditaments, made or created by livery and seisin only, and not put in writing and signed by the parties so making or creating the same, or their agents thereunto lawfully authorized by writing, shall have the force and effect of leases or estates at will only, and shall not either in law or equity be deemed or taken to have any other or greater force or effect;" for this reason it may be necessary to consider the formal parts of the charter which are generally used in this sort of conveyance at this day.

(a) By 29
Car. 2. c. 3.

These are, 1. The premises. 2. The *habendum*. 3. The *tenendum*. 4. The (b) *reddendum*. 5. The clause of (c) warranty. 6. The (d) *cujus rei testimonium*, comprehending the sealing. 7. The date. And lastly, the *his testibus*.

(b) But for
this vide tit.
Repts.
(c) Vide tit.
Warranty.
(d) And

note, that if the deed be sealed, though it wants the words in *cujus rei testimonium* sealed mean open it, yet

yet it is good enough ; for the seal appearing, it must be presumed to be set there by the parties to the deed. 2 Co. 5. Leon. 25. Owen, 23. Bendl. 1.

Co. Lit.

6. a.

9 Co. 47. b.

Hob. 275.

313. 2 Roll.

Abr. 65.

Cro. Jac.

364. Cro.

Eliz. 58.

1. Of the premises of the deed ; and their office is to name the grantor and grantee, and the thing to be granted or conveyed : Of this two things are observable as regularly true ; 1. That no person, not named in the premises of the deed, can take any thing by the deed, though he be afterwards named in the *habendum*, because it is the premises of the deed that makes the gift ; and therefore when the lands are given to one in the premises, the *habendum* cannot give any share of them to another, because that would be to retract the gift already made, and consequently to make a deed contrary and repugnant in itself ; thus, for instance, if a charter of feoffment be made between *A.* of the one part, and *B.* and *C.* of the other part, and *A.* gives lands to *B.*, *habendum* to *B.* and *C.* and their heirs ; *C.* takes nothing by the *habendum*, because all the lands were given to *B.*, and consequently *C.* cannot hold those lands which are given before to another ; but in this case, if the *habendum* had been to *B.* and *C.* and their heirs, to the use of *B.* and *C.*, this had been a good limitation of a use, and consequently the statute would carry the possession to the use, and *B.* and *C.* thereby become jointenants.

23 Co. 53.

Poph. 126.

So, if a deed of feoffment be made, without naming any feoffee in the premises, *habendum* to *B.* and his heirs, it seems doubtful whether *B.* shall take any thing by this gift, for though there be not that repugnancy in this case as in the former, the lands being given to nobody in the premises of the deed, and consequently the *habendum* cannot be said to be contrary to the premises, but rather explanatory in describing who shall hold the lands which were given in the premises ; and for this reason, it seems, that my Lord *Coke* (*a*) holds, that the gift to *B.* is good ; but by the opinion of (*b*) others the gift is void, because the *habendum* can only limit the duration of the estate, but no man can by virtue thereof hold lands which were not given to him.

(a) In Co.

Lit. 7. a.

(b) Cro.

Eliz. 903.

2 Roll. Abr.

66, 67.

2 Roll.

Abr. 67.

If lands be given to a husband, *habendum* to him and his wife, and to the heirs of their two bodies, the wife takes nothing, because she was not mentioned in the premises ; and therefore shall take nothing of that which was before given entirely to her husband.

Co. Lit. 21.

Plow. 153.

Cro. Jac.

454.

Poph. 126.

2 Roll.

Abr. 67.

But there are these four exceptions from this rule ; 1. That if lands be given in frankmarriage, the woman that is the cause of the gift may take by the *habendum*, though she be not named in the premises ; as if lands be given to *J. S.*, *habendum in liberum maritagium una cum* the woman who is daughter of the donor ; this is a good estate in frankmarriage to them both ; because the gift being totally on her account, it is necessary to the creation of the estate in the husband that the wife should take.

Poph. 125,

126.

Brook's

case. Cro.

Jac. 434.

2 Roll.

Abr. 67.

2. In grants by copy of court-roll, as if a copyholder surrenders to his lord, without limiting any use, and then the lord grants it in this manner ; *J. S. cepit de domino, habendum* to the said *J. S.* and his wife, and the heirs of their bodies begotten, this is a good estate-tail in the wife ; for these customary grants, that

that are made in pursuance of a former surrender, are construed according to the intention of the parties, as wills are; besides that, the custom of the manor is the rule for the exposition of such sort of grants, and in many manors such sort of form is usual.

Cro. Eliz.
323-
Downs and
Hopkins.

3. That a man not named in the premises may take an estate in remainder by limitation in the *habendum*.

2 Roll.
Abr. 68.
Hob. 313. Cro. Jac. 564.

4. In wills; for if a man devises lands to *J. S.*, *habendum* to him and his wife, this is a good devise to the wife; because, in construction of wills, the intention of the devisor is chiefly regarded; and wherever that discovers itself it shall take place, though it be not expressed in those legal forms that are required in conveyances executed in a man's life-time.

Plow. 158.
414.
2 Roll.
Abr. 68.

2. Of the *habendum*; and the office of this is to limit the certainty and extent of the estate to the feoffee or grantee, for the *habendum* need not repeat the thing granted; it is sufficient if it be named in the premises, because it is the premises that make the gift, and the word *habendum* does of its own nature refer to things mentioned in the premises.

2 Roll.
Abr. 65.
2 Co. 55. a.
9 Co. 47.

Of the *habendum* there are these things observable; 1. That the *habendum* cannot pass any thing that is not expressly mentioned or contained by implication in the premises of the deed; because the premises being part of the deed by which the thing is granted, and consequently that makes the gift; it follows that the *habendum*, which only limits the certainty and extent of the estate in the thing given, cannot increase or multiply the gift, because it were absurd to say, that the grantee should hold a thing which was never given to him.

2 Roll.
Abr. 65.

Hence it is, that if a man grants a manor, *habendum* together with another manor, or with the advowson of another manor, only the manor granted in the premises shall pass.

2 Roll.
Abr. 65.

But if a private person grants a manor *habendum una cum advocatione*, which belongs to the manor, this is a good conveyance of the advowson, because it was impliedly given by the gift of the manor itself.

2 Roll.
Abr. 65.

2. How far the *habendum* may alter or abridge the gift in the premises. And here it is regularly true, that the *habendum*, that is repugnant and contrary to the premises, is void, and shall be rejected; because the rule in the interpretation of all deeds is, that all grants shall be taken most strongly against the grantor; and therefore he shall not be allowed, by any subsequent part of the deed, to contradict or retract that gift which he made in the premises; as if a man gives lands to *J. S.* and his heirs, *habendum* to him for life, this is a void *habendum*, because repugnant to the premises.

2 Co. 23.
Baldwin's
case.

But for the better explication of this rule it will be necessary further to consider it under these exceptions; 1. That if no express estate be given in the premises, as if a rent be granted generally in the premises to *J. S.*, this creates an estate for life in *J. S.*, by implication of law; that is, the parties having omitted

Hob. 170.
Co. Lit.
183.
2 Co. 24. a.
55. 2 Roll.
Abr. 65, 66.

Cro. Eliz. 254.
8 Co. 154. to determine how long *J. S.* shall enjoy the rent, the law construes the grant most strongly against the person that makes it, and therefore gives *J. S.* an estate in the rent for his own life: but if the grantor had by the *habendum* limited the rent to *J. S.* for years, or at will, this *habendum* had been good; for the law creates an estate for life in *J. S.* only because there was no express estate given by the grantor; but when upon the face of the deed it evidently appears, that the rent was given but for a determinate number of years, or only at the will of the grantor, there the law will never create an estate against the express provision of the parties, or permit *J. S.* to enjoy the rent beyond the period of time positively limited in the deed.

Cro. Eliz. 254. Hogg and Crofs.
Hob. 171.
2 Roll.
Abr. 66.
2 Co. 55.
Buckle's case. Moor, pl. 591.
Cro. Eliz. 451. 585.
Vide Moor, 381. cont. So, the *habendum* may frustrate and control the estate by implication in the premises, though the estate limited by the *habendum* be void itself; thus if a deed of feoffment be made, and the lands given generally in the premises, *habendum* to the feoffee, and his heirs, after the death of the feoffor, the implied estate for life shall not pass by the premises, because it is evidently the intention of the deed that no estate shall pass till after the death of the feoffor; and the limitation in the *habendum* is void; because the livery cannot pass the freehold *in futuro*, for that would create an uncertainty of the freehold, and strangers would be at a loss against whom to bring their *præcipe*, as is before observed.

2 Co. 23.
24. Baldwin's case.
And. 223.
Owen, 48. 2. If to the perfection of an estate limited in the premises there be a ceremony necessary, which is not requisite to pass the estate in the *habendum*; there if the ceremony be not performed, to carry the estate in the premises, the *habendum* shall stand, though it be repugnant to the premises; as if a man covenants, grants, demises, and to farm lets land to *A.* and *B.*, and the heirs of *B.*, *habendum* to *A.* and *B.* for three hundred years, this is but a term for years in *A.* and *B.*, though there be words of inheritance; for it was plainly the intention of the lessor to create a term only by his using the common words of demise; besides, it is evident that the lessees by the premises could have but an estate at will, because the words of inheritance in the premises were not sufficient to carry the freehold without livery, which was not made in this case, and consequently the *habendum* does not really contradict but enlarge the gift in the premises: it is true my Lord Coke says, at the end of this case, that if livery had been made, only a term for years should have passed; because that the words of demise and covenants in the deed plainly discover the intention of the parties to create a term; but *Q.* of this, because there are words of inheritance in the premises; and therefore a livery pursuant to them ought to be taken most strongly against the grantor.

8 Co. 154.
b. Co. Lit. 21. a. Lit. Rep. 345. But though the *habendum* cannot retract the gift in the premises, yet it may construe and explain in what sense the words in the premises shall be taken; for it is upon a view of the whole deed, that the intent of the parties must be collected; therefore if lands be given to a man and his heirs, *habendum* to him and the heirs of his body; this is but an estate-tail; because the *habendum*

habendum only expounds the general word *heir* in the premises, and such exposition is consistent, and does not destroy the operation of the words mentioned in the premises, but only explains in what sense they are to be taken, and what heirs are comprehended.

A prebendary demised land, of which he was seised in right of the church, to *J. S.* and his heirs, *habendum* to him and his heirs for three lives, and it was holden to be a good lease against his successor; because the *habendum* explains in what sense and to what purpose the word *heirs* was used in the premises, viz. to create a special occupancy in the lessee; for if the demise had been only to *J. S.* *habendum* for three lives, without inserting the word *heirs*, any stranger, upon the death of *J. S.*, might have entered and holden the land as a general occupant, during the lives of the *cestui que vies*; therefore the heirs of the lessee shall enjoy the land, because they are mentioned in the premises; but the *habendum* explains in what manner they shall enjoy it, and that is, as special occupants during the three lives.

2 Jon. 4.
Piffworth
and Pyett,
2 Keb. 865.
S. C.

But it has been holden, where a husband was seised of land in right of his wife for her life, and they both by deed of feoffment conveyed the land to *J. S.* and his heirs, *habendum* to him and his heirs, to the use of him and his heirs for the life of the wife; that the whole fee-simple passed to *J. S.*, and so was a forfeiture of the estate; for there being a fee-simple conveyed to *J. S.* by the livery, and the premises and *habendum* of the deed, the words of restriction for the life of the wife refer only to the limitation of the use, and consequently the fee-simple remains in the feoffee; whereas, in the former case, the conveyance was wholly at common law; and therefore the restriction in the *habendum* must relate to that or be void, which is never admitted where they are only explanatory and not repugnant.

Cro. Eliz:
131.
Piers and
Hoe.

So of a rent; as if the grant had been to *J. S.* and his heirs, executors, and assigns, *habendum* to him and his heirs, executors, and assigns, for or during the life of *J. N.*, this is a good *habendum*, and the lessee has only an estate for life; for the *habendum* does not defeat, but explain the operation and use of the word *heirs* in the premises; for as this case stands, upon the death of *J. S.*, his heirs shall enjoy the rent during the life of *J. N.*, as special occupants; whereas, if the rent had been granted only to *J. S.* for the life of *J. N.*, it would have determined upon the death of *J. S.*, because there can be no general occupant of a rent; and the heirs of *J. S.* could not take, because not named in the grant.

Moor, 876.
2 Roll.
Abr. 66.
Wilkins and
Perrott.
Brownl. 169.
Bulf. 135.

If the grant had been to him and his heirs, *habendum* to him for his life, and the lives of three others; this is likewise a good *habendum*, because it does not render the word *heirs* in the premises useless, but expounds them only to create a special occupancy, and thereby to prevent the determination of the estate by the death of the grantee.

Bulf. 135,
136. Bowles
and Peor,
Cro. Jac.
282.

But if the grant in the premises be of a rent to a man and his heirs, *habendum* for the life of the grantee, this is a void *habendum*,

2 Co. 23,
24.

dum, because it totally defeats the operation of the word *heirs* in the premises, and, consequently, is repugnant and not explanatory, and therefore void.

Co. Lit. 190. b.
183. b.
and 180. b.
note 1.
13th edit.
Hob. 172.

If a man makes a feoffment in fee in 20 acres to *A.* and *B.*, *habendum* one moiety to *A.* and the other moiety to *B.*, this is good, and the *habendum* makes them tenants in common; for though the premises be joint, and therefore of themselves would operate to give a joint estate and possession, yet the *habendum* explaining the manner of possessing is not inconsistent or repugnant, because it makes no division of that undivided possession which was given in the premises.

Hob. 172.

But if the *habendum* had limited ten acres to *A.*, and the other ten acres to *B.*, this had been void, because the *habendum*, in this case, contradicts and is repugnant to the premises; for by the premises, the entire and undivided possession of the whole twenty acres is equally given to both; and therefore the *habendum* that excludes *A.* out of his share of ten acres, and *B.*, out of his share of ten acres, is contradictory to the premises, and therefore void.

Co. Lit. 183. 190.
2 Co. 55.
2 Roll.
Abr. 65.

If a lease be made to two, *habendum* to one for life, remainder to the other for life, this is a good *habendum*, because it explains the design of the gift in the premises, and shews that they shall take the whole in succession one after the other.

Dyer, 361.
Bulf. 135.

So, a lease to the mother and son, *habendum eis pro termino vite eorum & alterius eorum diutius vivent.*, *successive uni eorum post alterum sicut nominantur in charta & non conjunctim*; here the *habendum* explains in what manner they shall enjoy the land, nor is the *habendum* void for the uncertainty who shall take first, because they are to take one after another, as they are named in the deed; and therefore the mother was adjudged to be tenant for life, the remainder to the son.

Hob. 313.
Windimore
and Hubert.

But a demise to *A.*, *habendum* to him, *B.*, and *C. pro termino vite eorum & alterius eorum successive diutius vivent.*; this is a void *habendum*, and neither *B.* nor *C.* can take any thing, not as lessees in possession, because not parties to the deed, or named in the premises; nor by way of remainder, because they cannot take jointly in remainder, the limitation being to them *successive*; nor can they take in succession one after the other, because *non constat* by the deed who shall take first in remainder.

Cro. Eliz. 89. 107.
Moor, 267.
Leon. 217.

A. made a lease to *B.*, *C.*, and *D.* for their lives, *proviso*, and it is covenanted and granted, that *C.* shall not enjoy the land during the life of *B.*, and that *D.* should not enjoy the land during the life of *C.*, this is but a collateral covenant, which shall not alter the nature of the estate given by the premises which create the gift.

2 Roll.
Abr. 66.
Hob. 171.
Moor, 881.
Underhay
and Under-
hay. Cro.
Eliz. 269.
ill reported.

A. made a lease for three lives, and after grants the reversion to *J. S.*, *habendum* to him for life, which estate for life to begin after the death of the three first lessees; this is a good grant of the reversion to *J. S.* during his life, to commence immediately; for though the *habendum*, as is already observed, may totally control any implication in the premises, and defeat the estate therein

therein given by implication of law, yet in this case there was an exprefs estate given for the life of the grantee, and no subsequent words shall defeat that estate which was complete and exprefs by the former part of the deed; and therefore the subsequent words, which would limit the estate to commence *in futuro*, are void; because a freehold cannot be granted *in futuro*, for the reasons already observed.

A termor for years, reciting by indenture his term and lease, grants all his term, estate, and interest, to another, *habendum sibi & assignatis suis immediate post mortem* of the grantor; this was holden a void *habendum*, because, by the grant in the premises, the whole interest was absolutely conveyed; and therefore the *habendum*, that retracts the grant, is void; for it may happen that the grantor may outlive the term, and then the *habendum* defeats and is repugnant to the grant.

A. makes a lease for three lives of lands, and afterwards demises to J. S. for ten years the reversion of the lands, *habendum* the said lands from *Michaelmas* next ensuing, after the death of the lessee for lives; this is a good demise to J. S., because the word *reversion*, including not only the interest or estate which A. had depending upon the estate for lives, but likewise the land itself, returning after the determination of the particular estate, the *habendum*, which explains in what sense the word *reversion* is to be taken, shall stand; and therefore in this case J. S. was adjudged to have a term for years in the land, to commence upon the determination of the freehold.

3. The next formal part of the deed is the *tenendum*, and this, since the statute of *quia emptores terrarum*, must be to hold of the chief lord in fee, if a fee-simple be conveyed; but if an estate-tail be conveyed, it may be to hold of the donor.

[It is now of very little use, being only inserted by custom: it was formerly used to signify the tenure by which the estate granted was to be holden, *viz. tenendum per servitium militare, in burgagio, in libero soccagio, &c.*; but all these being reduced by statute 12 Car. 2. c. 24. into free and common socage, the tenure is now never specified.

4. Next follows the *reddendum*, which is that by which the grantor doth create or reserve some *new* thing to himself out of what he had before granted.

5. The clause of warranty. A warranty is a covenant real, annexed to lands or tenements, whereby a man and his heirs are bound to warrant the same lands, and to render in value, if they are evicted by a former title.

6. Of the *cujus rei testimonium*, comprehending the sealing. This clause is not necessary, though sealing be of the essence of a deed, for if a writing be not sealed, it is not a deed.

The practice of sealing came into this country with the Normans; some indeed, among whom is Sir Edward Coke, have supposed that it obtained in some degree in the time of the Saxons, a mistake which hath proceeded from not knowing that

Dyer, 272.
Lilly and
Whitney,
2 Roll.
Abr. 66.
Hob. 171.
Cro. Eliz.
255.

Plow. 147,
148. 160.
Throgmor-
ton v.
Tracy.

See Perk.
§ 633., &c.

See tit.
Rent.

See tit.
Warranty.

Co. Lit.
6. a. 7. a.
2 Co. 5. a.
1 Leon. 25.
Spelm.
Glossar.
voc. Sigil-
lum et sig-
num. Co.
Lit. 70. a.

Nicholf.
English
Hister.
Libr. 242.

the crosses (with which both principals and witnesses then signed) were indifferently called *signa* and *sigilla*. This mode of authenticating instruments soon became of general use; though it is certain that there were several conveyances, which, down as low as the reign of *Edw.* the 3d, were admitted as good and legal, when otherwise well attested, although they never had any seals affixed to them; these being the grants of those who still adhered to the old *Saxon* mode, and retained the subscription of names and crosses. And mankind might, perhaps, safely rely upon the authority of seals, whilst signets were carefully preserved, and the arms or impressions were appropriated: but as population increased, and the same arms were indiscriminately used by numbers, the evidence of seals only must necessarily become uncertain and unsatisfactory: the statute of 29 *Car.* 2. c. 3. revives, therefore, the old *Saxon* custom, and expressly directs the signing, in all grants of lands, and many other species of deeds. It hath indeed been formerly holden, that sealing is a signing within the statute, a doctrine which would have disappointed the intent of the legislature, and which the better judgment of later times hath exploded.

3 Lev.
2 Str. 764.

Co. Lit. 6.
a. 2.
Co. 5. a.
3 Leon. 100.
2 Roll.
Abr. 27.
Yelv. 194.

7. Of the date.—The date is not essential to a deed; for if it hath no date, or a false or impossible date, the deed shall be good, and shall take effect from the time of the delivery.

So, if it hath the day of the month, but no year is mentioned, for that is a void date: and in such case it may be pleaded to have been delivered at some other day than that mentioned in it.

1 Burr. 60.

If two deeds bear date the same day, and are evidently but one agreement, that shall be presumed to be executed first, which will support the clear intent of the parties.

2 Inst. 77-8.
2 Bl. Com.
307.

8. Lastly, the *his testibus*. The attestation or execution of a deed in the presence of witnesses is necessary, rather for preserving the evidence, than for constituting the essence of the deed. This clause of *his testibus* was formerly introduced as well in the king's grants as in the deeds of subjects; in the former however it hath been long discontinued, the king attesting his patent himself; and it was entirely disused in the latter in the reign of *Henry* 8., since which time the witnesses have subscribed their attestation either at the bottom, or on the back of the deed.]

(D) Who may make a Feoffment.

2 Roll.
Abr. 2.
Co. Lit.
247. 4 Co.
2. a.
Show. Parl.
Cases, 153.
and vide tit.

If a person *non compos* makes a feoffment, and gives livery himself, this is allowed on all hands to be good to bind himself, so that he can by no process or plea avoid the feoffment, and restore himself to the possession: the same law of an idiot; and the reason is, because the investiture being made before the *pares curie*, their solemn attestation could not be defeated by the person

son himself, it being presumed they are competent judges of the ability of the feoffor to make such feoffment.

But if an infant makes a feoffment, and makes livery himself, this shall not bind him, but he himself may avoid it by writ of *dum fuit infra etatem*: yet the feoffment of the infant is not void in itself, as well because he is allowed to contract for his benefit, as that there ought to be some act of notoriety to restore the possession to him, equal to that which transferred it from him.

But if an infant makes a feoffment, and a letter of attorney to make livery, that is void: so, if a person *non compos* makes a surrender or release, this is void in law: so, if he makes a letter of attorney to give livery: but the heir at law, after the death of the person of *non sane* memory, or idiot, may avoid his feoffment; and so may the king upon an office found of his lunacy during his life.

As the infant's feoffment is voidable by *dum fuit infra etatem*, when he comes of full age, so it is voidable by him by entry during his nonage; but his letter of attorney is merely void: and the same law seems to be of a feme covert, for if she makes a feoffment upon the land, it is voidable by her husband; but if she makes a letter of attorney to give livery, it is absolutely void in law; and the reason is, because the contracts of those that are disabled by law to contract were void contracts; but their infeudations were not in themselves void, because they were made *coram paribus curiæ*, who were presumed not to attest contracts of persons disabled by the law to contract, especially since such contracts were made for military or socage service, which were for the good of the commonwealth; and by those infeudations a stranger was directed to bring his *præcipe* against the person that was actually invested in the land; wherefore the infant's feoffment was good till it was avoided by an act of equal notoriety, to wit, by his entry *coram paribus*, which was equally solemn with the act of feoffment, or by bringing his *action at full age*, when the law had enabled him, by action in a court of record, to set aside the feoffment that he had made during minority: but the law enabled him by entry to set aside the acts *coram paribus* during minority, because the *pares* might undo what was done *in pais*; and the courts of justice were not to destroy the act *in pais* till the infant, by his own discretion, had chosen to avoid them, because it was derogatory to the dignity of the courts of justice to set aside the solemn acts *in pais*, till the infant had come to such age of discretion as might make it fully appear that the feoffment was made during his disability; for the infant was not received to disable himself during the time of his disability; but during such disability he might, by equal solemnity *in pais*, disable himself, since such an act was only *coram paribus*, in the same manner as the feoffment itself was made, but the warrant of attorney of the infant was *ipso facto* void; and therefore such feoffee was a disseisor, as if no authority had been committed to the attorney to make the feoffment: but in the case of the *non*

Idiot and Lunatic.

4 Co. 125.
2 Roll.
Abr. 2.
8 Co. 42,
43. Whit-
tingham's
case.

8 Co. 45.
Co. Lit.
247. a.
4 Co. 125.
a. 2 Roll.
Abr. 2.
Show. Parl.
Cases, 153.

4 Co. 125.
2 Roll.
Abr. 2.
8 Co. 42,
43. 45.
Cro. Jac.
617. Gar-
diner and
Norman,
Perk. §183.

See 2 Bl.
Comm.
291-2.

F. N. B.
202. D.

compos he was not admitted to stultify himself, because there was no stated time when such persons returned to sense and understanding, and therefore they could not be presumed to be conscious themselves of their own follies or defects; but the king, who had the care of all his subjects, might, by solemn office found, avoid such acts of insanity, and so might the heir at law after their death.

(E) Of making it by Letter of Attorney.

Co. Lit. 52.
2 Roll.
Abr. 8.

A Man may either give or receive livery by his attorney; for since a contract is no more than the consent of a man's mind to a thing, where that consent or concurrence appears, it were most unreasonable to oblige each person to be present at the execution of the contract, since it may as well be formed by any other person delegated for that purpose by the parties to the contract.

Co. Lit.
48. b. 52. a.
2 Roll.
Abr. 8.
Palsfeman
and Grobie.

But such delegation or authority, to give or receive livery, must be by deed, that it may appear to the court, that the attorney had a commission to represent the parties that are to give or take livery, and whether the authority was pursued.

11 H. 4. 3.
2 Roll.
Abr. 90.
Co. Lit.
258. Perk.
§ 188.

For if the letter of attorney be to make livery upon condition, as to make a feoffment conditional, and the attorney deliver seisin absolutely, the livery is not good, because the attorney had no authority to create an absolute fee-simple; and therefore such absolute feoffment shall not bind the feoffor, because he gave no such authority; and hence in some books the attorney is called a disseisor.

26 Aff. 39.
2 Roll.
Abr. 8.
Co. Lit. 258.
Perk. § 192.

But if the letter of attorney had been to make livery absolutely, and the attorney had made it upon condition, this seems a good execution of his power, and the feoffment good; because when the attorney had once delivered possession, he fully executed his power; and the condition annexed to it, being without authority, is void; and therefore shall not destroy the operation of the livery.

Perk. § 189.

If a warrant of attorney be given to make livery to one, and the attorney makes livery to two, or if the attorney had authority to make livery of *Black-acre*, and he made livery of *Black-acre* and *White-acre*, though the attorney has in these cases done more, yet there is no reason that should vitiate what he has done pursuant to his power, since what he did beyond it is a perfect nullity, and void.

Perk. § 189.

But if the attorney were to deliver seisin to two, and he had made livery only to one, that had been void, because he had no authority to deliver the whole possession to one exclusive of the other, and therefore it is void for the whole.

Co. Lit. 52.
2 Roll.
Abr. 9.

An attorney cannot make livery within view, because such livery is made by signs or words, instead of the act of delivery; besides,

besides, the power of the attorney is to deliver the possession, but that power is not executed by the livery in view, because the possession is not in the feoffee till actual entry made by him, and consequently the attorney has not executed his authority.

If a letter of attorney be given to two jointly to *take* livery, and the feoffor make livery to one in the absence of the other, in the name of both, this is void; because they being appointed jointly to receive livery are considered but as one.

Co. Lit. 49.
2 Roll.
Abr. 8.

But if a *feoffment be made to A. and B.*, and the feoffor give a letter of attorney to deliver seisin, and *J. S.* give livery to *A.*, in the absence of *B.*, in the name of both, this is a good livery; for though the entire possession be delivered to one only, yet they being joint-tenants by the deed of feoffment, such livery to one makes no alteration or change in the possession, because, if the livery had been made to both, each had been placed in the possession; besides that, every man being presumed to accept a gift for his advantage, *A.* is looked upon as the attorney of *B.* to receive the possession for him; and therefore the livery to *A.* enures to the benefit of *B.* till he disagrees to it.

Co. Lit. 49.
2 Roll.
Abr. 8.

But if a letter of attorney be made to three *conjunctim et divisim*, and two only make livery, this is not good, because not pursuant to their authority, for the delegation was to them all three, or to each of them separately; yet if the third was present at the time of the livery made by two, though he did not actually join with them in the act of livery, yet the livery is good; because when they all three are upon the land for that purpose, and two make livery in the presence of the third, there is his concurrence to the act, though he did not join in it actually, since he did not dissent from it.

Dyer, 62.
Roll. Abr.
326.
See Co. Lit.
52. b. n. 2.
13th edit.

If a letter of attorney be given to *A.* to make livery of lands already in lease, the attorney may enter upon the lessee in order to make livery; because, while the lessee continues in possession, the attorney cannot deliver seisin of it; and therefore to execute the power given him by the letter of attorney, it is necessary he should have a power to enter upon the lessee: but by *Rolle*, it is the safer way to insert a clause in the letter of attorney, for the attorney to enter *Et omnes alios inde expellend.*

Co. Lit.
52. b.
Poph. 103.
Dyer, 131.
a. 340. a.
2 Roll.
Abr. 9.

If *A.* be disseised of *Black-acre* and *White-acre*, and give a letter of attorney to enter into both, and make livery, if the attorney enter into one acre only, and make livery *secundum formam chartæ*, this is not good, because the attorney has not pursued his authority; for the estate of the disseisor cannot be defeated without an entry into both acres; and till the estate be defeated, the attorney cannot execute his power in the manner it was delegated; and therefore what he did in this case was void.

Co. Lit.
52. a.
2 Roll.
Abr. 9.

This power of the attorney must be executed during the life of the person that gives it, because the letter of attorney is to constitute the attorney my representative for such a purpose, and therefore can continue in force only during the life of me, that am to be represented. And hence it is, that if *J. S.* take a letter of attorney to deliver seisin after my death, it is void; be-

2 Roll.
Abr. 9.
Co. Lit. 52.
Perk. §188.

cause he cannot deliver seisin during my life, for that were plainly without any authority from me; nor can he do it after my death for the former reason.

2 Roll.
Abr. 8, 9.
and *vide*
Co. Lit. 52.

This authority to give livery may be delegated by deed indented, though the attorney be not party to the deed, because the attorney takes nothing by the deed, but has only a naked authority delegated to him; and therefore, since a man may take an estate in remainder, though he is not party to the deed, *a fortiori* one not party to the deed may receive a naked authority or power by it.

11 H. 7. 19.
14 H. 8. 3.
Co. Lit.
52. b.
2 Roll.
Abr. 12.

But if any corporation aggregate, as a mayor and commonalty, or dean and chapter, make a feoffment and letter of attorney to deliver seisin, this authority does not determine by the death of the mayor or dean; but the attorney may well execute the power after their death, because the letter of attorney is an authority from the body aggregate, which subsists after the death of the mayor or dean, and therefore may be represented by their attorney; but if the dean or mayor be named by their own private names, and die before livery, or be removed, livery after seems not good.

Co. Lit. 12.
Perk. § 187.

There are few or no persons excluded from exercising this power of delivering seisin, for monks, infants, femmes-covert, persons attainted, outlawed, excommunicated, villeins, aliens, &c. may be attorneys; for this being only a *naked authority*, the execution of it can be attended with no manner of prejudice to the persons under these incapacities or disabilities, or to any other person, who by law may claim any interest of such disabled persons after their death.

Co. Lit.
52. a.
Perk. § 198.
So a husband
may be attorney for his wife. Co. Lit. 52. a.

A feme-covert may be an attorney to deliver seisin to her husband, and so may he in remainder be an attorney to make livery to the tenant for life.

Co. Lit. 52.
Perk.
§ 200.

If lessee for life make a deed of feoffment and letter of attorney to his lessor to deliver seisin, if the lessor make livery accordingly, it is a good feoffment; but the lessor, notwithstanding he gave livery himself, may enter for the forfeiture of the tenant for life; because the freehold being in the tenant for life, the lessor was only his representative to transfer it: but if the tenant had been only lessee for years, and the lessor had made livery, that had been no forfeiture of the term; because, the freehold being only in the lessor, he could not be the representative of the termor to convey what the termor had not; and therefore the freehold, which past by the livery, must proceed from the lessor himself, and, consequently, shall bind him.

Co. Lit. 52.

If *A.* makes a lease for years to *B.*, and after makes a deed of feoffment with a letter of attorney to *B.* to deliver seisin, and *B.* makes livery accordingly, this shall not extinguish or affect his term, because the livery was made to pass the freehold, and that he did as representative to the lessor; and therefore, since the feoffee can claim nothing from the lessee, the interest of the lessee remains as it was, unaffected by the feoffment.

Fines and Amercements.

IT seems that originally all punishments were corporal; but that after the use of money, when the profits of the courts arose from the money paid out of civil causes, and the fines and confiscations in criminal ones, the commutation of punishments was allowed of, and the corporal punishment, which was only *in terrorem*, changed into the pecuniary, whereby the courts found their own advantage.

This begot the distinction between the greater and less offences; for in the *crimina majora* there was at least a fine to the king, which was levied by a *capiatur*; but upon the less offences there was only an amercement, which was affected, and for which a *disfringas* or action of debt only lay.

But for the better understanding hereof we shall consider,

(A) Who have sufficient Authority to fine and amerce.

(B) For what Offences the Party is to be fined or amerced.

(C) In what Actions or Proceedings there ought to be a Fine or Amercement: And herein,

1. Of the Nature of the Action, in which there ought to be a Fine or Amercement.
2. At what Time to be awarded.
3. Whether to be awarded when the Party is acquitted as to Part.
4. Whether to be awarded where there are several Parties, and some of them only acquitted.
5. Of awarding Fines and Amercements jointly or severally.
6. Whether the Party can be twice amerced in the same Action.

(D) Where a Fine ought to be awarded, and not an Amercement, & *vice versa*.

(E) Who,

(E) Who, in respect of their Persons, are not to be fined or amerced.

(F) Of the Reasonableness of the Fine; and herein of mitigating or aggravating it.

(G) Of the Reasonableness of an Amercement, and the Affeerment thereof: And herein,

1. Of the Necessity of an Affeerment.

2. By whom the Affeerment is to be.

(H) Of the Manner of recovering Fines and Amercements.

(A) Who have sufficient Authority to fine and amerce.

8 Co. 39. **R**EGULARLY all courts of (a) record may fine and imprison an offender, if the nature of the offence be such as deserves such punishment.
Dalt. 400. (a) But no court, unless of record, can fine or imprison. 11 Co. 43. b. Godb. 381. S. P. adjudged.—That wherever a jurisdiction is erected with power to fine and imprison, that is a court of record. Salk. 200. pl. 1.

2 Inst. 143. **T**herefore the sheriff in his *torn* may impose a fine on all such
8 Co. 38. as are guilty of any contempt in the face of the court, and may also impose what reasonable fine he shall think fitting upon a suitor refusing to be sworn, or upon a bailiff refusing to make a panel, &c., or upon a tithingman neglecting to make his presentment, or upon one of the jury refusing to present the articles wherewith they are charged, or upon a person duly chosen constable refusing to be sworn.

F.N.B. 82. **A**lso, the steward of a court-leet may by recognizance bind
Dalt. c. 1. any person to the peace who shall make an affray in his presence, sitting the court, or may commit him to (b) ward, either
Lamb. c. 3. for want of sureties, or by way of punishment, without demanding any sureties of him; in which case he may afterwards impose
10. b. a fine according to his discretion.
Crompt. 7.
2 Hawk.
P. C. 4.

(b) But in 11 Co. 43., it is said, that some courts may fine, but not imprison; as the leet. Roll. Rep. 74. S. P. by my Lord Coke; and in Roll. Rep. 35. it is said by Coke, that this is the only court that can fine but not imprison.

Keilw. 66. **A**lso, the sheriff in his *torn*, and the steward of a court-leet,
Kitchin. 43. have a discretionary power, either to award a fine or amercement for contempt to the court; as for a suitor's refusing to be sworn, &c.; and the (c) steward of a court-leet may either amerce or
51.
(c) But the statute 1 E.
4. c. 2. re- fine

fine an offender, upon an indictment for an offence not capital, within his jurisdiction, without any farther * proceeding or trial; especially if the crime were anyways enormous; as an affray accompanied with wounding. amercements on indictments found before him.—* *Qu. de hoc.*

It is said, that some courts may imprison but not fine, as the constables at the petit sessions. 11 Co. 44. Roll. Rep. 74.

Also, some (a) courts cannot fine or imprison, but amerce, as the county, hundred, &c. 11 Co. 43. b. (a) *A.* was seised

of the manor of *Gravesend*, and prescribed for a water-court within his manor, for reformation of the disorders amongst watermen; and whether this court was not in nature of a leet, and not a court-baron, so that the steward, without any special prescription, might assess a fine. Leon. 216. *abitatur.*

But some (b) courts can neither fine, imprison, nor amerce; as (c) ecclesiastical courts holden before (d) the ordinary, arch-deacon, &c., or their commissaries, and such as proceed according to the canon or civil law. 11 Co. 44. a. (b) No English court can fine for not appearing to

answer a bill there. Roll. Rep. 336. Nor can the chancellor for breach of a decree. 4 Inst. 84. (c) Their proceedings are only by ecclesiastical censures. 4 Inst. 324. *Vide* 16 Car. 1. c. 11. par. 4. 13 Car. 2. c. 12. Noy, 17. (d) But whether the high commission court (while standing) could fine and imprison, was *vexata quæstio*. *Vide* Poph. 60. Cro. Car. 582. 4 Inst. 324., &c. 332. By 16 Car. c. 11. § 2., such fines and imprisonment recited to have been used to the oppression of the subject.—That they used to fine and imprison, which was illegal; yet the parties were remanded on a *habeas corpus*. Comb. 306. *per* Holt, C. J.

(B) For what Offences the Party is to be fined or amerced.

EVERY court of record may injoin the people to keep silence under a pain, and impose reasonable fines, not only on such as shall be convicted before them of any crime on a formal prosecution, but also on all such as shall be guilty of any contempt in the face of the court; as by giving opprobrious language to the judge, or obstinately refusing to do their duty as officers of the court. 11 H. 6. 12. b. Roll. Abr. 219. 8 Co. 38. 11 Co. 43. Cro. Eliz. 581. Sid. 145.

If any of the jury give their verdict to the court, before they are all agreed of their verdict, they may be fined. 40 Aff. 10. for this *vide* head of *Furies*.

If time out of mind a constable hath yearly been elected, and presented by the jury at a leet, and *J. S.* by them is elected and presented constable, and being (e) in court, and by the steward required to take his oath accordingly, refuses and departs in contempt of the court, the steward may impose a fine on him. 8 Co. 38. b. *Griessly's case*. Sav. 93. (e) That the steward may impose

a fine upon a person who is elected by the homage, if he is present at the leet, and refuses to be sworn to execute the office; but if the person is not present, the steward cannot fine him, but he may be amerced, which must be presented at the next court, and assented; but the party ought to be summoned, and a time and place ought to be appointed under a penalty, when and where he shall come, and before whom to take the oath; and it is not sufficient to allege in general that he had notice, for though he be an inhabitant, yet he may be effoined. 5 Mod. 130. adjudged.

So, if a tithing-man refuse to make a presentment in a leet, 8 Co. 38 b. the steward may impose a reasonable fine on him.

So,

- 2 Co. 38. b. So, if one of the jury in a leet depart without giving his verdict, he shall be fined by the steward.
- 3 Inst. 53. If one is present when a murder is done, and does not his best endeavour to apprehend the murderer, he shall be fined and imprisoned.
- Wey. 50. So, if two are fighting, and others looking on, who do not endeavour to part them, if one is killed, the lookers on may be indicted and fined to the king.
- 4 Inst. 297. If at a justice-seat, holden within a forest, a man makes a false claim of privilege, he shall be fined.
- Keb. 278. If a dead body in prison, or other place, whereupon an inquest
2 Hawk. ought to be taken, be interred, or suffered to lie so long that it
P. C. c. 9. putrify before the coroner hath viewed it, the gaoler or township
§ 23. shall be amerced.
- 3 Inst. 53. If any homicide be committed, or dangerous wound given,
4 Inst. 183; whether with or without malice, or even by misadventure, or
Cro. Car. self-defence, in any (a) town, or in the lanes or fields thereof, in
252. the (b) day-time, and the offender (c) escape, the town shall be
3 Leon. 207 amerced; and if out of a town, the hundred shall be amerced.
2 Inst. 315.
Dyer, 210.
- (a) By the statute 3 E. 1. c. 6., no city, borough, or town shall be amerced without reasonable cause, and according to the quantity of the offence; and *vide* Cro. 252., where an information was exhibited against the mayor and commonalty of London, for that J. S. was killed in a tumult there, and none of the offenders taken, nor any person known or indicted for the felony; upon which they appeared and confessed the offence, and were fined 1500 marks. (b) Where the stroke was given in the day-time, but the party did not die till night. Leon. 107. 3 Leon. 207. *dubitatur*. (c) Of which the coroner may inquire upon view of the body; or the justices of the peace may inquire of such escapes, and certify them into the King's Bench. 4 Inst. and *vide* 3 H. 7. c. 1.
- 3 Inst. 53. Also, since the statute of *Winchester*, cap. 5. ordains, that walled
7 Co. 6. b. towns shall be kept shut from sun-setting to sun-rising, if the
7. a. fact happen in any such town by night or by day, and the offender escape, the town shall be amerced.
- 4 Inst. 294. If by the forest law, hue and cry is made for a trespass in venison, any township or village within the forest, which does not follow the hue and cry, shall be amerced at the justice-seat.
- 13 H. 4. 9. If the deciners ought to pay rent at the leet (d) *pro certo lete*,
Roll. Abr. this is not (e) properly a rent, but a sum in *gross*; and if they do
211. not pay it, they may be amerced, for this is due and payable at
Yelv. 186. the leet.
S. P. a custom being
laid. Brown. 190. 6 Co. 77.—But if not warranted by the custom, perhaps it is otherwise. Godfrey's case. 11 Co. 44. b. Roll Rep. 32. 73. (d) For the original thereof *vide* 6 Co. 77.
2 Inst. 71. (e) But for a rent distrainable, no amercement shall be in a leet. 11 H. 4. 89. b. Roll. Abr. 211.
- 12 H. 4. A man shall not be amerced in (f) a leet for trespass to the
S. b. lord himself, for he shall not be his own judge.
Leon. 242.
S. P. *per* Gawdy. Raym. 160. Sand. 135. 2 Keb. 139. 3 Keb. 744. S. P. adjudged. (f) But
such private trespass may be presented there for the lord's information. Sand. 135. 2 Keb. 139.
- 6 H. 6. 55. If a man arrests another in London, coming to the Common
Roll. Abr. Pleas to answer a writ at the suit of the (g) same man, because
2 S. S. C. he ought to have his privilege, the plaintiff shall be fined for the
S. Co. 60. contempt of the court.
S. C. cited.
(g) But if
another man had arrested him, who was not plaintiff in the writ in *Banco*, he should not be fined.
9 H. 6. 55.

So, if the plaintiff, in a suit *in banco* be arrested at the suit of the defendant in *London*, (a) before the return of the writ *in banco*, this is a contempt to the court; and for this he shall be fined and imprisoned *.

11 H. 6.
22. Roll.
Abr. 218.
S. C.
(a) Where
one under

countenance of law is guilty of double vexation; as if he sues in *B.*, and, pending this, sues in *London* for the same cause, he shall be fined. 8 Co. 60. a. Goulf. 30. pl. 5.—* *Sed qu.* If this is now law? as the defendant may have just cause of action against the plaintiff notwithstanding the prior suit pending.

(C) In what Actions or Proceedings there ought to be a Fine or an Amercement: And herein,

1. Of the Nature of the Action in which there ought to be a Fine or Amercement.

IT seems that regularly there was a fine or amercement in all actions; for if the plaintiff or demandant did not prevail, it was thought reasonable that he should be punished for his unjust vexation; and therefore there was judgment against him, *quod sit in misericordia pro falso clamore*.

2 Co. 39.
F.N.B. 75.

Hence, when the plaintiff took out a writ, the sheriff, before the return of it, was obliged to take pledges of prosecution, which, when fines and amercements were considerable, were real and responsible persons, and answerable for those amercements, (b) but being now so very inconsiderable that they are never levied, there are only formal pledges entered, *viz.* *John Doe* and *Richard Roe*.

Vide tit.
Bail.

(b) Sand.
227.

(c) In all actions, where the judgment is against the defendant, it was to be entered with a *misericordia*, or a *capiatur*; and herein the difference is, that if it be an action of debt, or founded on a contract, the entry is *ideo in misericordia*, without assessing any sum in certain, which was afterwards assessed by the coroners in the proper county; but if it were in an action of trespass, the court set the fine and levied it by a *capiatur* †.

(c) 8 Co. 60.
Roll. Abr.
212. 219.
Cro. Eliz.
844.
Cro. Jac.
255.
† But see
infra the
Stat. 5 & 6 W. 3. c. 12.

And therefore in all actions *quare vi & armis*, as rescous, trespass, &c., the defendant shall be fined.

8 Co. 59
Roll. Abr.
222.

So, in a writ of recaption in the Common Pleas, if judgment be given against the defendant, he shall be fined and imprisoned; but in a writ of recaption in the county-court, if the defendant be convicted he shall only be amerced.

8 Co. 41 a.
60. b.
11 Co. 47.
F.N.B. 73.

In an attaint against him who recovered in the first action, if the plaintiff recovers, the defendant shall be (d) amerced.

Roll. Abr.
212.
(d) But in

8 Co. 60. it is said, that if the attaint pass against the defendant, if he was party to the first record, he shall be fined and imprisoned; otherwise, if he was not party to the first record.

first record,

If a man recovers in an assise, and dies, and his wife is endowed, in an attaint against his wife, if he recovers, the wife shall be (e) amerced.

40 Aff. 20.
Roll. Abr.
212.

(e) But not fined, because not party to the first record. 8 Co. 61.

30 Aff. 38. In an action upon the (a) statute of *Marlebridge*, for driving a
 Roll. Abr. distrefs into another county, the defendant shall be ransomed,
 219. (which admits that he shall be fined.)
 (a) 52 H. 3.
 c. 4., which see explained, 2 Inst. 106.

33 H. 6. In an assise of rent, if the tenant be found guilty of a disseisin
 206. Roll. with force, because of a rescue done by him without *vi et armis*,
 Abr. 219. he shall be fined, though this be not within the statute.

8 Co. 61. a. In all judicial writs, if the plaintiff is barred, nonsuit, or his
 (b) That a writ abates, the plaintiff shall not be amerced, (b) because the
 man shall process is founded upon a record.
 not be fined
 in an *audita querela*. 12 H. 4. 15. b. Roll. Abr. 219.

But as fines and ameracements in those actions, by not being levied, became matter of form, it was thought hard, that for any irregularity herein a judgment should be arrested; and therefore,

For which
vide tit.
Amendment
and Jesfail.

By the 16 & 17 Car. 2. cap. 8. it is enacted, "That no judgment after verdict, confession by *cognovit actionem*, or *relicta verificatione*, shall be reversed for want of a *misericordia*, or a *capiatur*, or because one is put for the other."

And by the 5 & 6 W. 3. cap. 12., reciting that divers suits and actions of trespass, ejectment, assault, and false imprisonment, brought by party against party in the respective courts of law at *Westminster*; and upon judgment entered against the defendant or defendants, in such suits or actions, the respective courts aforesaid do *ex officio* issue out process against such defendant and defendants for a fine to the crown for a breach of the peace thereby committed, which is not ascertained, but is usually compounded for a small sum of money, by some officer in each of the said courts, but never estreated into the *Exchequer*; which officers, or some of them, do very often outlaw the defendants for the same, to their great damage; therefore it is enacted, "That no writ or writs, commonly called *capias pro fine*, in any of the said suits or actions, in any of the said courts, shall be sued out or prosecuted against any of the said defendant or defendants, or any further process thereupon, but the same fines, and all former fines, yet unpaid, are and shall hereby be remitted and discharged for ever; yet nevertheless the plaintiff or plaintiffs, in every such action, shall (upon signing judgment therein, over and above the usual fees for signing thereof) pay to the proper officer, who signeth the same, the sum of six shillings and eight pence, in full satisfaction of the said fine, and all fees due for or concerning the said fine, to be distributed in such manner as fines and fees of this kind have usually been, and not otherwise; which said officer and officers shall make an increase to the plaintiff or plaintiffs of so much in their costs, to be taxed, against the said defendant or defendants."

Salk. 54.
 pl. 2.
 Comb. 387.

But though this statute takes away the *capiatur fine*, yet it is said to be the practice of the court of *Common Pleas*, to make a special entry of the judgment in this manner, *nihil de fine quia remittitur*

remittitur per statutum in the same manner as where the fine was pardoned, in which case the entry was *nil de fine quia pardonatur*.

But it was ruled on debate in the *King's Bench*, that this statute having taken away the fine, there was no judgment of *capiatur* to be entered against the defendant, nor any thing in lieu thereof, but that that clause was totally to be left out of the judgment, for that it was not like the case of a pardon, which does not alter the law, but only excuses that party, so *nihil de fine quia pardonatur*.

Cart. 390.
Lindsey v.
Sir Talbot
Clerk.
Salk. 54.
Comb. 337.
S. C.

2. At what Time to be awarded.

If in a (a) real action the tenant comes the first day and renders the land, he shall not be amerced.

Co. Lit. 126.
5 Co. 49.
Cro. Eliz. 65. Cro. Car. 564. 8 Co. 61.

So, in detinue for a box of charters by the heir, upon the delivery of his father; if the defendant comes the first day, and says, that he hath been always ready to tender them, and yet is, if the plaintiff does not traverse this, the defendant shall not be amerced.

38 E. 3. 20.
Roll. Abr.
212.

In a *cui in vita*, if the tenant vouches, and the vouchee comes the first day of the summons and tenders, yet he shall be amerced; for when the tender is not at the first day of the original, an amercement is due to the king.

14 E. 3. 16.
Roll. Abr.
212.

In an account, if the defendant comes the first day and tenders the money, and the plaintiff accepts it, none of them shall be amerced.

2 R. 2. 45.
Roll. Abr.
213.

So, in an account, as receiver of 10*l.*, if the defendant pleads, never his receiver, and this is found against him, by which he is adjudged to account; and after he comes and tenders the 10*l.*, and makes oath, that after the time that the money was delivered to him, he could not find any thing to buy for profit, this shall be a good discharge of the defendant, and neither he nor the plaintiff shall be amerced.

46 E. 3. 40.
Roll. Abr.
212.

In dower, if the tenant, after he is (a) effoined, renders dower, and avers, that he hath always been ready, &c., the tenant shall not be amerced.

22 E. 3. 2.
Roll. Abr.
212.

(a) But if the tenant tenders to the demandant her dower, after she hath taken a day *prece partium*, he shall be amerced, though this delay was by the assent of the demandant. 18 E. 3. 39. Roll. Abr. 212. S. C. but a *quare* is added.

In a writ of dower, if the tenant vouches the heir of the baron, and the vouchee demands the lien; and upon this the vouchee enters into warranty, as he who hath nothing by descent, &c., and the tenant says that he hath assets by descent; upon which judgment is given, that the demandant shall recover against the tenant, &c., the vouchee shall be *in misericordia*, though he doth not counterplead the warranty.

13 E. 3. 14.
Roll. Abr.
212.

If in an action of debt the defendant comes the first day, and appears by attorney, and makes defence, *scilicet, defendit vim & injuriam quando*, &c., and after the attorney pleads *non sum informatus*,

Roll. Abr.
213. Hob-
berly and
Lewis ad-
judged.

formatus, the defendant shall be amerced; for he ought to have acknowledged the action the first day, not to have made any defence.

Roll. Abr. 213. Dame Slaney v. Vawtre. So, if in debt the defendant comes the first day, and imparls till the next term, and then judgment is given upon *non sum informatus*, the defendant shall be amerced.

Roll. Abr. 213. Barecroft and Rooks. Yelv. 108. S. P. adjudged. But if in an action of debt, the defendant comes the first day by attorney, and says, that *non est informatus*, and thereupon judgment is given, the judgment shall be against the defendant for the debt, damages and costs; but *nihil in misericordia quia venit primo die per summonitionem*, because this is all one, as to the plaintiff, as if he had confessed the action, for he is not more delayed by this, and this is the course of the *Common Pleas* in such cases.

5 Co. 42. Hall and Vaughan adjudged. Moor, 394. pl. 511. S. C. adjudged. Co. Lit. 126. Jenk. Cent. 258. S. P. If in a writ of entry, *in le quibus in Wales*, the defendant pleads *non disseisvit*, and pending this plea, a general pardon is made by parliament, by which all fines, amercements, &c. are pardoned, and after judgment is given for the demandant, yet the tenant shall not be amerced for the delay after; for the not rendering the first day, according to the command of the king's writ, is the cause of the amercement, and that is pardoned.

Vent. 96. Noel and Nelson, adjudged. Sid. 449. S. C. *adjournatur*. Lev. 286. S. C. adjudged, and said it was after imparlance. Sand. 226. S. C. adjudged, and there said by Sanders, that it was not law; for though they delayed the plaintiff, yet by their subsequent plea they excused themselves of the tort; as if in a *quare impedit* a bishop imparls, and after pleads *he claims nothing but as ordinary*, he shall not be amerced, because he hath excused himself of the wrong; but *quare* of this reason, because in this very case the bishop shall be amerced, as appears by Hob. 200. Cro. Jac. 93.

Co. Lit. 127. 8 Co. 61. Roll. Abr. 219. If the plaintiff be nonsuit, or if a writ abate by the (a) act of the plaintiff or demandant, or for matter of form, the plaintiff or demandant shall be amerced.

(a) But if a writ abate by the act of God, the plaintiff or demandant shall not be amerced. Co. Lit. 127. 8 Co. 61. S. P. So, in trespass for taking his corn, if upon the pleading the right of the tithes come in question, by which the writ abates, yet the plaintiff shall not be amerced, because there was not any default in him. 38 E. 3. 6. b. Roll. Abr. 213. S. C.

43 Aff. 18. 43 E. 3. 23. Co. Lit. 127. Roll. Abr. 213. In an action brought by two, if the writ abate (b) by the death of one of them, the other shall not be amerced, because it is by the act of God, without the default of the party. [(b) Such an abatement is now prevented by 8 & 9 W. 3. c. 11. § 7.]

47 Aff. 3. 8 Co. 61. So, if two join in a personal action, and one is nonsuit, which in law is the nonsuit of the other, yet the other shall not be amerced, because this is not his fault.

If one demandant or plaintiff is nonsuit in such action, wherein summons and severance lies, and the other proceeds therein, he that is nonsuit shall not be amerced. 8 Co. 61. a.

3. Whether to be awarded when the Party is acquitted as to Part.

It seems to be a general rule, that if part is found for the demandant or plaintiff, and part against him, he shall be amerced. 8 Co. 61. a.

As if in action of covenant for several covenants broken, the plaintiff be barred for one, he shall be amerced for this, though he recovers for the other. Roll. Abr. 216. Waffel and Yelton, Roll. Rep. 411. S. C.

So, in an action upon the case upon a promise to do two things, *scilicet* to pay so much for certain land sold, and if the vendee sells it again for more than he paid, to pay so much more; and the defendant pleads in bar a release, which is adjudged no bar for part, (*scilicet* for the last sum,) and a bar for the first sum; he shall be in *miseriordia* for this sum of which he is barred, though it be an entire promise; and he could not have an action but upon both parts, for he might have acknowledged himself satisfied of that which he had released. Roll. Abr. 216. Roll. Rep. 411. 3 Bult. 230. S. C. adjudged upon a writ of error, and the judgment affirmed accordingly.

If the plaintiff declares, that he was possessed of an hoy, floating at anchor in the river *Thames*, loaded with goods, and that the defendant *satis sciens*, being master of a ship sailing in the river, so negligently governed his said ship, that she in *predict. naviculam* of the plaintiff *violenter ruebat, & illam fregit & submersit*; and upon not guilty pleaded the jury find, that *quoad negligentem gubernationem navis pred. defend. per quod in naviculam querentis violenter ruebat, & illam fregit & submersit*, the defendant is guilty, *& quoad residuum premissorum* that he is not guilty, the plaintiff shall not be amerced, for there is no *residuum*, and the first part of the verdict comprehends all the injury complained of in the declaration. Hard. 300. Mustard and Homden.

In an action of waste in *domibus & gardinis*, if upon the writ of inquiry of waste the defendant be found guilty in *domibus*, and not guilty in *gardino*, the plaintiff shall be in *miseriordia* (a) for the garden. 14 E. 3. 27. Cro. Car. 453. S. C. cited and agreed, because he

counts for waste in places where no waste was done; but where waste is assigned in cutting down twenty trees, and the waste is found in cutting down two trees only, and so the variance in quantity, it is otherwise. (a) So, if in case the plaintiff declares he is seized of two hundred acres, to which he hath common appurtenant, and that the defendant inclosed, *per quod, &c.* and the jury find that he hath only ninety acres, parcel, &c. he shall be in *miseriordia* for the residue. Palm. 270.

In (b) trespass for the battery of his servant, and the taking of his timber, if the defendant be found guilty of the taking of the timber, and not guilty of the battery of the servant, the plaintiff shall be amerced for this. 22 Aff. 76. Roll. Abr. 217. S. C. Moor, 692. S. P. Dyer, 89.

pl. 111. like point. (b) So, in debt, where part is found for the plaintiff, and part for the defendant. 2 Sid. 137. Cro. Eliz. 699.

If in debt upon the statute of H. 8. for buying tithes, the plaintiff demands 50*l.* for the value of the land, and the jury find

find the value but 20*l.*, the plaintiff shall have judgment, &c., but shall be amerced *quoad* the residue of the 50*l.*

Cro. Eliz.
257. *per*
Curiam.

But in trespass, or other actions where the plaintiff declares *ad damnum*, if less be found than he declares for, yet the plaintiff shall not be amerced, because the action is founded upon an uncertainty.

2 Sid. 136.
per Curiam.

In replevin, if the defendant avows the taking of two several distresses, for several causes, and issue is joined upon the taking of one distress, and found for the plaintiff, and a *nolle prosequi* entered as to the other, the plaintiff shall not be amerced.

4. Whether to be awarded where there are several Parties, and some of them only acquitted.

8 Co. 61.

If all or part is found against one tenant or defendant, and nothing or but part against the other, the demandant or plaintiff shall be amerced, unless there be no default in him.

44 Aff. 33.
44 E. 3. 24.
Roll. Abr.
217.

In an assise against two, if it be adjudged against one upon his plea, and the demandant release his damages, and have judgment presently for the land against him, relinquishing his suit against the other, he shall not be amerced for the other.

44 Aff. 33.
44 E. 3. 24.
Roll. Abr.
217.

In trespass against several, one is found guilty, and the plaintiff prays judgment against him, relinquishing his suit against the rest, he shall not be amerced for them.

Roll. Abr.
217. Warner
and Player,
Cro. Car.
54, 55. S. C.

In trover and conversion of 1000 loads of coals against three persons, if one of the defendants is found guilty of 100 loads, and not guilty of the rest, and another guilty of 100 loads, and not guilty of the rest, and the third guilty of 100 loads, and not of the rest, in this case the plaintiff shall not be amerced against any of them, because each of them is found guilty of part, though severally.

23 Aff. 18.
Dyer, 312.

In an assise against two, if the plaintiff recovers against one, and the other is found not guilty, the plaintiff shall be amerced as to him.

19 H. 6. 32.
Roll. Abr.
216.

In a writ of forcible entry against several, for entering with force, and holding out with force; if some are found guilty of the forcible entry, and not guilty of the holding out with force, the plaintiff shall be *in misericordia* for this.

19 H. 6. 32.
Roll. Abr.
216.

So, if some are found guilty of the holding with force, and that they entered peaceably, the plaintiff shall be amerced for this.

17 E. 3. 46.
Roll. Abr.
216. S. C.

If a man brings an assise against the tenant and disseisor of a rent-service, and the tenant is acquitted, and the disseisor found guilty, the demandant shall be amerced for the tenant.

31 Aff. 31.
Roll. Abr.
216. S. C.

So, in an assise of a rent against one tenant and two disseisors, if he recovers against the tenant and one disseisor, and the other is acquitted of the disseisin, the demandant shall be amerced for him.

5. Of awarding Fines and Amercements jointly or severally.

11 Co. 43.
Roll. Rep.
74.

If there are several defendants, and all of them convicted, a joint award of one fine against them all is erroneous, for it

ought to be severally against each defendant; for otherwise one, who hath paid his proportionable part, might be continued in prison till all the others have also paid theirs, which would be in effect to punish him for the offence of another.

Dyer, 211.
Lev. 125.

If at a court-leet twelve of the inhabitants, time out of mind, by the steward, have been sworn chief pledges, who at every leet have used to present, that they the said chief pledges should pay to the lord of the leet 10s. *pro certo leta*, and accordingly have paid it at the said leet; if at a court-leet twelve chief pledges being sworn to inquire of the articles of the leet, refuse to present, that they ought to pay 10s. *pro certo leta*, the steward cannot impose one joint fine upon them all, but must fine them severally; for the refusal of one is not the refusal of the other.

11 Co. 42.
Godfrey's
case. Roll:
Rep. 32.
73. S. C.

If in an assise against two the disseisin is found with force, though the disseisin was joint, yet the fine shall be several.

11 Co. 43. 2.

If in a plaint two are nonsuited, the amercement shall be several.

11 Co. 43. 2.

And though the judgment be against two, and *ideo in misericordia*, yet when it is assented by the coroners *in pais*, the amercement shall be laid on them severally.

11 Co. 43. 2.

So, if there are several defendants, and by law they are to be fined, though in the entry of the judgment it is *ideo capiuntur*, yet it shall be taken *reddendo singula singulis*, and there shall issue several *capias pro fine*.

11 Co. 43.

Yet in some cases a fine or amercement shall be imposed upon several jointly, as upon a county, hundred, and so upon a village, &c., as for the escape of a murderer, &c., because of the uncertainty of the persons, and the infinity of their number.

11 Co. 63. b.

In trespass against two, if one be found guilty to damage *quoad* him, and the other is found guilty to damage *quoad* him; in this case each defendant shall be amerced severally, and the plaintiff shall also be severally amerced *quoad* each of them.

5 Co. 58.

6. Whether the Party can be twice amerced in the same Action.

It is laid down as a rule, that a defendant shall not be amerced twice in the same action, for that would be to punish him twice for the (a) same offence.

8 Co. 61. 2.
Roll. Abr.
218.

where one defendant may be amerced several times for several defaults in the same action, *vide* 2 Leon. 4, 5. 185, 186.

(a) But

In a *quare impedit*, if the plaintiff recovers the presentation against the defendant, and thereupon judgment is given upon demurrer for a writ to the bishop; and upon this the defendant is amerced, and after, a writ is awarded to inquire of the damages and the other points of the writ, and found accordingly, and judgment also given; for this the defendant shall not be amerced again.

5 Co. 58. b.
Roll. Abr.
218.

In an action against the same defendant or tenant, if the defendant or tenant pleads one plea to part, and another plea to the rest, or confesses part, and pleads to issue for the other, and

5 Co. 58.
Roll. Abr.
218.

several issues are found against him, yet the defendant or tenant shall not be twice amerced.

Cro. Car.
178.
Deckerow
& al' v.
Jenkins.

If in an *ejectione firmæ* against four, three are found guilty *quoad* part, and not guilty for the residue, and the fourth is found not guilty generally, the plaintiff may be amerced jointly *quoad* all the defendants, *scilicet*, *pro falso clamere quoad* the three, for so much of which they were found not guilty, and *pro falso clamore quoad* the fourth, *quod sit in misericordiâ*, and the prothonotaries said the usual course was so, and sometimes otherwise, *scilicet*, that *quoad* the three for so much, &c., he be *in misericordiâ*, and *quoad* the fourth that he be *in misericordiâ* also.

Salk. 54.
pl. 1. 253.
pl. 5. Ld.
Raym. 72.
Lord
Lady Ger-
lard, ad-
judged.
Comb. 352.
S. C. and
S. P.
5 Mod. 64.
S. C. and
S. P.

In dower defendant confesses as to part, and judgment is given against him, *quod sit in misericordiâ*, and as to the rest he pleads in bar, upon which there is a demurrer, and judgment is given against him, *quod sit in misericordiâ*; it was objected in error, that a man ought not to be twice amerced in the same action; but it was holden well enough in this case, because both judgments are final and independent of one another; but according to the report of this case in *Salkeld*, it would be otherwise where one judgment is only interlocutory and depends upon another, as (a) *quod computet* in account.

Skin. 592. pl. 6. S. C. and S. P. adjudged, because the second amercement was for a new delay. (a) That in account, if the defendant be adjudged to account, judgment shall be presently before the final judgment, *quod sit in misericordiâ quia non prius computavit*; and in this case, if he be afterwards found in arrearages, judgment shall be again, *quod sit in misericordiâ*. Roll. Abr. 218. Parrey's case adjudged, and affirmed upon a writ of error, and said by the clerks to be the course of the court.

(D) Where a Fine ought to be awarded, and not an Amercement; & *vice versâ*.

* S Co. 39.
Hob. 180.
(b) For the
various sig-
nifications
of the word
fine, vide

WE have already taken notice of the difference made between offences, and that for the *delicta majora*, such as breaches of the peace, contempts or disturbances committed *in facie curiæ*, the court may (b) fine and imprison; but that in real actions or actions of debt, the defendant is only to be (c) amerced.

3 Co. 59. Co. Lit. 126.—And that there is no difference between a fine and ransom in a legal understanding; for a fine makes an end of the business, and so does a ransom, because it redeems from imprisonment; and if they were different things, it would follow, that where the books say that a man shall make a fine and ransom, they must be taken to intend, that he ought to pay two different sums, of which there is no precedent, Co. Lit. 127. 2.; but in *Dyer*, 232. pl. 5. it hath been adjudged, that where a man is to make fine and ransom, the ransom must be treble the fine at least. (c) That if a sheriff, having returned a *cepi corpus* into the King's Bench on a *capias* against a man on an indictment of felony, does not bring him in at the day, it seems that he is by the course of the said court to be amerced, not fined. 40 Aff. pl. 42.—So, if a vill or hundred suffer a felon to escape without being arrested, they are to be amerced, not fined. 3 Inst. 53. *Dyer*, 210. 4 Inst. 294.—But whether the punishment inflicted on a gaoler for suffering a criminal negligently to escape, be properly a fine or an amercement, *q. & vide* 3 H. 5. 2. Fitz. Coron. 84. 292. Rast. Ent. 583. 27 Aff. pl. 9.

9 Co. Co.

(d) So, in
replevin it
was adjudg-
ed for the
avowant,

A man shall be fined and imprisoned for all contempts (d) done to any court of record, against the commandment of the king's writ under his great seal, as in a *quare non admittit, quare incumbravit*, attachment upon a prohibition, &c.

a *returne habendo* awarded, and there the sheriff returned an *elongata*, and a *colibernam* was awarded, though

though the plaintiff brought the money into court, and prayed the process might be stayed; yet the court would not grant it till they had assessed a fine upon the plaintiff. 2 Leon. 174.

But when the demandant or plaintiff, tenant or defendant *se retraxit*, or *recessit in contemptum curie*; yet this is no contempt against the commandment of the king by writ, and therefore he shall not be fined in such case, but amerced only. 8 Co. 58. Peecher's case, Cro. Jac. 211. S. C. and S. P.

If in replevin the defendant claims property falsely, and this in a *proprietary probanda* is found against him, he shall be fined and imprisoned. 8 Co. 60. a.

If one denies a recovery or other record to which he himself is party, he shall not be fined; for it is not his act, but the act of the court; and he does not deny the record absolutely, but *non habetur tale recordum*. 8 Co. 60. a.

In an assise, if the tenant be attainted of a disseisin with force, he shall be imprisoned. Roll. Abr. 222. and several cases there cited out of the year-books to this purpose.

But in an assise for a rent-sock, if the defendant be found a disseisor by denial only, the judgment shall not be *quod capiatur*, but only in *misericordia*. Roll. Abr. 223.

Also, in an assise of a rent-charge against several tertenants; if it be found the plaintiff distrained for this, and one of the defendants, without consent of the rest, made the rescous, though the others are disseisors by the denial; (a) yet they shall not be imprisoned, but only he who made the rescous, disseisor with force. 39 Aff. pl. 4. Roll. Abr. 223. (a) For he who made the rescous is the only disseisor with force. Co. Lit. 161. b.

In an assise, if the tenant by his plea does not deny the ouster, though he be after found a disseisor without force, yet he shall be imprisoned. 28 Aff. 15. Roll. Abr. 222. S. C.

In an assise of nuisance, if the defendant be found guilty, he shall be imprisoned. 19 Aff. 16. Roll. Abr. 222. S. C.

Although in all actions (b) *quare vi & armis*, as rescous, trespass, &c., the defendant shall be fined; yet (c) in actions of (d) trespass upon the (e) case, if the defendant be found guilty, the judgment shall not be *quod capiatur*, but *quod sit in misericordia*. (b) 8 Co. 59. b. Roll. Abr. 222. (c) 8 Co. 59. Hob. 180. (d) That in

trespass or other actions, where the plaintiff declares *ad damnum*, if less be found than he declares for; yet the plaintiff shall not be amerced, because the action is founded upon an uncertainty. Cro. Eliz. 257. (e) So, in an action against an inn-keeper for goods stolen, the judgment shall not be *quod capiatur*. Cro. Jac. 224. adjudged.

But in trespass, if the plaintiff declares that he levied a plaint in London, and upon process J. S. was arrested by a serjeant, and that the defendant *vi & armis* rescued him, *per quod* he lost his debt; and upon not guilty pleaded, it be found for the plaintiff; the judgment hereupon ought to be *quod defendens capiatur*; for though the nature of the action is properly an action upon the case, as touching the loss of the debt of the plaintiff; yet this being with force to the serjeant who was a minister as well to the plaintiff as the court, the plaintiff may count *vi & armis*. Hob. 180. Wheatly and Stone. Roll. Abr. 222. S. C.

Roll. Abr. If a man denies his own deed, and this is found against him by
 220. 224. verdict, he shall be imprisoned for his falsity, and trouble to
 2 Bulst. the jury *.
 230. S. P.

* *Qu.* If this is now law ?

But for this But if a man, where his own deed is pleaded against him,
vide 8 Co. pleads *non est factum*, and after at the *nisi prius*, or before verdict,
 60. Roll. *relictâ verificatione cognoscit* this to be his deed, he shall not be
 Abr. 224. imprisoned, but only amerced.
 Keilw. 42.
 2 Roll. Rep.
 45. Noy, 4. Cro. Jac. 64. Dyer, 67. Raym. 202. Mod. 73. 2 Saund. 185. 2 Keb. 678.
 688. 694. 734.

20 Aff. 10. If a man pleads a deed of the plaintiff or his ancestor, made
 Roll. Abr. to the ancestor of the defendant who pleads it, and this is found
 224. against him, he shall not be imprisoned for his falsity, because he
 could not know whether this was his deed or not, being made to
 his ancestor.

27 Aff. 56. In trespass *contra pacem*, for trampling his corn ; if it be found
 Roll. Abr. that the cattle of the defendant escaped, but not *contra pacem*,
 222. S. C. and trampled the corn, yet the defendant shall be imprisoned, for
 † *Qu. de* he ought to keep his cattle at his peril †.
hoc, if now
 law ?

Roll. Abr. In an action upon the case, upon an *assumpsit*, if the defendant
 222-3. be found guilty, the judgment shall not be *quod capiatur*, but
quod sit in misericordiâ.

Roll. Abr. In a writ of deceit against the party who recovered in a real
 223. action and the sheriff, if it be found that no summons was
 8 Co. 59. made, he that recovered before shall be imprisoned.
 S. P. be-
 cause founded upon the deceit done to the court in obtaining judgment.

8 Co. 60. b. In all cases where a thing is restrained by any statute, the of-
 Cro. Jac. fender shall be fined and imprisoned.
 631. Like
 point adjudged, 12 Co. 134. ; like point resolved 2 Inst. 131. 2 Roll. Rep. 400.—In an action of
scandalum magnatum, whether the judgment ought to be *quod defendens capiatur, dubitatur* ; Probee and
 the Marquis of Dorchester, Sid. 233. adjourned, Keb. 813. adjourned upon a writ of error. Lev.
 148. *dubitatur* ; but the court inclined, that if it was in *misericordiâ*, it was sufficient.

30 Aff. 38. As in an action upon the statute of *Marlebridge* for driving a
 Roll. Abr. distrefs out of the county, the defendant being found guilty shall
 222. be imprisoned †.
 † *Qu. de hoc*
 if now law ?

Roll. Abr. So, in an action of debt upon the statute of 1 & 2 Ph. & Mar.
 222. c. 12. of distreffes, by which the defendant shall forfeit to the
 party grieved, for the driving a distrefs out of the hundred, 5*l.*,
 and treble damages ; if the defendant be found guilty, the judg-
 ment shall be *quod capiatur*.

Roll. Abr. In an action of debt upon the statute of usury, for treble the
 223. Lovell sum lent for taking more than 8*l.* *per cent.*, if the defendant be
 and Bid- found guilty, the judgment shall be *quod capiatur*, because he
 good. took it contrary to the provision of the statute.

Roll. Abr. But in an action of debt upon the statute of 2 & 3 E. 6.
 223. c. 13., for not setting forth tithes, if judgment be given for
 Sid. 233. the

the plaintiff, the judgment shall be *quod sit in misericordiâ*, and not *quod capiatur*; (a) because this is but a debt given in recompence of tithes, and this is the usual course. S. P. ar-guendo. (a) In debt for 5 l. upon the statute of 1 & 2 Ph. & Mar. c. 12. for taking above 4 d. for a distress, the defendant shall be in *misericordiâ* only, because this action is founded upon the non-payment, and not upon the statute. Cro. Car. 560. adjudged.

So, in an action for a robbery founded upon the statute of *Winchester*, if the defendants are found guilty, the judgment shall be *quod sint in misericordiâ*; because this action is not founded upon any *male-feasance*, but upon a *non-feasance* only. Cro. Jac. 350. Old-field v. The Hundred of Witherly.

In an action of trespass for an assault and battery; if the battery was done before a general pardon, by which the fine is pardoned, yet the judgment shall be entered (b) *quod capiatur*; for the court need not take conuzance thereof without demand. Cro. Car. 32. Swayn and Rogers, adjudged. (b) The entry in this

case is sometimes *quod capiatur*, and sometimes *quod non capiatur quia pardonatur*; but Cro. Eliz. 153. 778. Leon. 300. Brownl. 211. Yelv. 126. 5 Co. 49. Moor, 394. Jenk. Cent. 258. Lane, 71. Salk. 54. pl. 2.

(E) Who, in respect of their Persons, are not to be fined or amerced.

THE king being plaintiff or demandant shall not be amerced, nor shall the (c) queen consort. Co. Lit. 127. 8 Co. 61. F. N. B. 31.

3 Bulst. 276. (c) Where the judgment is against the queen, & in *misericordiâ nibil*, eo *quod confors regis*. Roll. Abr. 215.

An infant being plaintiff or demandant shall not be amerced, and this is the reason (d) he shall not find pledges. Co. Lit. 127. 8 Co. 61. 3 Bulst. 276.

Palm. 518. Roll. Abr. 214. 288. (d) That he shall not find pledges. Cro. Car. 161, adjudged.

But an infant defendant shall be amerced, if he pleads with the demandant, and the matter is found against him; (e) but he shall be pardoned of course. Roll. Abr. 214. Cro. Car. 410.

entry in such case is *ideo in misericordiâ sed pardonatur quia infans*. 3 Co. 61. Palm. 518. (e) And the *Nibil in misericordiâ, quia infans*. Cro. Car. 410.

But if an infant brings an action by his *prochein amy*, and pending the action comes of full age, and makes an attorney, and after is *nonfuit*, he shall be amerced. Dyer, 338. pl. 41.

If an infant brings an action of trespass by guardian against two, and the defendants plead not guilty, and at the *nisi prius* the plaintiff appears in person, and a verdict is found for the plaintiff for part, and not guilty for the rest, and one of the defendants not guilty, and judgment is given for the plaintiff, for that for which the verdict is given for him, & *quod nil capiat per billam* for the rest, and him that is found not guilty, *sed nihil de misericordia pro falso clamore*, &c., *quia querens tempore transgressionis predictæ factæ infra atatem existerat*; yet this is good, and no error. Roll. Abr. 214. Methwold and Anguish, adjudged.

5 Co. 49. If a *præcipe* is brought against an infant, and pending the plea
 Moor, 194. he comes of full age, he shall be amerced for the delay after he
 Roll. Rep. comes of full age.
 294.

3 Bulst. 251.

16 E. 3. 14. If baron and feme are vouched in the right of the feme, and
 Roll. Abr. judgment is given against them, and the feme is to be amerced,
 74. they shall be amerced, (a) though the feme be within age, the
 (a) And this husband being of full age.
 amercement shall not be pardoned of court. 16 E. 3. 14.

Hob. 127. In an action upon the case against baron and feme for scandalous words spoken by the feme, and judgment given against both, as well the husband as the wife shall be amerced.

Roll. Abr. In an action of trover and conversion against baron and feme,
 215. Cro. for the conversion of the feme during the coverture; if the feme
 Jac. 439. be found guilty by verdict, and the baron not guilty, yet both
 40. Roll. shall be *in misericordia*; for the amercement is not for the conver-
 Rep. 291. sion, but for the delay of the suit, and the non-rendering the
 3 Bulst. 151. first day, of which the baron is as well guilty as the feme.
 S. C. ad-
 judged.

Roll. Abr. In a writ of dower, if the tenant vouches the baron and feme,
 215-6. as in the right of the feme, as heir to the husband of the de-
 mandant, and the voucher demand the lien, upon which the
 lien is shewn, and they enter into warranty, as those who have
 nothing by descent; and the tenant says that they have by de-
 scent, upon which judgment is given against the tenant, &c.,
 the feme only shall be amerced without the baron.

Bro. Ap- If a feme covert sues a groundless appeal of the death of her
 peal, 25. husband, known by her to be alive, she shall be fined.
 8 H. 4. 17. pl. 2.

37 Aff. 1. In an assise against baron and feme, if the feme be received
 Roll. Abr. upon the default of the baron, and plead in bar, and acknow-
 220. ledge an ouster, and the demandant take issue upon the bar, and
 (b) But if a this be found for the demandant, the tenant shall not be im-
 feme covert prisoned for this confession of an ouster, (b) because she is a feme
 be found covert.
 guilty of a
 trespass be-
 fore the coverture, she shall be imprisoned. 22 Aff. 37. Roll. Abr. 220.

Roll. Abr. If a baron of parliament be found a disseisor with force in an
 220. Lord assise, the judgment against him shall be *quod capiatur*.
 Stafford's case. Cro. Eliz. 170. S. C. adjudged, for that it is upon a disseisin found, upon which a fine is given
 by the statute of *Westm.* 1. c. 35. for which *vide* 2 Inst. 236.—And Hob. 61. that barons are not
 subject to imprisonment, but for great contempt.

Roll. Abr. So, in a debt upon an obligation against a baron of parliament,
 220, 221. if the defendant pleads *non est factum*, and the issue is found
 Earl of Lin- against him, the judgment against him shall be *quod capiatur*.
 coln and
 Flower. Cro. Eliz. 503. S. C. adjudged, because a fine due to the king upon this false plea, and there
 is privilege against it.

(F) Of the Reasonableness of the Fine: And herein of mitigating or aggravating it.

WHERE a person is convicted of a criminal offence, for which he ought to be fined, the measure thereof is left to the discretion of the judges, who proportion such fine, so as to make it adequate to the offence, from the consideration of the baseness and enormity, and dangerous tendency of it, the malice, deliberation, and wilfulness with which it was committed, the age, quality, and degree of the offender, &c.

2 Hawk. P. C. 48. § 11. *vide tit. Judgment*; and that by *Magna Charta* every fine must be with a *salvo contentamento*, which see explained, 2 Inst. 23.

If a prosecutor accepts costs from the defendant, he cannot, by the rules of the court, aggravate his fine, because, in such cases, having no right to demand costs, if he takes them at all, he must take them by way of satisfaction of the wrong; after which it is unreasonable for him to harass the defendant.

But as to those costs given by 5 & 6 W. & M. c. 11. on the removing of a cause by *certiorari*, the prosecutor is not restrained from aggravating the fine to be set on the defendant, because he has a right to such costs by the express words of the statute.

A fine is under the power of the court during the term in which it is set, and may be mitigated as shall be thought proper; but after the term it admits of no alteration.

If a person is indicted and found guilty of a great nuisance, and a writ goes to the sheriff to abate it, if the party refuses to abate it at his own charge, the court will raise the fine accordingly; *secus*, if the nuisance may be easily removed, as pulling down a wall, &c.

Upon a motion to submit to a small fine after a confession of the indictment, which was for an assault; *Holt*, Ch. Just. took a difference where a man confesses an indictment, and where he is found guilty; in the first case, a man may produce affidavits to prove *son assault* upon the prosecutor, in mitigation of the fines: otherwise, where the defendant is found guilty; for the entry upon a confession is only *non vult contendere cum domino rege*, & *ponit se in gratiam curie*.

If an excessive fine be imposed at the sessions, it may be mitigated at the King's Bench.

The court may assess a fine, but cannot award any corporal punishment against a defendant, unless he be actually present in the court*.

* And therefore the personal appearance of the defendant in such cases is not to be dispensed with, unless by rule of court in motion, and the clerk in court, or some other person approved of, undertaking to pay such fine as shall be set on the offender, &c.

2 Hawk. P. C. 48. § 11. *vide tit. Judgment*; and that by *Magna Charta* every fine

Salk. 55. pl. 5.

2 Hawk. P. C. 292. cont. Salk. 55. pl. 5.

Co. Lit. 260. Cro. Car. 215. Raym. 376. Comb. 10.

Salk. 55. pl. 6. The Queen and Templeman.

Vent. 336.

Salk. 56. 400. pl. 4. Comb. 36. 77.

(G) Of the Reasonableness of an Amercement, and the Afferment thereof: And herein,

1. Of the Necessity of an Afferment.

(a) That yet these statutes were in affirmation of the common law.

8 Co. 39.

2 Inst. 27.

(b) An amercement in Latin is called *miseri-*
cordia, be-
cause it
ought to be

assessed mercifully, and this ought to be moderated by afferment of his equals, or otherwise a writ *de moderata misericordia* lies. Co. Lit. 126. b. for this writ vide F. N. B. 75. Regist. 86. 184. 187. (c) So, that though in the courts of *Westminster*, where amercements were ordered either against plaintiff or defendant, they were carried down to the coroner to be settled and assessed. 8 Co. 39. Saund. 227. (d) In Hob. 129. it is said the jury must amerce to a certain sum, which may be mitigated and assessed by others, and therefore these offices cannot be confounded; and so in 3 Lev. 206., that every award of an amercement in a court leet must express a certain sum; but this opinion has been over-ruled by a later resolution, where it hath been holden, that though such amercement must be assessed, yet the award thereof need not express any particular sum. Salk. 56. pl. 7. [Fitzgib. and 1 Will. 248. acc.] And therefore, in judgment of law, the award of the *miseriordia* is the act of the court only, and the assessment of the sum to be paid the act of the assessors, and so ought to be pleaded. Kitchen, 51. See Fitzg. 109.

2 Inst. 27,

28. 169.

8 Co. 39.

These amercements are to be with a *salvo contenemento*, and were always holden too grievous and excessive, if they deprived the offender of the means of his livelihood; as if he were a sockman, and the amercement extended to take away the beasts of his plough; if he were a military man, and it extended to take away his arms; if he were a merchant, and it extended to take away his merchandize; if he were a villein, if it took away his cart or wainage; for the words of *Magna Charta* are, *liber homo non amercietur pro parvo delicto, nisi secundum modum illius delicti, & pro magno delicto secundum magnitudinem delicti, salvo sibi contenemento suo, & mercator eodem modo salva merchandizâ suâ, & villanus ulterius quam noster eodem modo amercietur salvo homagio suo, & si amercietur sit in misericordiâ nostrâ.*

8 Co. 39.

a. b.

2 Inst. 27.

11 Co. 43.

Keilw. 65.

Cro. Eliz.

581. Dalt.

Sheriff, 400.

But a fine may be set without afferment, for the statute of *Magna Charta* does not extend to those cases where a court of justice may imprison, and where a fine is set by way of mercy, as a ransom and purgation of the offence; for the statute was designed in mercy to the offenders, and not to hinder them from mercy, and so did not extend to offences that might be punished by imprisonment.

Moor, 75.

pl. 205.

3 Leon. 7, 8.

If at a court baron, according to the custom there used, a by-law is made, and the penalty of 20s. laid upon every offender, and

and at another court a tenant is presented for a breach thereof, by which the said penalty is forfeited, this cannot be affeered. Bendl. 159.
S. C. ad-
judged.

On the presentment of a nuisance in a torn or leet, the sheriff or steward may either amerce the party, and also order him to remove it by such a day, under a certain pain, or may order him to remove it, under such a pain, without amercing him at all; and the party having notice of such order shall forfeit the pain on a presentment at another court, that he hath not removed the nuisance, without any farther proceeding; and every pain so forfeited may be recovered in like manner as a fine or amercement by distress (a) or action of debt; (b) neither shall it be affeered to a less sum than is at first set. Leon. 203.
Kitchen,
51, 52.
Roll. Abr.
468. Cro.
Jac. 382.
2 Roll. Abr.
136. Roll.
Rep. 201.
Allen, 78.
3 Leon. 7, 8.
5 Mod. 130.
Salk. 175.
pl. 1.

Ld. Raym. 69. 5 Mod. 124. 11 Mod. 215. pl. 3. 12 Mod. 88. 115. 180. Comb. 351. 2 Salk. 502. pl. 2. Skin. 635. pl. 4. (a) There cannot be a distress without a custom. Ld. Raym. 69. (b) So, where a certain penalty is given by statute for an offence, of which the leet hath consueance, the steward may impose it by way of fine without amercement. Carter, 28, 29.

2. By whom the Affeement is to be.

The award of the amercement is the act of the court, but the taxing or reducing it to a certainty must be done by (c) certain officers called affeerors, chosen and sworn for that purpose; and therefore if an amercement be imposed in a court (d) leet, and affeered by the (e) jury, and not by sworn affeerors for that purpose, it is a void amercement, and the lord of the leet cannot maintain his action for it. 8 Co. 40. b.
3 Lev. 206.
(c) That the
amerce-
ments on
plaintiffs or
defendants
in the court
of Common
Pleas were

by the clerk of the warrants made estreats of, and delivered to the clerk of assize within each circuit, to deliver them to the coroners in each county to assize, and such assize by the coroners of the respective counties hath been holden a satisfaction of *Magna Charta, quod nulla prædictarum misericordiarum ponatur, nisi per sacramentum proborum & legalium hominum de vicineto*; the coroners being elected by the whole county. 8 Co. 39. b. (d) So, a justification for an amercement in a court-baron, without shewing it was affeered, is naught. 3 Lev. 19. (e) But it has been holden, that if a jury in a leet tax an amercement, this is sufficient without any other affeement, for the amercement is the act of the court, and the affeement of the jury. 8 Co. 40. b. Jon. 301. Cro. Car. 275. Fitzg. 109. Vide 2 Roll. Abr. 542.

Although by the express words of *Magna Charta, comites & barones non amercientur nisi per pares, &c.*, yet long usage hath prevailed against it, for the amercement of the nobility is reduced to a certainty, viz. a duke 10*l.*, an earl 5*l.*, a bishop who hath a barony 5*l.*, &c. 2 Inst. 28.
6 Co. 54.
8 Co. 40. a.
S. C.

In an (f) assize, if the plaintiff does not appear, nor any for him, yet three of the assize may be sworn to assize the amercement, and shall do it. 28 Ass. 26.
Roll. Abr.
212.
(f) So, upon
a non-suit after the jury are ready to give their verdict, the court may cause the amercement to be immediately assized by the same jurors. 8 Co. 35. b. 11 Co. 43. b.

In (g) trespass if the defendant, as bailiff, &c., justifies, for that the plaintiff was presented, &c., and sets forth, that the amercement was assized by two assizers, he ought to shew their (h) names. Keilw. 66.
(g) So, in
debt for an
amerce-
ment.
3 Keb. 362.

(h) So, if alleged, that at a court-baron *coram seſſatoribus ejusdem Curie*, it was presented, &c. the names of the suitors ought to be shewn. 3 Leon. 7, 8. Moor, 75. Bendl. 159.

(H) Of the Manner of recovering Fines or Amercements.

Cro. Eliz. **BY** the common law, the king or lord may, at their election, distrain or bring an action of (a) debt for a fine or amercement.
581.
Savil, 93.
Raft. Ent.
 151. 553. 606. 2 H. 4. 24. b. 10 H. 6. 7. Raym. 68. (a) And the defendant shall not be allowed to wage his law in any such action, because it is grounded on the act of a court of record.
 10 H. 6. 7. Co. Lit. 295. 2 Roll. Abr. 106.

Hob. 129. But every avowry or declaration of this kind ought expressly to shew, that the offence was committed (b) within the jurisdiction of the court, for if it were not, all the proceedings were *coram non judge*, and a court shall not be presumed to have a jurisdiction where it doth not appear to have one.
Raft. Ent.
553. Co.
Ent. 572.
 (b) But that it need not be alleged in the presentment itself. **Hob. 129.**—Yet *per* 2 Hawk. P. C. c. 10. § 21. it is most adviseable to have such an allegation, and that perhaps may supply the want of the averment of jurisdiction in the pleadings.

But for this **vide** 2 **Hawk. P. C.** as well as presented, and to shew the names of the presentors and the assessorors in setting forth a presentment or assessorment, and also to shew that proper notice was given of holding the court.
 c. 10. § 22.
 and several authorities there cited.

2 Hawk. Of common right, a distress is incident to every fine and amercement in a torn or leet, for offences of common right within the jurisdiction thereof; but if the offence was only the neglect of a duty created by custom, and of a private nature, it is clear that there must be a custom to warrant a distress, and perhaps such custom is also necessary though the duty be of a publick nature.
 P. C. c. 10. § 25. and the authorities there.

Roll. Abr. Also, the sheriff or lord may for such fines or amercements distrain the goods of the offender, even in the highway, or in land not holden of the lord, unless such land be in the possession of the crown.
 670.
 2 Inst. 104.

Owen, 146. But such fines and amercements being for a personal offence, no stranger's beasts can lawfully be distrained for them, though they have been levant and couchant upon the lands of the offender.
Noy, 20.

Herley, 62. If such court is in the king's hands, the distress may be sold of common right, after it hath been kept for a reasonable time, as the space of sixteen days; and it seems the better opinion, that where any such court is in the hands of a common person, if the goods were distrained for an offence of a publick nature, they may be sold of common right, without any special custom for that purpose.
Finch. 476.
3 Co. 41.
Roll. Rep.
75.
Noy, 17.
Bulf. 53.

Cro. Eliz. No bailiff can lawfully distrain for any such fine or amercement without a special warrant for so doing, which must be set forth by him in an avowry or justification of such a distress.
 698. 748.
Moore, 574.
pl. 739.
 607. pl. 839. 2 Keb. 745. Salk. 107. pl. 2.

Fines and Recoveries.

A Fine is an agreement of the parties on record, by which lands are transferred from conuzor to conuzee, with or without a render; and this is esteemed a conveyance of greater security than a feoffment, or the investiture by livery, being not only equivalent to the notoriety of livery (*a*), but having the constant and undoubted credit of a court of record to protect and support it; and this farther convenience and security, that it does not only transfer the right of the vendor, and all claiming under him, but likewise extinguishes the right of others who omit to make their claim in due time.

Spelman describes it thus: *Finis est solemniter transference dorum prædiorum in Curia Regis civilium causarum, quo nihil sanctius vel augustius ad ali-*

enationes & hereditates stabiliendas. Spel. Gloss. voc. Finis. [(a) But this was not on account of the acknowledgment thereof in a court of record, for no such acknowledgment is made in any of the ancient fines; but because lands acquired in this manner were supposed to be recovered by sentence of a court of justice, and the possession was delivered by the sheriff, in pursuance of a writ delivered to him for that purpose. Cruise on Fines, 6.]

Fines seem originally to have been invented and allowed of for different ends and purposes than they are now applied to; for they were at first no more than a friendly composition and determination of the matters in debate between the demandant and tenant in the lord's court; and this way of composing differences was easily admitted in those days, because the suitors of the court, who were judges of all suits, were by these amicable compositions the sooner dismissed from their attendance at the court; nor did the lord of the manor suffer by them, because on these agreements, the parties litigating paid him a fine for his *congé d'accorder*, as they do the king at this day, which was equivalent to the amercements, which were paid him in adversary suits.

From an observation of the peculiar benefit and security from fines, and from the countenance and encouragement they received from the courts of justice, men began to engage themselves, and oblige each other by covenants to compose their differences; and they were the more easily drawn into this amicable way, because it was not attended with the usual expences of adversary suits, which being generally prosecuted with warmth and animosity, by the parties litigating, must necessarily involve one or both parties in difficulties, which such friendly compositions are free from; and the judges, considering these agreements as the publick acts of the court, allowed them some sanction with their own judgments: and hence they came to be improved into that useful and common assurance which we find them to be at this day, as they stand upon the statutes of 4 H. 7. cap. 24. and the 32 H. 8. c. 36.

These fines were not only thought useful to private or particular persons, but such as established the publick peace of the kingdom; and Spelman says, *Fines ejusmodi maxime placuere, quod propter resolutionis magnificenti-*
rius

am, non solum ad stabiliendas transactiones sed ad rescindendas lites maxime valebant; ideoque ob empra-

ribus terrarum tanquam sacra anchora culta & admirata. Spelm. Gloss. Verb. Finis. [Mr. Cruise thinks, that the idea of a fine was originally taken from the *transfatio* of the civilians; and therefore dates their antiquity no higher than the reign of *Stephen*, or his immediate successor, *Henry II.* Cruise on Fines, 7., &c.]

But for the better understanding of the doctrine of fines, we shall distinguish this head into the following branches, under which the particular cases may be comprehended.

- (A) Of the several Parts of a Fine, and when they begin to operate.
- (B) The several Sorts of Fines.
- (C) Who may levy Fines.
- (D) Of the *Dedimus Potestatem*.
- (E) Of the Operation of a Fine in barring the Issue in Tail.
- (F) Of the Operation of a Fine, in barring Strangers, or those who have but an uncertain Interest, as a Term for Years, or barely an equitable Interest.
- (G) Of the Remedies given to Strangers, by Claim and Entry, for the Preservation of their Right.
- (H) Of erroneous Fines, and the Manner of reversing them.

Of what things a fine may be levied, and by what name, and what shall be a sufficient description of the thing, without naming either vill, hamlet, or parish, see in the next head of *Recoveries*, of what things a recovery may be suffered.

- (A) Of the several Parts of a Fine, and when they begin to operate.

Co. Read-
ing, 3. 10.
Plow. 394.
2 Roll. Abr.
14.
2 Inst. 510.
5 Co. 38.
A fine may
be levied on
a writ of
right close,

THE first part of a fine is the original writ, and without this the fine is erroneous, and may be reversed for error in *B. R.*, this being absolutely necessary to bring the parties within the jurisdiction of the court; and though at this day the original is generally a writ of covenant, yet fines are taken on all writs in which lands are demanded, or are to be charged, or which any way relate to them; for the law having provided different remedies for the several grievances of the subject, it was but reason-
able

able in the judges to allow of these compositions, whatever method the injured person took to recover his right.

an original in a personal action; and the common writ of covenant, on which a fine is levied, is not a personal, but a real action; for though it is to have damages for breach of covenant, as in personal actions, yet it is to have an execution and performance of the covenants. Salk. 340. resolved *per Curiam*.

The practice now is for the conuzor to make the conuzance, and acknowledge the fine, before any original sued out; and this has so far obtained, that the judges have resolved such fines should stand, though the conuzor died before the writ of covenant was taken out; but in these cases the originals were sued out, and made returnable, as of a term precedent to the conuzance, for they are still necessary to make the fine a perfect and complete conveyance, though for the greater expedition they have allowed of this variation from the ancient course.

If, in a *warrantia chate* against *B.* to warrant one acre, he levies a fine of that acre and another, the fine operates to convey only all his right in that acre he was called to defend, for the other was not mentioned in the original.

venant be brought *de terris*, and the defendant make conufance of pasture, meadow, or wood, this fine is not good, nor *e contra*; for these being of a different nature from ploughed land, (which *terra* properly implies,) are not contained in the writ, and consequently there does not appear to the court any contention about them. 2 Inst. 514. Co. Lit. 4. a. 2 Roll. Abr. 16.

Hence it is, that if the conufance be of the manor of *Dale*, the conufee cannot make a render of the manor of *Salé*; or if the conufance be of the third part, the render cannot be of the whole; because the court can determine the right only of that about which the parties contended, and which the conufee demanded in his original; but if the conufor acknowledges all his right, &c. to the demandant, for which conufance he grants and renders the land to the conuzor for life; or if he grants a common in the land, or so many loads of wood off it, this is a good fine; because the determination is wholly of the thing in dispute, one party taking the property, and the other a profit arising from it, and comprehended in the original, for which thing in dispute it was brought.

Therefore, if the grant and render had been of a rent *de novo*, that had been good; because the rent issuing out of the land must be implied in a demand of the land; and, consequently, the concord and agreement of the parties is received and allowed for that only which they litigated.

venant be of land, he may grant the reversion. 2 Roll. Abr. 16.

As nothing can pass by the fine but what is expressed or implied in the covenant, so no one can take an immediate estate by it who is not mentioned in the writ of covenant, because none can have any benefit from the judgment of the court that is not judicially before it, and sues for it; yet a grant and render may be made to a stranger in remainder; but the reason is, because the render being only a consideration for the conufance, a remainder

or in any real action, but not in case.
1 H. 7. 9.
Hob. 330.
Farmer's case.
2 Vent. 47.

Co. Reading, 10.
2 Roll. Abr. 16.
So, if a writ of co-

2 Roll. Abr. 15, 16.

2 Roll. Abr. 15.
Co. Reading, 11.
2 Inst. 514.
So, if the writ of co-

Co. Reading, 8.
2 Inst. 514.
Bro. tit. Fines, 111.
But if a writ of covenant be brought against *B.*,

who vouches C., the vouchee may make conveyance. 2 Roll. Abr. 13. Bro. 105. 2 Inst. 514.

mainder limited to a stranger may be as much a consideration to the conusor, as if the whole estate had been given to himself: but there must be an immediate estate given back to the conusor, because the render *ex vi termini* implies that it must return to him.

Co. Read-
ing, 3.

5 H. 4.
c. 14.
5 Co. 39. b.
2 Sid. 55.

When the parties are judicially before the court by original, the counsel for the conufee appears with the *præcipe* and concord, which is in nature of a declaration, setting forth the conveyance which ought to be made by the tenant in the writ, after his appearance is recorded; then follows his conveyance, which is no more than an acknowledgment, that the manor, or other lands, &c. contained in the writ, belong of right to the demandant, as land which he hath of the gift of the tenant, with a general release and warranty to the conufee and his heirs. When this conveyance was taken, they went originally to the treasury, but now by the 5 H. 4. c. 14. they stop with the *custos brevium*, who records it; that statute providing that all the parts of the fine shall remain in the safe custody of the chief clerk of the C. B., before the chirographer has them out of court; the design of the act being thereby to prevent the inconvenience which frequently happened by the embezzlement of fines, when they lay only in the hands of the treasurer and chirographer, either by their connivance or negligence.

2 Inst. 511.
5 Co. 39.
[Formerly
the post-
fine, or
king's sil-
ver, was
paid at the
king's sil-
ver-office;
but it is now
paid at the
alienation-
office, by the

The next and most material thing considerable in a fine is the king's silver; this is entered on the writ of covenant, and gives it the force and effect of a fine, and is granted to the king *pro licentia concordandi*, or *congè d'accorder*, in compensation of the amercements, and other fines, which became due on judgments and nonsuits, in adverse suits; this is always paid by him who takes the fee-simple by the fine, and on the entry of it on the covenant, the sum given is expressed, together with the plea, and between whom, with mention of the land for which it is given.

stat. 32 Geo. 2. c. 14. *quod vide*.]

2 Inst. 511.

It is likewise called the post-fine, in respect of the premier fine in the hanaper, which is due to the king on the original, and is greater or less in proportion to that; for it is as much as the premier fine, and half as much more; as if the premier fine be 6*s.* 8*d.*, this is 10*s.*

2 Inst. 511.
5 Co. 39.
Dyer, 220.
(a) Petty's
case,
1 Freem.
78.
[When a

From the entry of this the fine is obligatory, and begins to operate; and thenceforth the fine shall stand, though either party die before the other parts are recorded. [(a) And though the conusor be an infant, the court cannot stay the passing of the fine: all they can do in such case is, to assign the infant a guardian, with instructions to bring a writ of error to reverse it.]

year and a day has elapsed from the date of the caption, or acknowledgment of a fine, without entering the king's silver, an affidavit must be made, that all those who depart with any interest by the fine are still living, otherwise the king's silver will not be received. And now that the king's silver is paid at the alienation-office, if a year elapses before the fine is carried to the king's silver-office, an affidavit must be made, that the parties were alive when the king's silver was paid, Barnes, 215. Cruise on Fines, 25.]

But if the conufor dies before the king's filver be entered, the fine is voidable, and may be reverfed by writ of error; becaufe this being given *pro licentiâ concordandi*, the agreement of the parties is not to be admitted as the judgment of the court till it be paid and entered, and confequently, if the conufor dies before that be done, the fine is erroneous, as a judgment given in an adverfary fuit after the death of one of the litigating parties. But this is to be underftood with this diftinction, that where it appears by the record itfelf, that the king's filver was paid after the death of the conufor, there the fine is erroneous; but where after the conufance made the conufor died before the king's filver was paid, and after his death the filver was paid, and entered on a writ of covenant returnable the term precedent his death; as where baron and feme made conufance before commiffioners the 26th of *March*, the feme died the day following, and upon a writ of covenant made returnable the *Hilary* term precedent, the king's filver was entered as of that term, the fine was adjudged to ftand; for where there does not appear an error on the face of the record, the judges, in favour to fines, which fo much ftrengthen men's titles, and quiet their poffeffions, have always fupported them, and would not fuffer the entering the king's filver, after the parties' death, to be examined, when it appeared by the record itfelf, that the fine was completed, as a fine of the term precedent the death of the conufor.

[The king's filver, it muft be remembered, is not payable until the return-day of the writ of covenant: if therefore any of the parties die before that time, the fine will be void.]

484. Okell v. Hodgkinson, 3 Mod. 99. Clements v. Langharne, 2 Ld. Raym. 872. Farrar, Sir T. Raym. 461. Price v. Davis, Comb. 57. 71. Watts v. Birkett, 2 Willf. 115. S. C.

3 Mod. 140.

2 Infl. 511.
2 Vent. 47.
Hob. 330.
Farmer's
cafe.
Barnes, 213.
Barber v.
Nunn.

Wright v.
Mayor of
Wickham,
Cro. Eliz.
Cookman v.
Barnes, 220.

The other parts of the fine are the foot and note of it: the foot of the fine runs thus; *hec eft finalis concordia facta apud Weftm. in curiâ domini regis, &c.*, and mentions the day, year, and place, and before what juftices the conufance was taken.

The note of the fine is no more than a docket taken by the chirographer, from which he tranfcribes the indentures, which are delivered to the party to whom the conufance was made; and when this is done, the fine is faid to be engroffed.

5 Co. 39.
Co. Read-
ing, 3.
2 Bl. Com.
350.

5 Co. 39.
2 Infl. 463.
F. N. B.
147. [A
fine may be
engroffed at

any time after it is levied. 4 Leon. 96. Dy. 254. a.]

A fine was thus; *hec eft finalis concordia facta in curia regis apud Weftm. a die fancte Michaelis in tres feptiman. anno decimo Willielmi tertii coram Thom. Trevor, &c., & poftea in craft. fancte Trinitat. i Anna conceff. & recordat. coram ejufdem jufticiar.*; fo that the concord of the fine was of one term, and the *recordat.* of the term following; and the queftion was, Of which term this fhall be faid to be a complete fine? And it was holden to be a fine of the term in which the concord was made, and that the *concordia facta in curiâ* is the complete fine.

Salk. 341.
pl. 7.
Lloyd v.
Vifcount
Say and
Seal.

[The chirograph of a fine is evidence to all perfons, and in all courts of fuch fine; becaufe the chirographer being an officer ap-

Bull. N. P.
229.

pointed by the law for the purpose of transcribing fines from the record, his copies must be allowed to be authentick.]

(B) The several Sorts of Fines.

Co. Reading, 4.

[(a) This fine is executed as to the first part, and executory as to the second; for if the first part was not executed, it would be void, as the cognizee can have nothing to render to the cognizee till he is in possession.]

Cruise on Fines, 73. (b) If the party to whom the estate was limited by a fine executory was in possession at the time when such a fine was levied, he need not sue out a writ of *habere facias seisinam*; for in that case the fine would enure by way of extinguishment. Touchst. 4. So, if a fine executory was levied of a reversion depending on an estate for life, or years, or of a feignory, or any thing which lay in grant, they would pass immediately, because it would be impossible to give actual possession of them. 1 Co. 97. a.]

Co. Lit. 9. b.

Co. Reading, 4, 7.

[This species of fine hath been called a feoffment of record; but this expression is by no means accurate; for there are

cases in which a feoffment hath a more extensive operation than a fine, Co. Lit. 50. 1 Salk. 339. 3 Atk. 141. ; and therefore, Sir W. Blackstone hath said, that it might, with more accuracy, be called an acknowledgment of a feoffment or record. 2 Bl. Comm. 348. But this perhaps is not making a very substantial distinction. 2 Wooddes. 309.] (c) And therefore if the limitation be expressly to the donee, and the heirs of his body, the fine passes only an estate-tail; for it would be absurd to give more against so solemn a declaration of the parties. Co. Reading, 4. 1 Salk. 340.

Bro. tit.

Fines, 30.

2 Roll. Abr.

18. But if

the conu-

sance be

only of an

estate for

life, the conu-

for the recovery of all rent services, which this must be, being incident to the reversion. Co. Reading, 5.

2 Roll. Abr. 18.

ALL fines are either executed, as fines *sur conuſance de droit come ceo*, &c., fines *sur release*, and fines *sur surrender*; or executory; as fines *sur conuſance de droit tantum*, and *sur grant & render* (a). The fine *sur conuſance de droit tantum* seems to be the most ancient; for the conuſance being in the place of the judgment, which was always executory in adversary suits, the demandant was obliged to follow the rules of the law, and sue out execution (b): but in time, when these fines became the common and best way of purchasing, the purchaser, to prevent the trouble of suing out execution, had seisin given him by livery in the country, and for his further assurance obliged the vendor, by covenant, to levy a fine; and thus the fine *sur conuſance de droit come ceo*, &c. came in use, which supposes a precedent gift, by which the donee was put into possession, and consequently there needs no execution of what he had already.

This fine *come ceo*, &c. is most commonly used, being the surest for the purchaser; in which it is to be observed, that this fine and that *de droit tantum*, convey a fee-simple to the donee, without words of inheritance; for when the donor acknowledges the land to be the right of the donee, it is repugnant and contradictory to his own acknowledgment, to claim any right or interest to the land in reversion or remainder; besides, in every judgment a fee-simple was recovered, and the conuſance coming in lieu of the judgment must necessarily import as much, unless the express acknowledgment of the parties (c) qualify it.

Upon a fine *sur conuſance de droit come ceo*, &c. the donor cannot reserve a rent, because the conuſance supposing a precedent gift he cannot charge the inheritance which he has given entirely away; and so the *reddendum* comes too late when the fine has mentioned before an absolute gift, without any such clause of reservation.

A fine *sur consueance de droit come ceo*, &c. cannot be levied to two and their heirs; for the end of fines being not only to settle the possession for the present, but for ever, the admittance of such a fine would not answer the end; for besides the uncertainty which of the consuees should survive and enjoy the land, the fine itself cannot operate according to the limitation; for the survivor, by the privilege of jointenancy, shall enjoy the whole, and for ever exclude the heirs of the other consuee; besides, the fine being equivalent to a judgment, ought to decide and settle the right of the fee.

heirs of one of them, this is good; for all things will continue as the fine has settled them. *Fines*, 65.

Roll. Abr. 19. Co. Reading, 5. 9. The same law is against the grant of a reversion. Bro. tit. *Fines*, 65. But if lands by fine be granted to two and the Bro. tit.

For the former reason the judges will not, or at least ought not, to admit of a fine upon condition, because such a fine does not positively determine and settle the right of the fee, it being uncertain whether the consuee will enjoy the land according to the fine, since that depends upon the performance or non-performance of the condition; but my Lord *Coke* tells us, that if such fines be admitted by the judges they are valid and shall stand, the rule, *quod fieri non debet, factum valet*, obtaining in this case; because fines being the private agreement and concord of the parties, it were to trifle with the authority of the king's courts, which ever ought to be preserved sacred, to suffer either party to recede from their contract, after their solemn composition acknowledged on record, and received in the most solemn manner by the judgment and decision of a court of justice.

5 Co. 38. b. Tye's case. 2 Roll. Abr. 18. Bro. tit. *Fines*, 5. Co. Reading, 5.

A. makes a lease for life, and afterwards grants the reversion by fine to B. for life, the remainder in tail in a *quid juris clamat* against the lessee, he would have surrendered to the consuee, reserving a rent during his life, but the court refused it; for had this surrender, with the reservation of the rent, been admitted, it might have happened that the rent would not continue according to the limitation of the fine; for if the grantee of the reversion died before the tenant for life, the remainder-man in tail should hold the land discharged, and the tenant for life could not enjoy the rent as long as the fine gave it; but if in this case the lessee had surrendered to the grantee for his own life, with a reservation of a rent, this might have been admitted, for this is no absolute surrender; and each party may enjoy what the fine gave him, according to the several limitations thereof.

Co. Reading, 5. cites 19 E. 3. *Qu.* for there is no report of that year.

If there be lessee for life, the remainder for life, and the lessee levy a fine *sur consueance de droit tantum* to him in remainder, this enures by way of (a) surrender, because by this fine he only acknowledges all the right he has in the land to belong to him in remainder; but if the lessee had levied a fine, *sur consueance de droit come ceo*, &c. to him in remainder, it had been a forfeiture of both their estates, and he in reversion might enter immediately; and the reason of the difference is this, the fine *sur consueance de droit come ceo*, &c. always grasps a fee-simple, which passes by the precedent gift as the fine supposes; but the fine *sur*

Co. Reading, 5. (a) Note, the forms of these fines *sur surrender* are the same with those *sur consueance de droit*, only the clause of warranty is omitted.

consueance

conuſance de droit tantum only conveys all his right, which is intended all he can lawfully paſs away.

Where *C.* was ſeiſed in fee as heir of the part of the mother, and he and his wife levy a fine to *A.* and *B.* with warranty, and *A.* and *B.*, by the ſame fine, granted and rendered to the huſband and wife in tail, remainder to the heirs of the huſband; though it was urged, that the ſeiſin of the conuſee was fictitious, and that nothing was allowed by the fine, yet reſolved, that the conuſee was more than a bare inſtrument, and that the eſtate was once in him; and that the fine and render is a conveyance at common law, and the render makes the conuſor a new purchaſer, as much as a feoffment and re-infeoffment at common law.

Salk. 337.
pl. 1.
Price v.
Langſod.

(C) Who may levy Fines.

Co. Read-
ing, 8.
2 Inſt. 515.

AND here it muſt be firſt obſerved, that whatever legal defects may be in the conuſor, if the judge admits his conuſance, the fine ſhall ſtand in all caſes, except that of an infant, though the judge omits a very neceſſary part of his duty in not rejecting ſuch fines.

Co. Read-
ing, 8.
But for this
ſide the ſe-
veral titles of

The principal defects are either want of diſcretion and underſtanding, as in infants, idiots, and perſons of *non ſane* memory; or want of power, as *femes covert*.

Infants, Idiots, and Baron and Feme.

Vide Poſtea,
letter (H),
&c.

Co. Lit. 380.
b. Moor, 76.

2 Roll.

Abr. 15.

Bro. tit.

Error, 60.

Bro. tit.

Fines, 74.

79.

2 Inſt. 482.

2 Buſt. 320.

12 Co. 1. 22.

If an infant

brings a writ

of error to

reverse a

fine for his

nonage, and,

after inſpection and proof of infancy by witneſſes, dies before the fine is reversed, his heir may reverse

it, becauſe the court, having recorded the nonage of the conuſor, ought to vacate his contract when he

appeared to be under a manifeſt diſability at the time he entered into it. Co. Lit. 380. b. Moor, 884.

An infant acknowledged a fine, and the conuſor committing to have the fine ingroſſed till he came of age,

in order to prevent the infant from bringing a writ of error, the court, upon view of the conuſance pro-

duced by the infant, and upon his prayer to be inſpected, and his age examined, recorded his nonage to

give him the benefit of his writ of error, which he muſt otherwiſe loſe, his nonage determining before

the next term. Sarah Griffith's caſe, 12 Mōd. 444.

4 Co. 124.

Beverly's

caſe. Co.

As to fines levied by an infant, though ſtrictly ſpeaking all contracts made by infants are in their own nature void, becauſe a contract is an act of the underſtanding, which, during their ſtate of infancy, they are preſumed to want; yet civil ſocieties have ſo far ſupplied that defect, and taken care of them, as to allow them to contract for their benefit and advantage, with power to recede from and vacate it when it may prove prejudicial to them: now the method to ſet aſide ſuch a contract muſt be by matter of equal notoriety with the manner in which it was made; and therefore if an infant levies a fine, which is no more than his own agreement recorded as the judgment of the court, he muſt reverse it by writ of error, and this muſt be brought during his minority, that the court of *B. R.* may by inſpection determine the age of the infant; but the judges by *adjuncta* may in ſuch caſes inform themſelves by witneſſes, church-books, &c.

After inſpection and proof of infancy by witneſſes, dies before the fine is reversed, his heir may reverse it, becauſe the court, having recorded the nonage of the conuſor, ought to vacate his contract when he appeared to be under a manifeſt diſability at the time he entered into it. Co. Lit. 380. b. Moor, 884. An infant acknowledged a fine, and the conuſor committing to have the fine ingroſſed till he came of age, in order to prevent the infant from bringing a writ of error, the court, upon view of the conuſance produced by the infant, and upon his prayer to be inſpected, and his age examined, recorded his nonage to give him the benefit of his writ of error, which he muſt otherwiſe loſe, his nonage determining before the next term. Sarah Griffith's caſe, 12 Mōd. 444.

As to idiots and lunatics, it is neceſſary to diſtinguiſh between their acts done *in pais* and thoſe ſolemnly acknowledged

on

on record; though the law is clear, that in neither case are they admitted to disable themselves, for the insecurity that may arise in contracts from counterfeit madness and folly; but their heirs and executors may avoid such acts *in pais* by pleading the disability; because if they can prove it, it must be presumed real, since nobody can be thought to counterfeit it, when he can expect no benefit from it himself.

Lit. 247.
Bro. tit.
Fait, 62.
Cro. Eliz.
398. 622.
F. N. B.
202. But in
what case
they them-

selves may have relief in equity, *vide tit. Idiots and Lunatics.*

But neither the lunatick * himself, nor his heir, can vacate any act of his done in a court of record; and therefore if a person *non compos* acknowledges a fine, it shall stand against him and his heirs; for though the judges ought not to admit of a fine from a man under that disability, yet when it is once received, it shall never be reversed, because the record and judgment of the court, being the highest evidence in the law, the consor is presumed to be, at that time, capable of contracting; and therefore the credit of it is not to be contested, nor the record avoided by any averment against the truth of it.

4 Co. 124.
2 Inst. 483.
Bro. tit.
Fines, 75.
Co. Lit. 247.
* Idiocy to
be judged
of by the
justices, on
fine levied.
15 Ed. 2.

So it is in the case of a fine levied by an idiot, it shall stand against him and his heirs; for no averment of idiocy can vacate the fine, nor will an office finding him an idiot *a natiuitate* be sufficient to reverse the fine, for that were to lessen the credit of judgments in courts of record, by trying them by other rules than themselves.

2 And. 193.
Hugh
Lewis's
case. 4 Co.
124. a.
120. b.
Bro. tit.

Fines, 75. Co. Lit. 247.

And as fines ought not to be taken from lunatics and idiots, so neither from old dotting men who have lost the use of their reason; but if they be weak or infirm through age and sickness, that will be no sufficient cause to refuse them.

West. Fines,
§ 4.

As to feme coverts, from the intermarriage, the law looks upon the husband and wife but as one person, and allows of but one will between them, which is placed in the husband as the fittest and ablest to provide for and govern the family, and therefore gives him an absolute power over her chattels personal, to dispose of as he pleases, without her consent; but as to her real estate, has thought fit that no act of his shall prejudice her or her heirs in it, unless she join with him by some matter of record, and on examination testify her assent to such disposition.

10 Co. 42. b.
43. a.
2 Inst. 510.
Sid. 11.
Roll. Abr.
347. ; but
those books
which say,
that a fine
shall not
bind a wo-
man under
coverture,
unless she be

examined, must not be understood as if it were in her power to reverse the fine for want of her examination; but they are to be understood in this sense, that the judge ought not to receive a fine from a feme covert without examining her, lest it should not proceed from her own freedom and choice; but if such a fine be once admitted, and recorded without any examination, though the judge has omitted a very necessary part of his duty, yet the fine shall stand, and neither the feme, nor her heirs, shall be admitted to aver that she was not examined; for that were to lessen the credit of the judgment of the courts of justice, which is the highest evidence of the law. But of fines levied by the husband solely, or by the husband and wife jointly, of the wife's inheritance, or of fines levied by the wife solely, of lands which are of the provision of the husband, *vide tit. Baron and Feme*, (1), [and the statutes 11 H. 7. c. 20. & 32 H. 8. c. 28. & c. 36.]

[No person can levy a fine of lands that will affect strangers, unless he has at least an estate of freehold in them, either by

Touchst. 14.
West. Symb.
p. 2. § 13.

right or by wrong; for otherwise it might be in the power of any two strangers to deprive a third person of his estate, by levying a fine of it, so that in every case where a fine is levied, and none of the parties to such fine have any estate of freehold in the lands whereof the fine is levied, it will only bind the parties themselves, and their heirs, but may at any time be set aside by the real owner, by pleading that neither of the parties had an estate of freehold in the lands at the time when the fine was levied.

3 Co. 77. b. Hence, therefore, if a person who is only possessed of lands for a term of years, or who holds them by a statute merchant, statute staple, or writ of *elegit*, or is tenant at will, levies a fine, it will have no effect whatever as to strangers.

Ld. Townshend v. Ash, 3 Atk. 335. (a) Co. Cop. § 55. Upon the same principle, a fine levied before entry or receipt of rent will be void. So, if a fine be levied by a copyholder of his copyhold (a), because the freehold is in the lord.

Carter v. Barnardiston, 1 P. Wms. 505. But a person having a defeasible right only to lands, may, notwithstanding, levy a fine of them, which cannot be set aside by the plea that neither of the parties had an estate of freehold in the lands.

1 Ch. Ca. 213. Taib. 43. So a *cestuy que trust* may levy a fine of his trust estate, although he is only tenant at will to his trustees; for it is now settled in equity, that any legal conveyance or assurance by the *cestuy que trust*, shall have the same effect on the trust estate, as it would have had on the legal estate, if the trustees had conveyed it to the *cestuy que trust*. If it were not so, trustees, by refusing, or by not being capable of executing their trust, might prevent a *cestuy que trust* tenant in tail from exercising the power given him by the law over his estate, which would tend to the introduction of perpetuities.

3 Co. 29. b. So, a fine levied by a vouchee to the demandant, or a fine from the demandant to the vouchee, will be good; because in law the vouchee is supposed to be tenant of the land, though in fact he never is so at present.

13 Vin. Abr. 228. An alien, not being capable of holding lands, ought not to be permitted to levy a fine: but if he does levy a fine, it will not conclude the king after office found.

Co. Read. 7. Corporations aggregate cannot levy fines; because, as they are invisible, they can only appear by attorney; whereas the statute *de modo levandi fines* requires that the parties to a fine shall appear personally before the judges. But Sir Edward Coke saith, that a sole corporation may acknowledge a fine.

By the statutes 11 H. 7. c. 20. and 32 H. 8. c. 28. women seised of jointures or estates tail of the gift of their husbands, and husbands seised *jure uxoris* are prohibited from levying fines of such estates. And the disabling statutes, which prevent ecclesiasticks from alienating their church-lands for any longer time than three lives, or twenty-one years, by necessary implication prohibit them from levying fines,

Persons

Persons outlawed, or waved in personal actions, may alien by fine, for their estates still remain in them, although they have forfeited the rents and profits. West Symb. P. 2. § 13.

A person who hath committed murder may, it seems, before conviction, levy a fine, if the deed to lead the uses be prior to the time of committing the offence.] Stevens v. Winning, 2 Will. 219.

(D) Of the *Dedimus Potestatem*.

THE statute (a) of 15 E. 2., called the statute of *Carlisle*, introduced the *dedimus*, which is a special commission, granted out of Chancery, to certain persons therein named, to take the consufance of such persons as through age or sickness are not able to appear in court in person. By this statute nobody can be a commissioner but the judges, and two or one

of them, by the consent of the rest, may receive the consufance; and if there go but one of them, he shall take with him an abbot, a prior, or a knight, a man of good fame and credit; and writs of error have been allowed to reverse fines where the consufance hath not been taken before such persons. *Pro. tit. Fines*, 120. *F. N. B.* 145. But the present practice falls short of the order this statute prescribes, and it is sufficient if one of the commissioners be a knight, *Reg. Pasch.* 43. *El. Will.* 78.; or though neither be a knight, if one of the judges of the *C. B.* gives his *allocatur* to the caption, by which great abuses have happened in the taking of fines. [(a) This statute, as it is called, is not properly a legislative act, but is merely a writ directed to the justices of the bench, for their government in taking the acknowledgment of fines. 2 *Reeves*, 304.]

By the custom, the chief justice of *C. B.* may take consufances any where out of court, and certify the same without any *dedimus*: and if a serjeant hath a patent to be *C. J.*, he may take consufances without a *dedimus* before he is sworn. *Co. Read.* ing, 10. *Cro. Eliz.* 469.

[So by custom, the judges of assize may, in their circuits, take the acknowledgment of fines without any writ of *dedimus potestatem*, on account of the great confidence which the law placeth in their judgment and integrity: in such cases, however, a writ of *dedimus potestatem* ought to be sued out, bearing date before the acknowledgment of the fine; although, if the writ of *dedimus potestatem* is tested after the date of the acknowledgment, still the fine will be supported.] *Jenk.* 227. *Dy.* 224. b. *Cro. El.* 275.

If a fine be levied to one of the justices of *C. B.*, and the said justice take the consufance of the fine, it is void, *quia judex in propria causa*. *Co. Read.* ing, 10.

If the *dedimus* be directed to two jointly, and the consufance be taken by one only, the fine is erroneous; for where two are invested with a joint power, it cannot by any construction from the commission be executed by one only. *Cro. Eliz.* 240. *Downes v. Savage.*

The *dedimus* contains the substance of the writ of covenant, and therefore must bear *teste* after it, otherwise it is error, and must be signed by the lord keeper or chief justice, or by some of the justices of the circuit where the lands lie. *F. N. B.* 146. *Cro. Eliz.* 677. 740. *Co. Read.* ing, 10. *Bro. tit. Fines*, 116. *Roll. Abr.* 794. *Dyer*, 220.

If the commissioners refuse to certify the consufance to the court in convenient time (a), which is a year and a day, a *certiorari* is to be awarded against them, reciting the substance of the *dedimus*, *F. N. B.* 147. [(a) They are required

by Stat. 23 *dedimus*, and that they have taken the conuſance, and command-
 11. c. 23. ing them to certify it; and in caſe of refusal to do it, an *alias*, a
 § 5. to cer- *pluries* and attachment will iſſue againſt them.
 tify the
 acknowledgment of the fine within twelve months after it is taken, and alſo to certify the year and day
 whereon it was acknowledged.]

Co. Read-
 ing, 10.
 F. N. B.
 147.

If the commissioners die before the conuſance be certified, their
 executors muſt certify it upon *certiorari* to them directed, and
 upon their refusal like proceſs lies, as in the former caſe.

Cro. Eliz.
 576, 577.

If a *dedimus* be awarded to take the conuſance of three ſeveral
 perſons, the commissioners may take the conuſance from each of
 them, and at ſeveral times, for it may ſo happen that they can-
 not meet at one place at the ſame time; and if the commissioners
 return the conuſance but of two of them, the court may eraze
 the name of the third out of the *dedimus*, and make the writ of
 covenant agreeable to it; for ſince the third does not join, it can
 be no prejudice to him; and therefore it were unreaſonable that
 his obſtinacy or refusal ſhould impeach the conuſance of the other
 duly taken, and ſo prevent their amicable compoſition of their
 differences.

Cro. Eliz.
 576. 577.

A *dedimus* was awarded to take the conuſance of a fine from
 baron and feme, and the feme refusing to join, the conuſance of
 the huſband was only returned; in this caſe the court ordered a
 new *dedimus* to be awarded, but to be of the ſame date with the
 former, and that the return of the commissioners ſhould be an-
 nexed thereunto; for the refusal of any one of the conuſors can
 be no reaſon to delay or hinder another to transfer his right.

Touchſt. 5.
 Co. Read. 9.
 1 Roll.
 Rep. 223.
 Cro. Eliz.
 740.

[As the writ of *dedimus poteſtatem* recites, that a writ of cove-
 nant is depending between the parties, it ſhould bear date after
 the writ of covenant; elſe it will be error. But (a) if it be
 teſted on the ſame day with it, the fine will be valid.

1 Roll. Abr. 774. (a) Cro. Eliz. 677. Cro. Ja. 11. 5 Co. 47. b.

Wilson, 82.
 Vide Dean v.
 Tidmarsh.
 Barnes, 143.

By a rule of the court of Common Pleas made in *Hil. 13 Geo. 1.*
 it was directed, that no fine acknowledged before commissioners
 ſhould be allowed to paſs, unleſs ſome perſon, who was preſent
 when the fine was acknowledged, ſhould appear perſonally be-
 fore the lord chief juſtice of the court, and be examined upon oath
 touching the execution thereof.

This rule having been found by experience to be attended with
 inconveniencies, and not having answered the good purpoſes for
 which it was intended, the court made the following rules:

Wilson, 85.

Hilary 17 Geo. 2. "It is ordered, That inſtead of an oath made
 " *viva voce* of the due acknowledgment of fines, an affidavit in
 " writing on parchment ſhall be made and annexed to every fine,
 " in which the perſon making the ſame ſhall ſwear that he knew
 " the parties acknowledging ſuch fine; that the ſame was duly
 " ſigned and acknowledged, that the party or parties acknow-
 " ledging, and alſo the commissioners taking the ſame, were of
 " full age and competent underſtanding; that the feme covert
 " (if any) were ſolely and ſeparately examined apart from their
 " huſbands,

“ husbands, and freely and voluntarily consented to acknowledge
 “ the same; and that the cognizor or cognizors, and every of
 “ them, knew the same to be a fine to pass his or their estate or
 “ estates, which fine, together with such affidavit annexed, shall
 “ be transmitted to the lord chief justice, or some other justice
 “ of this court, for his *allocatur* thereon, and such affidavit shall
 “ remain annexed to such fine, and be left with the same in the
 “ proper office: and it is ordered, That every such affidavit, ex-
 “ cept where the persons, at the time of their acknowledging
 “ the fine, are in *Ireland*, or some other parts beyond the seas,
 “ shall be made by some attorney of the courts of *Westminster-*
 “ *hall*.”

Hilary 26, 27 Geo. 2. “ It is ordered, That in the affidavits
 “ made in pursuance of the preceding rule, the person or per-
 “ sons so making the same shall swear, that the fine was duly
 “ signed and acknowledged upon the day and year mentioned in
 “ the caption; and if there be any rasure or interlineation in
 “ the body or caption of such fine, that such rasure or inter-
 “ lineation was made before the party or parties signed the said
 “ fine, and before the caption was signed by the commissioners.”

Wilson, 89.

These rules have in some instances been dispensed with, and
 (a) particularly where fines have been acknowledged out of the
 kingdom.

Say v. Smith,
Barnes, 217.
 (a) *Fleet-*
wood v. Calenda, id. 219. Heathcock v. Hanbury, id. 217. Seton v. Sinclair, 2 Bl. Rep. 880.

wood v. Calenda, id. 219. Heathcock v. Hanbury, id. 217. Seton v. Sinclair, 2 Bl. Rep. 880.

By the statute 34, 35 *Hen. 8. c. 26. § 40.* it is enacted, That
 fines shall and may be taken before the justices of *Wales*, of
 lands, tenements, and hereditaments, situated within their jurisdic-
 tion, by force of their general commission, without any writ
 of *dedimus potestatem*, to be sued for the same, in like manner and
 form as is used to be taken before the king's chief justice of his
 Common Pleas in *England*.]

(E) Of the Operation of a Fine in barring the Issue in Tail.

BY the 4 *H. 7. c. 24.* a fine with proclamations shall conclude
 all persons, both privies and strangers, except women-covert,
 persons under age, in prison, out of the realm, or of *non sane*
 memory, being not parties to the fine; by which general clause
 all others are bound; but by the first saving,

4 *H. 7.*
c. 24.

The right and interest that any person or persons (other than
 parties) hath or have at the time of the fine engrossed, is saved;
 so that they or their heirs pursue such their right or interest by
 action, or lawful entry, within *five* years after the proclamations
 so made. This clause seems to comprehend only those who have
 present right; but by the second saving,

The right and interest of all persons is saved which accrues
 after the engrossing of the fine, so that the parties having the
 same

same pursue it within *five* years after it so accrues; and if at the time of the fine engrossed, or of such accruer, the persons be covert, (and no parties to the fine,) under age, in prison, out of the realm, or of *non sane* memory, they or their heirs have time to pursue their action within five years after such imperfection removed.

Bro. tit.
Fines, 1.
Hob. 332.
Dyer, 3.
The reasons
of this
doubt, and
the opinions
pro and con.
may be seen
Co. Lit. 372.
2 Inst. 516,
517.
Moor, 250.
And. 170.
Plow. 373.
Jo. 39.
19 H. 8. 6.
pl. 5.
And. 46.
pl. 118.
Raym. 271.
287. 321.
345 to 349.

Though this statute evidently concludes all persons under the words *privies and strangers to the fine*, and the statute hath savings for strangers, but none for privies; yet it was at first doubted, whether a fine levied by tenant in tail could bar the issue by that statute; for the entails had continued so long, and most people were so fond of them, that the judges were very cautious in making so large an exposition on that statute as it would well bear; and though at length the judges resolved, that a fine with proclamations was a bar, not only to the tenant in tail, because he could claim no right against his own acknowledgment on record, that it was the right of another; but also against the issue in tail, because the words and intention of the statute place the privies, that is, the persons claiming the right devolved at any time on the conusor, in the same condition as the conusor himself; yet this introduced the statute of 32 H. 8. c. 36., which by a retrospection confirms the construction made by the judges on the 4 H. 7. c. 24., and declares that

2 Jon. 238. in the case of Murray and the Earl of Derby.

32 H. 8.
c. 36.

All fines levied, by any person or persons of full age, of lands entailed before the same fine to themselves, or to any of their ancestors in possession, reversion, or remainder, or use, shall immediately after the fine engrossed, and proclamations made, be a sufficient bar against them and their heirs claiming only by such entail, and against all others claiming only to their use, or to the use of any heir of their bodies.

(a) If there
be two
jointe-
nants, and
one of them
levy a fine;
or if there
be donor and
donee, and
one of them
levy a fine;
though
there be a
privity be-
tween each
of these
within the
letter of the
act, yet nei-

For the better explication of these statutes, it is to be observed, that the persons, whose right is barred by the fine, are either *parties, privies, or strangers*; that the *parties* themselves are barred is plain, and admits of no doubt; as to *privies*, which is the material and operative word in the 4 H. 7. c. 24., it is to be noted, that it has a threefold signification, for it either comprehends a privity in (a) estate, as between donor and donee, which arises purely from their own contract, or a relation between parties arising from (b) blood only, neither of which are meant by the word *privies* in the act; for it were unreasonable and absurd to allow any man to strip me of my acquisitions or inheritances, without any laches or neglect of mine, because I happen to be his heir, or because by a fair contract I am concerned in interest with him, or am his tenant.

neither the jointenant in the one case, nor the donor in the other, shall be barred by the fine unless they omit to make their claim within five years after their titles accrue. 2 Inst. 516. (b) So, if the heir apparent be seized of lands, and the father levy a fine and die, it shall not bar the heir, because he does not claim or derive any title to the land from his father; and therefore, in that respect, shall have five years to preserve himself from the fine. 2 Inst. 523. 3 Co. 89. a.

But

But the *privies* understood and intended by this act are those who are privy not only in blood to the conusor, but likewise in estate and title to the land of which the fine was levied; that is, those who must necessarily mention the conusor, and convey themselves through him before they can make out their title to the estate.

Hob. 333. And hence the issue in tail is barred; so it is, if there be baron and feme in

special tail, and the baron levy a fine without the wife, this shall bar the issue though the son survive, because he must necessarily, in making out his title, shew himself heir to the father as well as to the mother, and consequently shew himself privy to the conusor within the statute. Keilw. 205. Dyer, 251. 2 Inst. 681. 8 Co. 72. Hob. 257. 9 Co. 139. a. 2 Bendl. 50. Moor, 28. So, if there be grandfather and grandmother tenants in special tail, and the grandfather die, and the father enter upon the grandmother and levy a fine, the son is barred. Hob. 258. 333. 3 Co. 90. Moor, 146.

But if tenant in tail has issue a daughter, who levies a fine, and after a son is born, the fine shall not bar the son, because he may make himself heir to the entail without any mention of her, and can make out his title without conveying himself through her; and therefore as to the estate he is a stranger to her, and may plead *quod partes finis nihil habuerunt*.

3 Co. 61. Hob. 333. So, if tenant in tail has issue two sons, and the eldest levies a fine

and dies without issue in the life of his father, the second son shall inherit the entail notwithstanding the fine, because he need not mention the conusor in making out his title to the entail. Cro. Car. 434. Cro. Jac. 689. Moor, 252.

A. devised land to his wife for life, remainder to his son in tail, when he should attain to his age of twenty-five years; and before that time he levied a fine: this barred his issue, though he had nothing in remainder, as it was allowed he could not have till that age; for though he was not actually tenant in tail when he levied the fine, but the vesting of the estate depended on the contingency of his coming to that age, yet the issue being obliged to make out his title through his, must be barred as a privy within the words of the 4 H. 7. c. 24., and the conusor was a person to whom the land was entailed, and so plainly within the words of the 32 H. 8. c. 36.

Cro. Eliz. 611. Cro. Car. 435.

If tenant in tail levies a fine, and dies before the proclamations are past, though a right really descends to the issue, because the fine is no bar till the proclamations are past, yet after the proclamations the entail is barred; for the proclamations distinguish the fines which bar the entail from those at common law, which only discontinue it; and by the express words of 32 H. 8. c. 36. all fines levied with proclamations of any lands entailed to the person so levying the same, or to any of his ancestors, shall immediately after the proclamation made be adjudged a sufficient bar against the said person and his heirs, claiming only by force of the said entail.

3 Co. 86. Plow. 430. 437. Smith v. Stapleton, 2 And. 177. Moor, 628.

Hence it was adjudged, that where A. was tenant for life, remainder to B. in tail, and B. levied a fine, and died before all the proclamations were past, his issue being out of the realm; that after the proclamations were past, though the issue, immediately upon his return into the kingdom, made his claim to the remainder, yet it availed him nothing, but the fine was a final bar to him.

3 Co. 87. Case of Fines.

So it was where there was grandfather, father, and son; and the grandfather being tenant in tail enfeoffed the father, and afterwards

Cro. Eliz. 589. 610. Hunt v. King.

afterwards disseised him, and then levied a fine with proclamations to *J. S.*, but before the proclamations were all past the father entered, and after they were all past, the conusee entered, and then the grandfather and father died, and the son brought his *formedon*; the conusee pleaded the fine with proclamations, and the demandant thereupon the entry of his father, but could recover nothing; because after the proclamations past, the fine was a good bar to the entail which was made to the grandfather who levied the fine.

3 Co. 60.
Purflow's
Plow. 435.

And the law is the same in case of actions brought, as of an entry made to preserve the entail; for if tenant in tail levies a fine, and dies before all the proclamations are past, and the issue in tail brings a *formedon*, the conusee may plead the fine with proclamations, though they were made pending the writ.

Cro. Eliz.
620.
Poph. 65,
66.

And this has been carried so far, that though a particular tenant, who is a stranger to the tenant in tail, should enter before the proclamations were past, to preserve his own right, yet the entail is barred; as if there is *A.* tenant for life, remainder to *B.* in tail, remainder to *C.* in fee, and *B.* disseises *A.*, and levies a fine; but before the proclamations are past, the tenant for life enters and avoids the fine as to himself, and *C.*, though in this case, neither the estate of *A.* or *C.* are affected by the fine, yet after the proclamations made, the entail is barred from the proclamations made, nor can any act of the issue preserve it.

Plow. 430.
Bro. tit.
Fines, 106.

As tenant in tail may convey his whole estate by the fine, so may he carve any less estate out of it, which shall likewise bind the issue after his death; as if there be *A.* tenant for life, remainder to *B.* in tail, and *B.* agrees to make a lease for years to *J. S.* upon writ of covenant brought by *B.* against *J. E.*, he may levy a fine *come ceo*, &c. to *B.*, and *B.* may render the land to *J. S.* for the term agreed on, with reservation of a rent; and this lease shall continue in force against the issue, because when *J. S.* conveys by the fine, though he really has no right, the tenant in tail and his issue are estopped to say otherwise than that he took a fee-simple; and, consequently, it appearing by the fine that he was tenant in fee-simple, he has thence a power to make a lease to bind his issue.

And. 6.
3 Co. 89.
Dyer, 213.
Plow. 435.

But if there be tenant for life, the remainder in tail, and the tenant for life levy a fine *come ceo*, &c. to the tenant in tail, who grants and renders a rent-charge out of the land to the conusor, this fine shall not bind the issue, because the rent was newly created by tenant in tail, and not entailed to him or any of his ancestors; and the entail of the land continuing, no incumbrance of the donee can affect the land any longer than his life.

10 Co. 96.
Beymour's
case.
Bull. 162.
S. C.

If there be *A.* tenant in tail, the remainder to *B.* in tail, the reversion to the right heirs of the tenant in tail, and the tenant in tail bargain and sell the lands to *J. S.* and his heirs, and then levy a fine to him, this is a bar to the issue in tail, but no displacing or discontinuance of the remainder in tail, because the bargain and sale conveyed no more than what the tenant in tail could lawfully grant, which was a descendible estate during his own

own life; and no estate of freehold passed by the fine, that being before conveyed by the bargain and sale; but yet the fine had this effect, though subsequent to the bargain and sale, to convey the whole estate-tail to the bargainee, who before had but a descendible estate during the life of tenant in tail; because where-ever a fine is levied to a person to whom the lands were entailed, and whom the issue must mention in his *formedon*, such fine cuts off the entail, and bars the issue.

If tenant in tail of a rent-charge, issuing out of a manor, levies a fine of the manor, this, by the opinion of *Hobart* and *Harvey*, is a bar of the rent, because the fine being levied of the land, inclusively gives the rent.

Cro. Jac. 699. But *Q.* because there appears to be no fine le-

vied of the rent, which being the thing entailed, and not the land, should, it seems, descend to the issue, till the entail thereof be barred by a fine. But see 1 Vez. 391. Carter, 22.

That the estate-tail is preserved to the issue in tail, notwithstanding any fine levied by the tenant in tail, when the reversion is in the crown, and the estate of the provision of the king, by 34 & 35 H. 8. c. 20. *vide post*, title *Recoveries*.

(F) Of the Operation of a Fine in barring Strangers, or those who have but an uncertain Interest, as a Term for Years, or barely an equitable Interest.

IF tenant in tail be disseised, and the disseisor levy a fine, the disseisee has five years to make his claim by the first saving, because he is the first who has a right at the time of the fine levied; and if he omit to make his claim in that time, the issue is bound for ever.

3 Co. 87. Cro. Eliz. 806. Co. Lit. 372. Though the statutes of 4 H. 7. c. 24.

and 32 H. 8. c. 36. have made the operation of fines stronger against parties and privies than they were at common law, for by them the issue in tail is bound, though not those in remainder or reversion; yet have they enlarged the privilege that strangers had at common law to avoid them, for upon these statutes they have five years from the fine to make their claim where they have a present right at the time of the fine levied; and where it accrues after the fine, they have five years from the time of such accruer; whereas by the common law in both these cases a stranger had only a year from the entry of the silver, at which time the land passed.

If tenant in tail bargain and sell his lands, or discontinue the tail, and the bargainee or discontinue levy a fine, though five years pass in the life of the tenant in tail, yet the issue shall have five years after his death to avoid the fine; for his father having given all his right by the sale, could not claim any right against his own gift; the issue therefore is helped by the second saving, because he is the first to whom the right accrued after the fine levied.

Dyer, 3. 3 Co. 87. b. Cro. Eliz. 896.

If a mortgagee be disseised, and five years pass after the proclamations, the mortgagee is hereby barred; but if the mortgagor pay or render his money, he has five years to prosecute his right by the second saving in the act, because his title did not accrue till the payment of the money.

Plow. 373.

If an infant disseisor be disseised, or make a feoffment, and the feoffee or disseisor levy a fine, and five years pass, the first disseisee is barred of his right by the first saving in the act, because he has a present right, which he ought to pursue immediately by action or entry; but the infant shall have five years from his full age to avoid the fine, because no laches are to be imputed to him but from the time he arrives at his full age.

Plow. 356
to 372.
Stowel v.
Zouch.

A., seised of *Black-acre* in fee, is disseised by *B.*, who levies a fine with proclamations of the said acre during the life of *A.*; three years after the fine levied *A.* dies, and his right descends to *C.* his grandson, as his heir, who at the time of the descent of such right was an infant; and the question was, Whether *C.*, having suffered five years after the fine levied to pass during his ancestor's life and his own minority, without making any claim, should be barred, or should have other five years upon his arrival at full age, to make his claim in? and it was adjudged, that he should not, but that he was barred, and that by virtue of the first saving in the 4 *H. 7. c. 24.*, which saves to all persons and their heirs, other than parties to the fine, such right, claim, and interest as they have in lands and tenements whereof a fine is levied, so that they pursue such right by way of action or lawful entry within five years. Now *A.* having a right to *Black-acre* at the time the fine was levied, consequently he and his heirs must be comprehended in this saving, but then they cannot take the benefit of such comprehension unless they pursue the method, and the time prescribed and limited in the said saving, which they apparently neglected to do, since neither *A.* nor his grandson made any claim or entry, or brought any action for recovery of their right within the five years; and therefore such right must be barred and extinguished; and *C.* in this case shall have no privilege of infancy, because the statute intends that only in cases where the right first attached in the infant, and therefore he shall have five years after his infancy to make his claim; but here the right was first in *A.* at the time of the fine, and the statute allows but five years to pursue the right from the time it accrues, which was not done in this case.

Dyer, 133.

But if *A.* be tenant in tail, the remainder to *B.* in fee, and *A.* levy a fine with proclamations, and then *B.* die, his heir within age, and then *A.* die without issue, and five years pass without any action brought by the heir, yet he shall either, during his minority, recover the land notwithstanding the five years lapsed, because the right first accrued to him, *B.* having no right to the land by the remainder, till the estate-tail was spent, which did not happen in his life; or the heir of *B.* may defer making his claim till he comes of age, and then by the express words of the act he shall have five years to recover his right.

Plowd. 366.

[If an infant be in his mother's womb when a fine is levied, he will be allowed five years from the time he attains his full age to make his claim; for although he is not comprehended within the letter of the act, which only mentions infants under the age of twenty-one years, and therefore does not extend to those who
are

are unborn, yet they are within the intention of the act, and will be aided by the exception.

If a person labours under several disabilities at the same time, as if a woman is covert, under age, of insane mind, and in prison, at a time when the fine is levied, or when a right accrues to her, and one or more of those disabilities are removed, still the five years given by the statute will not commence until all her disabilities are entirely removed. Idem. 375.

It is now settled, notwithstanding some old opinions to the contrary, that when once the five years allowed to persons labouring under disabilities, to avoid a fine, begin, the time continues to run notwithstanding any subsequent disability. Doe v. Jones, 4 Term Rep. 301.

But if a person to whom a right accrues to lands whereof a fine hath been levied, labours under any of the disabilities, specified and excepted in the statute 4 Hen. 7., and dies before his disabilities are removed, it seems to be a doubtful point, whether the heir of such person be obliged to make his claim within five years after the death of his ancestor, or be allowed an indefinite time for the purpose.] See Cruise on Fines, 258., &c.

It is a rule, that no interest is barred by a fine that is not divested and turned to a right; for if the person who has the right continues in possession at the time of the fine levied, he is under no necessity to make his claim, and cannot be put to his action or entry, which are the only remedies the act gives to avoid fines and secure one's interest, because he being in possession, and not disturbed by the fine, has already all those remedies it can give him, and therefore it were fruitless and unnecessary to pursue them; as if a man levies a fine of land, out of which I have a rent, common, or the like, the fine and five years nonclaim shall not affect me, because I am still in possession of my rent or common, and it were in vain to endeavour to recover what I still enjoy. 2 Inst. 517.
9 Co. 106. a.
Cro. Jac. 60.
5 Co. 124.
Vent. 81.
[This position, that no fine will bar any interest which is not divested and put to a right is too general, if the words divested and

put to a right, are understood in their strict technical sense. See Cruise on Fines, 289., where the learned author shews the general rule to be, that no estate or interest can be barred by a fine unless it is divested out of the real owner, either before the fine is levied, or by the operation of the fine itself, that is, unless the real owner is turned out of possession of such estate or interest, and that while he continues in possession, a fine will not affect him.]

A. leases to *B.* for years, to commence after a former lease in *esse*; the first lease is determined, and before any entry by *B.*, the lessor enters and makes a feoffment, and levies a fine, and five years pass without any claim: *B.* is barred of his interest; for by the general clause the fine concludes all privies and strangers, and the first saving includes the lessee in respect of the word *interest*, which a term for years may properly be called. 5 Co. 124.
Saffin's case, Cro. Jac. 60.
9 Co. 105.

But if *B.* who had the future interest, had died before the determination of the first lease, and upon the expiration thereof the lessee had entered and levied a fine; and after the five years administration had been granted; the administrator should have been allowed five years to make his claim, for none had a right or title of entry before, and it accrued to him by the administration after the fine, and consequently he must be allowed five years from the accruer Leon. 99.
2 Leon. 157.
Cro. Jac. 61.
5 Co. 124. a.

accruer of his right: but in the former case, the lessee had a right of entry at the time of the fine levied, and therefore could have but five years from that time. But if the lessor enters upon the first lessee, and levies a fine, the second lessee shall have five years after the first lease is determined, because his right then first accrued.

Hard. 410.
413. 415.
Edwards v.
Slater.

As, if a man settles land by fine to the use of himself for life, with a clause in the deed of uses to this effect; that if he should make a jointure to his wife, and a lease for thirty-one years to commence after his death, then the conusees should stand seised to such uses; he makes a lease accordingly, and then he and his wife levy a fine; the lease is not barred, though five years should pass without entry or claim, because he having but a future interest, such interest is not displaced or divested by the fine; consequently, an entry were fruitless to preserve that which was not touched by the fine: besides, this being an *interesse termini*, the lessee had no right till after the death of the lessor; consequently, must have five years from the accruer of his right to preserve it.

9 Co. 105.
2. Margaret
Podger's
case.

5 Co. 124.
But it has
been ruled

A copyholder may be barred by a fine and nonclaim, because it is an interest within the statute: so executors, that have land till debts and legacies are paid, may be barred by a fine and five years nonclaim, because they likewise have an interest within the words of the statute.

in Chancery, that where *A.* devises lands to *B.* in tail, remainder to *C.* in tail, subject to the payment of legacies; and *C.* levies a fine, and five years pass without any claim; that the legacies are not barred by the fine; and for *C.* having no title but under the will, the purchaser must be presumed to have notice thereof, and of the legacies thereby bequeathed. 2 Vern. 662.

2 Inst. 517.
5 Co. 134. a.
Plow. 374.
So it is if
an inquisition
upon an
elegit be
found, and

If there be tenant by *elegit*, statute merchant or staple, and a fine be levied of those lands, and five years pass without any claim, they are bound by the fine, because they have each of them an interest within the words and intention of the statutes, and thereby shall be bound if they do not pursue their rights within five years (*a*).

then a fine be levied of the lands, and five years pass without any claim, the interest of the tenant is barred; because, after the inquisition found, the party before entry has the possession, and may have an ejectment or trespass, and therefore his interest may be displaced, and consequently his right barred. Mod. 217. Ognel v. Lord Arlington. [(a) And in the case of Deighton v. Grenville,

2 Vent. 333. 1 Show. 36. Skin. 260., all the judges agreed, that although the cognizees of statutes-merchant did not enter, yet that they had possession in law, in consequence of their extents and liberates, which gave them a right of entry, and therefore they might be barred by a fine. However, they cannot be barred until they have extended the lands, or pursued their rights in some other manner, for until then they have no right to enter on the lands, and, therefore, cannot be put out of possession. 1 Mod. 217.]

Mod. 217.
So, if a man
has a decree
in Chancery
to charge
lands, and
the tenant
of the land,
after the decree,
aliens
by fine, and
five years
pass, yet the
plaintiff may

But if a man have a judgment for a debt at common law, and the debtor before the land is extended alien by fine, and five years pass, the plaintiff may still have a *scire facias* and an *elegit*: so it is of a conusee of a statute before execution sued; for though the judgment and execution be incumbrances that are chargeable upon the estate, yet before execution sued, the conusee, &c. has no right to the land, for his release of all his right to the land will not hinder him from suing out execution, and consequently he cannot be barred by a fine, unless he omit to make his claim in five years after the extent, for then his right first accrues.

have execution, because, till the decree be executed, he has no right to the land, and therefore is not obliged to make any entry or claim to preserve it till his title accrues. Chan. Cases, 268.

The

[The estate of a devisee may be barred by a fine and non-claim if the devisee has not entered.

Thus where *John Metcalf* devised lands to *John Gallant*, an infant of the age of three years, in fee; the son and heir of *John Metcalf* entered on the lands, and levied a fine of them; and *John Gallant* the infant died before he attained his full age, leaving a sister, who was then married; the court were of opinion, that the sister must make her claim within five years after the death of her husband, otherwise the fine would bar her.

Hulm v. Heylock, Cro. Car. 200.

A title of entry for a condition broken may be barred by a fine levied by the grantee or devisee of the conditional estate.

Thus, where lands were devised to trustees and their heirs, upon condition that they should pay a certain sum of money every year for the support of a schoolmaster, &c.; and, on non-performance of the trusts, the lands were devised over to other persons; the trustees neglected to perform the trusts, and levied a fine of the lands; it was determined that the fine was a good bar to the persons who had a title to enter on breach of the condition.

Mayor of London v. Alsford, Cro. Car. 575. 1 W. Jones, 452.

A title of entry for a condition broken may also be barred by a fine levied by the grantor of the conditional estate: as if a person makes a feoffment on condition, and before the condition is broken, the feoffor levies a fine of the same lands, either to the feoffee, or to any other person, the condition will be thereby discharged for ever. But if the fine was levied for the purpose of corroborating the conveyance by which the condition was created, it will not destroy the condition; for in that case the fine and conveyance will be construed together, and will operate as one assurance.

Shep. Tou, 154.

Cromwell's case, 2 Rep. 69.

It seems, that a right or title of entry on any other account may also be barred by a fine. Thus where *Humphrey Mackworth* was seized to him and his heirs, provided that if a hundred pounds was not paid within three months after the birth of a child, the trustees should enter; the money was not paid; so that the estate of *Humphrey* being with a *quousque* ceased, but the trustees did not enter: *Humphrey* conveyed away the lands by lease and release, and levied a fine; after which five years passed: Lord Chief Justice *Bridgeman* delivered the opinion of the court, that the entry of the trustees was barred by the fine.

Thomasin v. Mackworth, Carter, 75.

A power appendant, or in gross, may be barred by a fine levied of the lands to which the power relates, by the person to whom such power is reserved; because, by the fine, the person acknowledges all his right and interest in the lands to be vested in another; and therefore it would be repugnant to that acknowledgment that he should ever afterwards claim any power over those lands. Besides, a power appendant, or in gross, being part of the old dominion, is considered as an interest, which may be released. Thus where *Christopher Digges*, being seized in fee, covenanted to stand seized to the use of himself for life, remainder over, reserving to himself a power of revocation, by deed indented and enrolled; and *Christopher Digges* revoked the uses; but, before the deed of revocation was enrolled, he levied a fine; it was resolved that

1 Inst. 237. a. 3 Rep. 83. a.

Digges's case, 1 Rep. 173.

the fine being levied before the enrolment of the deed of revocation, until which time the revocation was imperfect, had destroyed the power.

1 Inst. 215. a. A power of revocation may also be destroyed in part, by levying a fine of part of the land, and yet the power will continue good as to the residue.
Tou. 501.

Herring v. Brown, 2 She. w. 185. 3 Ventr. 368. Carth. 21. Comb. 11. Skin. 124. If a person who has a power appendant, or in gross, levies a fine of the lands to which the power relates, and afterwards by deed declares that such fine shall enure as an execution of his power, the fine and declaration of uses will in that case be considered as one assurance, and will not destroy the power.

1 Freem. S. C. Doe v. Whitehead, Dougl. 45. S. P.

A power collateral to the land, which is not joined with an interest, cannot be destroyed by a fine, levied by the person to whom such a power is reserved; because it is considered as a bare and naked authority, which cannot be released or divested. Thus it is said by Lord Chief Justice *Popham*, in *Digges's* case, that if a feoffment was made to *A.* in fee to divers uses, with a proviso that it should be lawful for *B.* to revoke those uses, *B.* could not in that case release his power, nor extinguish or destroy it by a fine, because it was a collateral power; for the land did not move from him, nor would the party have been in by him, if he had executed the power.

1 Inst. 237.

a. 1 Rep. 174. a.

It follows from the same principles that a collateral power cannot be barred by the fine of a stranger. Thus where a person by a proviso in his marriage-settlement gave his wife a power to dispose of one hundred pounds to such persons as she should appoint, to be paid within one year after his decease; and in default of payment one *John Moreton* was empowered to make a lease of certain lands to raise that sum; the wife, in a year after the death of her husband, made an appointment of this sum, but it was not paid; the heir of the husband levied a fine of the land, and five years passed, and afterwards the appointees of the one hundred pounds brought their bill to be paid that sum; Lord *Hardwicke* observed, that although by the several statutes relating to fines, all right, claim, and interest which strangers had, were barred by a fine, yet that such a stranger as *John Moreton*, who had no interest, but only a bare naked power, and who could not have made an entry, was not affected by it.

Willis v. Shorrall, 1 Atk. 474.

A fine and non-claim is a good bar to a writ of error, in consequence of the word, actions, in the second saving of the statute, 4 Hen. 7. and a fine is also a good bar to a writ of error to reverse a common recovery.]

Bartholomew v. Bellfield, Cro. Jac. 332.

9 Co. 105. If lessee for years be ousted, and he in reversion disseised, and the disseisor levy a fine; this and five years non-claim shall bar both, because the lessee for years may have his ejectment, and the lessor his assise.

But if lessee for life be disseised, the reversioner shall have five years after the death of the particular tenant, because he can have no action to recover the freehold.
9 Co. 105. b. Co. Lit. 250. Plow. 374.

If lessee for life or years makes a feoffment and levies a fine, and five years pass without entry or claim by the reversioner, and then the lessee dies, the reversioner has five years to preserve his right, because he has two different rights in this case upon the feoffment and fine; one immediately accrues by the act of the lessee in committing the forfeiture; the other upon the death of the lessee or expiration of the term, and therefore he shall not forfeit the last by omitting to take advantage of the first; wherefore if the reversioner omits to enter upon the breach of the condition in law, yet his old right, which accrues upon the death of the lessee, or expiration of the term, still continuing, is saved by the statute, which preserves future rights, as well as those *in presenti*.

Vent. 241.
3 Keb. 37.
110.
Raym. 219.
Moor, 71.
Cro. Eliz.
254.
3 Co. 78.
Cro. Car.
157. But
if tenant in
tail makes
a lease for
life, and so
discontinues
the tail, and
then levies a
fine with

proclamations, and dies without issue, and five years pass without any entry or claim, the remainderman is barred, because upon the death of tenant in tail without issue his title commenced, and he shall be allowed but five years from thence to preserve it. Cro. Car. 156. Salvin v. Clerk.

[If lands are extended on two statutes, and the person who is seised of the land levies a fine; though the cognizee of the first statute must make his claim within five years after the fine has been levied, otherwise he will be forever barred; yet the cognizee of the other statute need not make his claim until satisfaction has been entered upon record on the first statute, because that is the only proper determination of an extent, so that he will have five years allowed him from that time to avoid the fine by the second saving in the statute, 4 Hen. 7.; because until then his right did not accrue.]

Deighton v.
Grenville,
2 Ventr.
333.
1 Show. 36.
Skin. 260.
S. C. Lords
Journals,
vol. 16.
P. 454.
26th April
1699.

Cruise on Fines, 242., &c.

If there be tenant for life, the remainder to *B.* in tail, and the lessee levy a fine, *B.* being out of the realm; if *B.* die beyond sea, the issue in tail is at large to avoid the fine when he pleases, for that clause of the 4 H. 7. c. 24. which gives persons out of the realm, infants, &c., and their heirs, five years after their impediments removed, to pursue their right, cannot be extended to this case, because *B.* being dead, cannot return into the realm to make his claim, and the clause limits five years to him and his heirs after his return, which now is become impossible.

2 Inst. 519.

A copyholder of a dean and chapter levied a fine with proclamations, and five years passed without any claim by him that was dean at the time of the fine, yet the succeeding dean was not bound by the fine; because if that were allowed, the statutes of 1 Eliz. c. 19. & 13 Eliz. c. 10. would be of little use to restrain alienations; for then by combination between the dean and tenant all lands belonging to the chapter might be aliened.

Vent. 311.
Howlett v.
Carpenter.

[Although the statute 4 Hen. 7. does not extend to the possessions of the church, yet in case a bishop, dean, vicar, or prebendary, should neglect to make his claim within five years after a fine levied of an estate to which he was entitled in right of his bishoprick, &c., he will be barred during his life, but his successor will be allowed five years to avoid the fine, from the time of his becoming entitled to the lands.]

Plowd. 533.

Cro. Car.
110.
Morris v.
Isham.

If lessee for years assigns his term in trust for himself, and afterwards purchases the inheritance and occupies the land, and then levies a fine, and five years pass without claim by the assignee, the term is lost, for neither the *cestui que trust*, nor the termor, have any remedy: not the *cestui que trust*, because he by the fine hath acknowledged the land to be the right and inheritance of the conusee; and it were unreasonable to allow him any pretensions after so solemn a confession to the contrary: not by the termor, because he having a right at the time of the fine levied, and omitting to make his claim within five years, is barred by the express words of the statute. So it is, if tenant in fee-simple makes a lease for 100 years to attend the inheritance in trust for himself, and still continues in possession, and makes a lease for fifty years, and levies a fine *sur conusance de droit* to confirm it, and five years pass without any claim by the first lessee; his interest is barred by the fine; for the second lease and the fine divested the first term out of the lessee, and consequently, if there be no claim by him in five years, his interest must be barred.

Lev. 270.
Freeman
and Barns.
Sid. 478.
Vent. 80.
Chan. Rep.
51. 65.

Sid. 460.
Vent. 82.
Lev. 272.

But if a man purchases the fee-simple of *Black-acre*, of which there is a long lease in being, and the conveyance is made by fine, and the purchaser, to protect the inheritance, has an assignment of the term in trust for himself, though the termor makes no claim in five years, yet the term continues; because the statute of fines being made for the security of purchasers, they would weaken their interest, if fines destroyed such leases against the intention of all parties.

Sid. 460.
Vent. 82.
Lev. 272.
2 Vez. 482.
So, if the
mortgagee is
in possession,
and levies a
fine, and the
five years
pass, yet
upon pay-
ment of the money the mortgagor may enter. 1 Vern. 132., and there said to be a new way of fore-
closing the equity of redemption; but *vide* 2 Vern. 189.

Thus if a man mortgages his land, and, as is usual, still continues in possession, and levies a fine, and five years pass, yet the mortgagee is not barred; for though the mortgagee be in reality out of possession, yet when that is done by the consent of both parties, and the nature of the contract requires it should be so while the interest is paid, it is against the original design of the contract, that any act of the mortgagor, except the payment of the money, should deprive the mortgagee of his security, and is no less than a fraud, which the law will not countenance.

3 Co. 77.
Farmer's
case.

Thus it has been adjudged, where a man was lessee for years of one part of a manor, and tenant at will of another, rendering rent, and the lessee made a lease for life, and then levied a fine to the tenant for life, but still continued in possession and paid the rent; that this fine should not bar the lessor, because this is visibly a fraud and trick in the first lessee, which he shall reap no benefit by, and the lessor had no reason to make his claim while the rent was duly paid him.

Chan.
Cafes, 268.
2 Chan.
Cafes, 247.

It is agreed on all hands, that a fine and non-claim will bar a trust, because the *cestui que trust* has an equitable interest, and therefore ought to pursue it by proper remedies to secure it; yet this must be understood with these following restrictions.

But for this
vide Vern.
149.

1. Where the purchaser has notice of the trust, though the trustee conveys to him by fine, and five years pass without any claim

claim by the *cestui que trust*, yet the trust is not barred, because where the purchaser has notice, he sees the title of the vendor, and what power he has to convey; and therefore, when he takes the land from him, shall be presumed to hold it in the same plight, and that the vendor could not make him a better title than he had in himself; and when the purchaser takes it upon these terms, the trust is undisturbed, and *cestui que trust*'s interest no way affected by the fine.

[So, where a person to whom lands were devised chargeable with legacies, levied a fine, on which there was a five-years non-

claim, and afterwards granted a rent-charge, and mortgaged the lands; it was decreed, that the fine and non-claim were no bar to the legatees, because the devisee having no title but under the will, must have had notice of them. *Drapers' Company v. Yardley*, 2 Vern. 662.]

2. Though the trustee should convey by fine to a purchaser, who had no notice, and thereby and five years non-claim the *cestui que trust* should be barred, yet if the purchaser should reconvey to the trustee, the bar from the reconveyance ceases, and the trust as to him revives again; for he that was originally invested with a trust shall never be allowed to plead his own tortious act in his own justification, for that were to allow a man to plead his crime in his own defence, and excuse of his treachery.

2 Chan. Cases, 124-5-6. *Bovey* and 11th, Vern. 60, S. C.

[And a fine levied by a trustee will not be allowed to affect the interest of the *cestui que trust*.

Thus in the above case of *Bovey v. Smith*, the Lord Keeper put this case to Serjeant *Maynard*,—"A. seised in fee in trust for B. for full consideration conveys to C., the purchaser having notice of the trust; and afterwards C., to strengthen his own estate, levies a fine. Whether B. the *cestui que trust* be not in that case bound to enter within five years? and the counsel were all of opinion, that he was not; for C., having purchased with notice, notwithstanding any consideration paid by him, was but a trustee for B., and so the estate not being displaced, the fine cannot bar."

1 Vern. 143.

So in the case of *Shields v. Atkins*, Lord *Hardwicke* says, it would be dangerous, where a person enters on the foot of a trust, and never makes any declaration of his having performed the trust, to construe this such an entry, as that a fine and non-claim afterwards would be a bar. And in the case of Lord *Pomfret v. Lord Windsor*, his lordship observed, that a court of equity would not suffer a fine levied by a trustee to bar an equitable right: and that if a practice of this kind was allowed to prevail, a court of equity might as well be abolished by act of parliament.]

3 Atk. 563,

2 Vezey, 481.
2 Atk. 631,
S. P.

If lands are devised to trustees till debts paid, and then to an infant and his heirs, and J. S. a stranger enters on the lands and levies a fine, and five years and non-claim pass, and the infant, when of age, brings an ejectment, but is barred, because the trustees ought to have entered; yet equity will relieve, and not suffer an infant to be barred by the laches of his trustees, nor to be barred of a trust estate during his infancy; and the infant in this case shall recover the mesne profits.

2 Vern. 363,
Allen v. Sayer.

[But if the title is merely a legal one, and a man has purchased an estate which he sees himself has a defect on the face of the

2 Atk. 631,

deeds,

deeds, yet the fine will be a bar, and will not affect the purchaser with notice, so as to make him a trustee for the person who had the right, because, as Lord *Hardwicke* observes, this would be carrying it much too far, for the defect upon the face of the deeds is often the occasion of the fine being levied.

Year Book,
27 Hen. 8.
20. Bro.
Ab. tit.
Fine, pl. 4.

Before the statute of uses, if a *cestui que use* had levied a fine it might have been avoided at any time by the plea *quod partes finis nihil habuerunt*; as the *cestui que use* had no estate in the land, but was barely tenant at will to his feoffees. But modern chancellors have very much altered the law in this respect, having laid it down as a general rule, that any legal conveyance or assurance by the *cestui que trust*, shall have the same effect and operation on the trust estate, as it would have had on the legal estate, if the trustees had conveyed it to the *cestui que trust*. So that now a *cestui que trust* in tail may by a fine duly levied, bar his issue as fully, as if he had the legal estate; for otherwise trustees by refusing, or by not being capable of executing their trust, might prevent the tenant in tail from exercising the power given him by the law over his estate, which would be extremely inconvenient, and would tend to the introduction of perpetuities.

1 Chan.
Ca. 213.
Cafes Temp.
Talbot, 43.

Basket v.
Pierce,
1 Vern. 226.

A *cestui que trust* in tail may not only bar his own issue by a fine, but also the persons in remainder or reversion, unless they make their claim within the time specified by the statute.

Goodrick
v. Brown, 1
Chan. Ca. 49.
2 Vern. 56.

Where a fine is levied pursuant to a decree of the court of chancery, for a particular purpose, that court will not permit it to operate farther than the decree directs.

Trevor v.
Trevor,
1 P. Wms.
622. 2 Br.
P. C. 122.

The intention of marriage articles is so far considered in equity, that if a fine be levied of the lands comprehended in such articles to different uses, a court of equity will compel a conveyance of the lands to the uses of the marriage articles, notwithstanding the fine.

Holt v.
Lowe, 4 Br.
P. C. 253.

The plea of a fine and long possession under it, is not a good bar to a bill brought for a discovery of the deeds, declaring the uses of such fine.

Loyd v.
Carew,
Show, P. C.
137.

A springing or shifting use cannot be barred by a fine, levied of the estate out of which such springing or shifting use is to arise.]

(G) Of the Remedies given to Strangers by Claim and Entry for the Preservation of their Rights.

[(a) As where a fine operates as a discontinuance of the estate, in which case a real action must be brought. 1 Vern. 212.]

If a man have only a right of action, and his entry be taken away (a), there a claim or actual entry on the land will not preserve his right, or avoid the fine; because though he has a right to the land, yet since he has not pursued it in the manner the law has prescribed, it is as ineffectual as if he had been quiet.

Moor, 450.

A man that has a right of entry may empower another to enter for him, and such entry is sufficient to avoid a fine; for what another

another does by my command or direction, is looked upon to be my own act.

But where a man enters in my name, and without my direction; this does not avoid the fine, or preserve any right, because the statute preserves my right only in case I pursue it by entry, &c., in five years; but what a stranger does in my name, without my direction, is not my act, and consequently cannot avoid the fine; yet in this case, if a stranger enters without my direction, and I agree to and approve of the entry within five years, this is sufficient to avoid the fine, because my subsequent assent and approbation is equivalent to a precedent command, and therefore the act of another by my direction is my own.

Lessee for life levied a fine *come ceo*, &c., and he in reversion, five years after his death, brought his ejectment, and a stranger by his direction delivered a declaration in ejectment to the tenant in possession; yet this was adjudged no entry to avoid the fine.

[Nor does the delivery of a declaration in ejectment amount to such an entry as will avoid a fine, even though the defendant appears to it, and confesses lease, entry and ouster; for there must be an actual entry made *animo clamandi*, whereas in an ejectment, there is only a fictitious or supposed entry, for the purpose of making a demise: and the entry must be made before the time when the demise is laid.]

If an action be brought to recover lands of which a fine was levied, and the demandant discontinues, this is no claim to avoid the fine, because the discontinuance shews no intent of the demandant to preserve his right.

[The suing out of a writ, and delivering it to the sheriff does not amount to a pursuing a claim or title by way of action, unless the writ be returned by the sheriff.]

If the claim be made by action, it must be a real action; so that an ejectment will not suffice, nor is a bill in chancery such a claim under the statute 4 Hen. 7. as will avoid a fine.

There is however an exception to this rule, in the case where a fine has been levied of a trust estate, because no entry by the *cestui que trust*, or claim, or other legal act, will be sufficient to avoid the fine, or suspend the bar arising from the non-claim; it can only be done by bill in chancery, as the claim to avoid a fine ought to be of a nature which corresponds with the estate.

And even where the subject matter of the suit is of legal jurisdiction, the filing of a bill in a court of equity will, in some instances, prevent the bar arising from a fine and non-claim: and in cases of this kind, the court will direct a trial at law, with an order that the defendants shall not set up the fine in bar of the plaintiff's claim, upon the same principle that it sometimes directs that the defendants in a suit at law, shall not plead the statute of limitations.

The entry of one joint tenant, coparcener, or tenant in common, will be sufficient to avoid the effect of a fine, as to the other joint-tenant, coparcener, or tenant in common.

Poph. 108.
Pollard v.
Lutterall,
Co. Lit.
245.

Mod. 10.
Clerk v.
Rowell and
Phillips.
Saund. 319.
Vent. 42.
3 Burr.
1897.
Douglass. 468.
2 Str. 1086.
4 Br. P. C.
353.

Dallison,
116. 107.
Vent. 45.

2 Leon. 221.

2 Bl. Rep.
994.
Dal. 116.

1 Ch. Ca.
268. 278.
2 Bl. Rep.
994.

2 Atk. 389.
Pincke v.
Thornycroft, 1 Br.
Ch. Rep.
289.
Printed
Cases Dom.
Proc. 1784.

2 Will. 45.

No entry is necessary where the fine is levied without proclamations, for the statute 4 Hen. 7. doth not extend to such a fine; and it may be avoided at any time within twenty years.]

By the 4 & 5 Ann. c. 16. it is declared, that no claim or entry, to be of or upon any lands, shall be of any force or effect to avoid any fine levied, or to be levied, with proclamations, unless upon such entry or claim an action shall be commenced within one year next after the making such entry or claim, and prosecuted with effect.

(H) Of erroneous Fines, and the Manner of reversing them.

Roll. Abr.

747.

Dyer, 90.

3 Lev. 36.

As, if a man settles land to the use of himself and the heirs of his body, the remainder to his own right heirs, and dies, leaving issue only a

AND here in the first place it is to be observed, that no person can bring a writ of error to reverse a fine, or any judgment, that is not entitled to the land, &c., of which the fine was levied; for the courts of law will not turn out the present tenant, unless the demandant can make out a clear title, possession always carrying with it the presumption of a good title till the right owner appears; besides, where the plaintiff in the writ of error cannot make out a title he can receive no damage by the fine, which the writ of error always supposes to be done, though it should be erroneous; and therefore it is no less than trifling with the courts of justice to seek relief when he cannot make it appear he has received any injury.

daughter, who levies a fine, and dies without issue; and J. S. brings a writ of error as cousin and collateral heir of the daughter; yet he shall not reverse the fine; for there could no right descend to him from the daughter, because she had but an estate-tail, which determined by her death without issue; and it does not appear that the remainder was in the daughter as right heir. Dyer, 89. Cro. Eliz. 469. S. C. 3 Lev. 36. S. C. cited. So, if tenant in tail female levies a fine, which happens to be erroneous, and dies, leaving a daughter and a son, the daughter shall have the writ of error, and not the son, because she is to enjoy the land. Roll. Abr. 744. Dy. 90. a. [So, if one who is seised *ex parte maternâ* levies a fine in which there is error, the heir *ex parte maternâ* will be entitled to the writ of error. 1 Leon. 261. So, the younger son, when entitled to lands by the custom of borough-english, shall have the writ of error, and not the heir at common law, for this remedy descends with the lands. *Id. ibid.* Yet a brother of the half-blood is not entitled to bring a writ of error on a fine levied by his elder brother; though if there had not been such fine the land would have descended to him. Co. Lit. 14. a. n. 6.] If a man releases all his right, or makes a feoffment of all the lands, of which an erroneous fine was levied, he shall have no writ of error; but if the release or feoffment were only of part, he may bring a writ of error to reverse the fine, as to the rest. Cro. Eliz. 469. Roll. Abr. 788. Moor, 413. Jon. 352. Moor, 365.

Roll. Abr.

747.

Dyer, 89.

This, Roll

says, is only for conformity;

but there seems to be something of justice in the practice, that they who

joined in the fine, and thereby contributed to an illegal disposition (for such is an erroneous fine) of

what another man had a right to, should be instrumental and assistant to the recovery of it.

But if there be several parties to an erroneous fine, they shall all join with the party that is to enjoy the land, though they themselves can have nothing.

Roll. Abr.

757.

Another rule to be observed is, that nothing can be assigned for error that contradicts the record; for the records of the court of justice being things of the greatest credit, cannot be questioned but by matters of equal notoriety with themselves; wherefore though the matter assigned for error should be proved by witnesses of the best credit, yet the judges would not admit of it.

And

And hence it is, that, in a writ of error to reverse a fine, the plaintiff cannot assign that the conusor died before the *teste* of the *dedimus potestatem*, because that contradicts the record of the conusance taken by the commissioners, which evidently shews that the conusor was then alive, because they took his conusance after they were armed with the commission and the *dedimus* issued.

But the plaintiff in error may say, that after the conusance taken, and before the certificate thereof returned, the conusor died; because this is consistent with the record.

If a conusance upon a fine be made in court, the plaintiff in error cannot assign for error, that the conusor died before the return of the writ of covenant, for that would directly contradict the record, because the conusance in court is never made till the writ of covenant be returned, the parties till then not being judicially before the court.

If the conusance be taken before commissioners *in pais*, the plaintiff cannot assign for error, that the conusor died before the return of the writ of covenant, for the *dedimus* may issue the day after the writ of covenant, and may recite it as pending before the return thereof.

A conusance of a fine was taken before *R. M.*, one of the justices of *C. B.*, and after, in the prosecution of the fine, the *dedimus* was directed to Sir *R. M.*, he being after the conusance made a knight, who returned the *dedimus* with his name and title, and this was assigned for error, that the person who took the conusance was not the same that was empowered to take it: but it was not allowed, because it contradicts the record, which is, that the *dedimus* was directed to Sir *R. M.*, and that Sir *R. M.*, by virtue thereof, took the conusance.

If a *dedimus* be awarded to two, and one only take the conusance of the fine, this may be assigned for error; because where one of the commissioners only certifies the conusance, the assignment does not contradict the record; but in this case, if the fine had afterwards been drawn up as a fine acknowledged in court, there the erroneous conusance taken upon the *dedimus* shall not be assigned for error, because it shall be taken as a fine acknowledged in court only, and no averment of the party shall be admitted to disprove the record.

If one of my name levies a fine of my land, I may avoid this fine by shewing the special matter; as to say, that there are two of my name, one of *Sale* and the other of *Dale*, and that he of *Sale* levied the fine, and not I, who am of *Dale*; for this is consistent with the record, because I still admit that one of my name levied the fine.

S. C. where the court may order a vacat to be entered on the roll, or a reconveyance of the estate.

No man can have a writ of error to reverse a fine that took any estate by it.

One *Parrott* married *A.* who had an estate of inheritance of a considerable value, and whilst she was under age he prevailed on her to levy a fine with him of those lands, the uses whereof were declared to him and her and the heirs of their two bodies, remain-

Dyer, 89. b.
Roll. Abr.
757.
Cro. Eliz.
469.

Roll. Abr.
557.

Cro. Eliz.
468.

Roll. Abr.
757. Cro.
Jac. 11.
Cro. Eliz.
468. Vide
Raym. 462. 2 Jon. 181. cont.

Yel. 33.
Arundell v.
Arundell,
Roll. Abr.
757. Cro.
Jac. 11, 12.

Cro. Eliz.
240.
Yel. 34.

Co. Read-
ing, 9.
Cro. Eliz.
531. Hu-
bert's case.
Moor, pl.
866.

12 Co. 123.

5 Co. 39.
Tey's case.

2 Vent. 30.
Herbert
Parrott's
case, Mod.
246. S. C.

in C. B.
Vide 12 Co.
 121. Anne
 Hungate's
 case. Roll.
 Rep. 113,
 114. S. C.
 12 Co. 123.
 Mansfield's
 case.
 12 Co. 124.
 Warcomb
 and Car-
 roll's case.

der to the heirs of the survivor: this fine was taken in the country by virtue of a *dedimus protestatam* to Sir Herbert Parrott, his father, and an ignorant carpenter; after which the wife died without issue, and now her heir at law prayed the relief of the court: upon examination it did appear, that Sir Herbert did examine the woman, whether she were willing to levy the fine, and asked her husband and her whether she were of age or not, and both answered that she was; and now her heir moved that this fine might be set aside, and a fine imposed upon the commissioners for this undue practice in taking a fine of one under age; but all the court agreed they could not meddle with the fine; but if the wife had been alive, and still under age, they might bring her in by *habeas corpus*, and inspect her, and set aside the fine upon motion; for perhaps the husband would not suffer the bringing or proceeding in a writ of error; and the court were of opinion, that it was the duty of commissioners to inform themselves of the party's age, and that a voluntary ignorance would not excuse them; and that if a commissioner to take a fine execute it corruptly, he may be fined by the court; for in relation to the fine, (which is the proper business of this court,) he is subject to the censures of it, as attornies, &c.; but here it did not appear, that Sir Herbert Parrott knew that she was under age, and therefore the court would not fine him.

Hutchison's
 case, 3 Lev.
 36.

Husband and wife, the wife being but sixteen years of age, levied a fine, which was taken by virtue of a *dedimus*, and they being brought into the court of C. B. by complaint of the remainder-man, a vacat was entered of the fine *quoad* the woman, and the court directed the remainder-man to prosecute an information against him who took the caption of the fine.

Eq. Caf.
 Abr. 258.
 St. John and
 Turner.

A. having inveigled his wife to levy a fine of her land to him when she lay on her death-bed; pretending, as was suggested, he was to have it only for his life; a *dedimus* was sent into the country to take the fine, and the caption was taken the very day she died; and because the fine would not have stood, the party being dead before the king's silver was paid, the writ of covenant was rased in the teste, and made to bear date ten days backward, and all the other parts of the fine were rased likewise, and made to correspond with it, and the king's silver was paid, and so all appeared on the record to have been done before the death of the woman: on a bill brought in the court of chancery to have the fine set aside, or to have a re-conveyance, it was holden by the court, that though chancery has a power to relieve as much against a fine obtained by fraud or practice, as any other kind of conveyance, yet that such relief was not by decreeing a vacat of the fine, but by ordering a re-conveyance; but for any error in the fine, or irregularity or ill practice in the commissioners, it was a matter properly cognisable in that court where the fine was levied, and for which that court may vacate the fine; but there being no proof of fraud or practice in this case, the bill was dismissed.

See *acc.*
 1 Vern. 205.
 2 Vern. 307.
 678. 2 Atk.
 331. 350.

Roll. Abr.
 752.
 F. N. B.
 20. b.
 2 Bend. 51.
 Dyer, 83.

The manner of reversing fines differs from the method observed in reversing other judgments; for in all other cases, where the suit is adversary, the record itself is removed; but in case of a fine the transcript only is removed; for where the suit is adversary, the record

record itself is transmitted, that it may be a precedent in like cases; but fines are only a more solemn acknowledgment or contract of the parties; and therefore are no memorials of the law, and need only be affirmed or vacated; if the former, the contract stands as it was; if the latter, the justices of *B. R.* may send for the fine itself and reverse it, or they may send a writ to the treasurer and chamberlain to take it off the file; besides, should the record itself be removed and affirmed, it could not be engrossed for want of a chirographer in *B. R.* and for this reason, my Lord *Coke* says, a fine levied in *B. R.* is voidable by writ of error.

If there be tenant for life, remainder to an infant in fee, and they two join in a fine, the infant may bring a writ of error and reverse the fine as to himself, but it shall stand good as to the tenant for life; for the disability of the infant shall not render the contract of the tenant for life, who was of full age, ineffectual (*a*).

in a later case, that although a fine may be reversed as to part of the land, and remain good as to the residue, yet that it cannot be reversed *in toto* as to one person, and remain good *in toto* as to another. *Zouch v. Thompson*, 1 *Ld. Raym.* 179.]

If an infant brings a writ of error to reverse a fine for his nonage, and his nonage, after inspection, is recorded by the court; but before the fine reversed he levies another fine to another, this second fine shall hinder him from reversing the first, because the second having entirely barred him of any right to the land, must also deprive him of all remedies which could restore him to the land.

But if tenant in tail levies an erroneous fine with proclamations, and then levies a second fine, which is also erroneous, and dies; if the issue in tail brings a writ of error to reverse the first fine, the defendant may plead in bar the second; for though there be error in the second, yet, till that appears judicially to the court, it must be looked upon as a fine duly levied, and consequently a bar to the plaintiff, because while the second stands in force he cannot have the land; but if in this case the plaintiff brings a writ of error to reverse the second fine, and the defendant pleads in bar the first fine, the plaintiff may reply upon the first writ of error, that the second fine was erroneous; and upon the second writ, that the first fine was erroneous, and so be relieved against both; for here the examination of both fines comes judicially before the court, and if there appears any error, the court will set them aside, and not suffer them to stand in the way of the plaintiff's right.

But in a writ of error to reverse a fine, the defendant cannot plead the same fine, now endeavoured to be reversed, and five years, in bar of the writ of error, no more than in a writ of error to reverse an outlawry can that outlawry be pleaded in bar of the writ of error, *quia non valet exceptio istius rei, cujus petitur dissolutio*.

Roll. Rep. 36. 2 *Bull.* 244. *Raym.* 461. *Vent.* 353. 2 *Sid.* 92. 93. 2 *Jon.* 181. *Cro. Jac.* 333. 2 *Inst.* 518.

If one that is sheriff of a county levies a fine, and the writ of covenant is directed to the coroner, this is no error, but the proper method, in order to prevent partiality.

A writ of covenant to levy a fine ran thus, *Præc' A. quod teneat conventionem de octo messuag', duobus toftis, decem gardinis, and the dedimus*

Roll. Abr. 753. *Co. Reading*, 12. *Salk.* 337. By which last book a writ of error *coram vobis* lies upon an affirmation of a fine in *B. R.*

Leon. 115. 317. 2 *Sid.* 55. 2 *Jon.* 182. [(a) But it hath been adjudged

Roll. Abr. 788.

Roll. Abr. 788.

Cro. Car. 415. *Roll. Abr.* 797.

Cro. Jac. 77. *Roll. Abr.* 794.

dedimus potestatem was pursuant to the writ of covenant, but the *præc'*, which was drawn up with the concord, was *de duobus messuag' pro duobus toftis*; but this was no error, because where the concord was pursuant to the *dedimus* and the writ of covenant, the *præcipe*, which seems to be but a copy of the writ of covenant on paper, is more than is needful, and therefore no material error.

Cro. Jac.
77, 78.
Roll. Abr.
794.

If the commissioners upon a *dedimus* return thus, *executio istius commissionis patet in quodam pannello huic commission' annex'*, where the usual form is *in quadam schedulâ*; yet this is no error to avoid the fine, for whatever return certifies the conuſance to be duly taken by the commissioners is ſufficient; and therefore, if the commissioners certify the conuſance under their ſeals, without any words, it is well enough; ſo if the return had been made thus, *executio patet in hac annexâ*.

Dyer, 216.
182.
Hughes's
Abr. 938.

If a fine be levied, but the proclamations thereon be not duly or regularly made, the writ of error ſhall reverſe only the proclamations; for where the proclamations are not all of them, or not duly made, it is altogether the ſame as if they had never been made, and then the fine remains good at common law to work a diſcontinuance.

Salk. 339.
pl. 4.

The court will not reverſe a fine without a *ſcire facias* returned againſt the tertenants; for the conuſees are but nominal perſons; and though it was otherwiſe in the precedent in *Co. Ent.* and *Hern's Plead.* 375. and the law perhaps does not ſtrictly require it, yet the courſe of the court does.

Cro. Eliz.
471.
[Doubts
were enter-
tained, ſoon
after the

Fines may be avoided where they are obtained by fraud, covin or diſceit, though there be no error in the proceſs; and that may be done either by writ of diſceit or averment ſetting forth the fraud or covin.

Reſtoration, reſpecting the power of parliament to ſet aſide a fine obtained by force and fraud. Lords' Journals, vol. 11. p. 191. 209. 12 Car. 2. Comm. Journ. vol. 8. p. 344. 13 & 14 Car. 2. c. 27. Cruise on Fines, 347.]

F.N.B. 98.
a. Moor, 6.
2 Wilf. 17.
The reaſon

Thus if a fine be levied of land in ancient demefne, the lord ſhall have a writ of diſceit, againſt the conuſor and the tenant, and by that avoid the fine.

why fines of ancient demefne land muſt be levied in the lord's court is, becauſe thoſe lands were not originally within the juriſdiction of the courts of *W'ſtmiſter*; and this privilege the tenants enjoy, not to be called from the buſineſs of the plough by any foreign litigation; but for this *vide* 4 Edw. 3. 4. Keilw. 43. Roll. Abr. 775. F.N.B. 98. a. Leon. 290. Cro. Eliz. 471. Bro. tit. *Fines*, 101. 9 H. 7. 12. Salk. 339. pl. 5.

3 Co. 80. a.
Plow. 49. b.

If a fine be levied to ſecret uſes to deceive a purchaſer, and the conuſee pleads the fine in bar, the purchaſer may aver the fraud in avoidance of the fine, by 27 *Eliz. cap. 4.* and ſuch averment is not contrary to the record, becauſe it admits the fine, but ſets it aſide for the covin and fraud in obtaining it.

3 Co. 80.

So if a fine be levied upon uſurious contract, it may be avoided by averment, by 13 *Eliz. cap. 8.* becauſe ſuch fine being levied for ends the law has prohibited, the law will not encourage any evasion out of the act, nor ſuffer ſuch uſurious contracts to be ſupported by the ſolemn acts of the courts of juſtice againſt the intention of the ſtatute.

[By

[By statute 23 *Eliz. c. 3. § 2.* "No fine shall be reversed for
" false or incongruous Latin, rasure, interlining, mis-entering of
" any proclamations, mis-returning or not returning of the she-
" riff, or want of form in words, and not in substance."

By statute 10 & 11 *W. 3. c. 14.* a writ of error to reverse a fine must be brought and prosecuted within 20 years after the fine levied.

A writ of error can only be brought to reverse a judgment in a court of record, for to amend errors in a base court, which is not of record, a writ of false judgment lies, returnable in the court of Common Pleas. Co. Lit. 288. b.

A writ of error, properly speaking, is a proceeding in the nature of an appeal; it is therefore usually brought to reverse a fine in the court of King's Bench, that court having an appellant jurisdiction over the court of Common Pleas. But where the error assigned in the judgment doth not arise from any fault in the court, but from some defect in the execution of the process, or from some matter of fact, the writ of error must be brought in the same court where the judgment was given; in cases of this kind, therefore, in the court of Common Pleas. F. N. B. 23. 9 Vin. Abr. 486.

During the term in which a judicial act is done, the record may be amended or invalidated, without a writ of error; because, during the term, the record is in the breast of the court, and the rolls are alterable at the discretion of the judges; and now the courts of justice will allow amendments to be made at any time, while the suit is depending, notwithstanding the record be made up, and the term be past; for they consider the proceedings as in *feri* until the judgment is given. Co. Lit. 260. a. 3 Bl. Com. 407.

As to the amendment of fines, the court of Common Pleas has frequently permitted it, where any palpable mistake or misprision has been made by the officers of the court, in the entry of the king's silver (*a*), the proclamations (*b*), or the description of the lands; and this even after error brought upon the very point. (a) Bohun's case, 5 Co. 43. (b) Dowling's case, id. 44. (c) 1 Ld.

Raym. 209. Pig. Recov. 218. Cas. of Pr. 52. Barnes, 216. 24. 3 Wilf. 58.

But it will not allow the number of acres to be increased where the deed of uses is general, and the fine is levied by a husband and wife. Nor, where a fine is recorded of one term, will it alter it, and make it a fine of another (*d*). Neither will it permit a change of the christian names of the parties (*e*). Powell v. Peach, 2 Bl. Rep. 1202. (d) Heath v. Sir I. E. Wilmot, 2 Bl. Rep. 778. (e) Dixon v. Lawson, 2 Bl. Rep. 816.

The judges have, in some instances (*f*), directed the original writ upon which a fine has been levied to be amended; but the propriety of such amendments seems, from some modern determinations (*g*), to be extremely doubtful. (f) Gage's case, 5 Co. 45. b. (g) Lord Pembroke

v. Lord Jeffries, 1 Salk. 52. 2 Ld. Raym. 1066.

In a late case, the court of Common Pleas refused to amend the return of a writ of covenant on which a fine had been levied, Lindsay v. Gray, because

2 Bl. Rep.
1013.

because the deed of uses was suspicious, the fine having been taken from a dying woman. But Sir *Wm. Blackstone* observes, that the court gave no opinion as to the propriety of such an amendment in a fair case.

By the statute 23 *Eliz. c. 3. § 10.* it is enacted, That no fine levied before that act, which shall be exemplified under the great seal, shall, after such exemplification, be in anywise amended. And by the statute 27 *Eliz. c. 9. § 10.* no fine levied before that act, which shall be exemplified under any judicial seal of any of the shires of *Wales*, or the town or county of *Haverfordwest*, or under the seal of any of the counties palatine, shall, after such exemplification, be in anywise amended.]

Fines and Recoveries.

2 Inst. 75.
429. 1 Bur.
Rep. 115.
5 Term
Rep. 107.
but particu-
larly Cruise
on Reco-
veries.

A RECOVERY, in a large sense, is a restitution to a former right by solemn judgment; and judgments, whether obtained after a real defence made by the tenant to the writ, or whether pronounced upon his default or feint plea, had the same efficacy and force to bind the right of the land in question: this was the notion of the common law; and hence men took an opportunity of making use of the decisions of the court to their own advantage, and to the prejudice of others, who, though in some cases strangers to the action, yet were interested in the land for which it was brought.

Vide Co.
Lit. 104.
Kel. 109.
2 Inst. 321.
Bro. 69.
F.N.B. 462.
Plow. 57.
(a) As
Westm. 2.
c. 3. which
makes pro-
vision for

For whilst these recoveries were governed by the strict rules of the common law, particular tenants, as tenant in dower, curtesy, in tail after possibility of issue extinct, and for life only; also, those who had made leases for years, and those whose wives were entitled to dower, often took advantage of them, and by selling the lands, and suffering their purchasers to recover them, thereby defeated the right of those in remainder or reversion, &c., which were inconveniencies so great, that it was thought necessary to provide against them by (a) positive laws.

him in reversion, against the recoveries suffered either by the tenant in dower, by the curtesy, or in tail, after possibility of issue extinct, or for life; and by c. 4. of this statute, the wife is secured as to her dower; and the statutes of *Gloucester, c. 11.*, and the 7 H. 8. c. 4., and 21 H. 8. c. 16., have established the right of termors, and enabled them to falsify such recoveries. *Vide* Doctor and Student, 45.

But there is no express provision made by any statute to preserve the interest of the issue in tail, or of him in reversion, against
a recovery

a recovery suffered by the donee; yet it seems to have been for two hundred years after the making of the statute *de donis*, that they were protected by that statute; and therefore we find no express resolution, where such recovery was allowed to bar the issue in tail, or those in remainder or reversion, till the reigns of *Ed. 4.* and *H. 7.*, though in some cases the donee in tail was allowed to (a) charge the entail, and even to (b) bar it.

(a) Thus in the case of *Ogilvian Lombard*, in the 44 *Ed. 3.*, it was adjudged, that the donee in tail of the gift

of the disseisor may grant a rent-charge to the disseisee, in consideration of a release of all his right, and the issue in tail bound by the grant. *Roll. Abr. 342. Co. Lit. 343. 10 Co. 37. Plow. 436.*
(b) A lineal warranty with assets has been always allowed as a sufficient bar. *2 Inst. 335. Co. Lit. 374. 4 Leon. 132, 133.* But the first case we find in which it was attempted to bar the issue in tail by a recovery, is *Taltarum's case*, which *vide 12 Ed. 4. f. 19. Vide head of Estates-tail.*

When these recoveries were established as a common conveyance, as the best and surest way of barring the issue in tail, and those in reversion or remainder, the tenant for life began to apply them once more to the prejudice of those who had the inheritance; and though the former statutes gave those who had the inheritance a remedy, yet the provision made by them being tedious and expensive, it was thought proper to make the 32 *H. 8. c. 31.*, which declares such covinous recoveries against the particular tenants to be void in respect to him in reversion or remainder; and though the judges very reasonably determined recoveries against that act to be not only void, but a forfeiture of the particular estate, because it was a manner of conveyance as much known at that time as a fine or feoffment, and therefore by parity of reason ought to have the same effect and operation; yet that statute did not fully answer the end for which it was made.

Co. Lit. 356. a. Co. 15. Vaugh. 51.

For if *A.* had been tenant for life, and made a lease for years to *B.*, and *B.* had made a feoffment in fee, if the feoffee had suffered a recovery, and vouched the tenant for life, this was no void recovery within the statute, because *A.* the tenant for life was not seised at the time of the recovery, for the feoffment of the termor was a disseisin to *A.*, and him in reversion; and the statute makes recoveries of tenants for life in possession only void against them to whom the reversion then belongs.

10 Co. 45. a. Co. Lit. 362.

Yet where tenant for life bargained and sold his land in fee by indenture enrolled, and the bargainee suffered a recovery, and vouched the bargainor; this was a void recovery, and a (c) forfeiture within the 32 *H. 8. c. 31.*; for though the bargain and sale was of the inheritance, yet it past only an estate for life of the bargainor, which was the greatest estate he could lawfully pass, and consequently the reversioner was not divested; and therefore the bargainee being a legal tenant for life in possession, the recovery against him, though with a voucher of the bargainor, was void within that act against him in reversion, whose reversion was not turned to a right, as in the former case of a disseisin.

Co. 15. Pelham's case. Leon. 125. S. C.

(c) And it has been since holden, that if tenant for life bargains and sells, and suffers a recovery by coming in as voucher,

though afterwards he should reverse that recovery for want of an original, yet it is a forfeiture of his estate. *Sid. 90.*

But the former defect was cured by 14 *Eliz. c. 8.*, which declares all recoveries (had by agreement of the parties or by covin) against

against tenant for life, of any lands whereof he is so seised, or against any other with voucher over of him, to be void, as against the reversioners and their heirs.

10 Co. 39.
b. 45. Jen-
ning's case.
Co. Lit.
362. a.
3 Co. 60. b.
Cro. Eliz.
362.
Wifeman
and Crow.
Moor, 690.
Cro. Eliz.
570.
[A. tenant
for years,
remainder

These statutes made no provision for reversions or remainders expectant on estates-tail; and therefore if there be tenant for life, remainder in tail, remainder in fee, and the tenant for life suffer a recovery, and vouch the remainder-man in tail, who vouches the common vouchee; this is so far from being a void recovery within those statutes, that the reversion in fee is actually barred by it; for the intended recompence, which the remainder-man in tail is to have against the common vouchee, is to go in succession, as the estate-tail would have done; and it cannot be a covinous recovery within the act, because the remainder-man in tail joined in it, who may at any time suffer such a recovery to destroy the remainder in fee.

to B. for life, remainder to the first and other sons of B. in tail, remainder to B. in tail; A. and B. join in a lease and release, to make a tenant to the *præcipe*, and suffer a recovery. It was holden, that the estate-tail to the sons of B. was not defeated by the recovery, nor did A. and B. incur any forfeiture of their respective estates: whether A. had forfeited or not, it was immaterial to consider, as there was no one to take advantage of it but B.; and B. had a remainder in tail subsequent to that limited to his sons; upon which the recovery might lawfully operate; and the recompence in value could not go to the sons, because their estate-tail preceded that of which the recovery was suffered: such estate, therefore, could not be displaced, or in any manner affected by the recovery. *Smith v. Clifford*, 1 Term Rep. 738.]

Doct. &
Stud. 54.
Co. Lit.
326. a.
8 Co. 72.
2 Inst. 342.
2 Roll.
Abr. 295.
10 Co. 43.

These common recoveries were no sooner allowed of by the judges to bar estates-tail, but men began to improve them into a common way of conveyance, and to declare uses upon them, as upon fines and feoffments. Hence it is, that the statutes, which provide against any alienations or discontinuances of particular tenants, provide at the same time against their recoveries; thus 11 H. 7. cap. 20., declares all recoveries, as well as other discontinuances by fine or feoffment of women tenants in tail, of the gift of their husbands, or their ancestors, to be void; so, a recovery against husband and wife of the inheritance of the wife, without any voucher, is declared to be void within 32 H. 8. cap. 28., though the statute says, suffered or done by the husband; for this, like a feoffment by baron and feme, in substance is the act of the baron only, and so within the statute; but a common recovery suffered by a feme covert, where her husband joins with her, is good to bar her and her heirs.

Under this head, we will consider,

- (A) Who may suffer a Recovery.
- (B) Of what Things a Recovery may be suffered, and by what Names.
- (C) What Estates and Interests may be barred by a common Recovery: And herein of the single and double Voucher.
- (D) Of erroneous and void Recoveries; who may avoid them, and by what Method.

(A) Who may suffer a Recovery.

WHEN recoveries were improved into a common way of conveyance, it was thought reasonable that those, whom the law had judged incapable to act for their own interest, should not be bound by the judgment given in recoveries, though it was the solemn act of the court; for where the defendant gives way to the judgment, it is as much his voluntary act and conveyance, as if he had transferred the land by livery, or any other act *in pais*; and therefore if an infant suffers a recovery, he may reverse it, as he may a fine by writ of error during his minority. And this was formerly taken for law, as well where the infant appeared by guardian, as by attorney, or in person; but now the distinction turns on this point, that if an infant suffers a recovery in person it is erroneous, and he may reverse it by writ of error; but even in this case the writ of error must be brought during his minority, that his infancy may be tried by the inspection of the court, for at his full age it becomes obligatory and unavoidable: but, in some instances, the court has admitted the infant to appear by guardian, and to suffer a recovery, or come in as vouchee; but this is seldom allowed, and only upon emergencies, when it tends to the improvement of the infant's affairs, or when lands of equal value have been settled on him. And recoveries suffered in this manner have been the rather allowed, because if they be to the prejudice of the infant, he has remedy for it against his guardian, and may reimburse himself out of his pocket, to whom the law hath committed the care of him.

his footmen, and he petitioned the king for leave to suffer a recovery, who referred it to the judges of the Common Pleas, before whom several precedents suffered by infants on privy seals were produced; but the judges, observing that most of them were on the petitions of their fathers on their sons marriage, and an equal recompence given, and that there was no such consideration in this case, refused; but for this *vide* the above authorities, and Vern. 461. [Common recoveries suffered by privy seal are now disused, and private acts of parliament are universally substituted in their stead. Cruise on Recov. 184. For notwithstanding the precautions of the judges, recoveries suffered in that manner might be reversed by writ of error. Cro. Car. 307. 1 Mod. 48.]

If an infant suffers a recovery, and appears by attorney, it seems he may reverse it after his full age; for here it may be discovered, whether he was within age when the recovery was suffered, because it may be tried *per pais*, whether the warrant of attorney was made by him when he was an infant.

[When, therefore, an infant is to suffer a recovery, he must make a tenant to the *præcipe* by feoffment, and give livery of seisin in person, by which means the feoffment is only voidable; whereas if the infant appointed an attorney to give livery of seisin for him, the feoffment would be absolutely void.

An infant trustee may join in a common recovery, in consequence of the statute 7 Ann. c. 19., if he is directed to do so by the court of Chancery.

Bulf. 235.
2 Roll.
Abr. 395.
Co. Lit.
381. b.
10 Co. 43.
Roll. Abr.
731. 742.
Sid. 321.
322.
Lev. 142.
2 Sand. 94a
Cro. Eliz.
471.
Hob. 196.
Cro. Car.
307.
5 Mod. 209.
Mes 10 Co.
43 & 2
Roll. Abr.
395. cont.
vide 2 Salk.
567., where
J. S. being
of the age of
nineteen
years, his
sister who
was next in
remainder,
and also his
heir, mar-
ried one of

Sid. 321.
Lev. 142.
Q.

Perk. 12.
3 Burr.
1804.

Ex parte
Johnston,
3 Atk. 533.

Fig. 74.
Plowd. 244.
Cro. Car.
96.

Cruise on
Recov. 185.

The king cannot suffer a common recovery, for if he does, he must either be tenant or vouchee; and in both cases the demandant must count against him, which the law does not allow.

Idiots, lunatics, and generally all persons of non-sane memory, are disabled from suffering common recoveries, as well as from levying fines; though if an idiot or lunatick does suffer a common recovery, and appears in person, no averment can afterwards be made that he was an idiot or lunatick. But if he appears by attorney, it seems that such an averment would be admitted, upon the same principle that an averment of infancy may be made against a warrant of attorney, acknowledged by an infant for the purpose of suffering a common recovery, as the fact of idiocy may be tried by a jury, with as much propriety as the fact of infancy.

Hume v.
Burton,
Cruise on
Recov. Append.

In a celebrated case which was lately determined by the House of Lords of *Ireland*, the majority of the judges were of opinion, that the caption of a warrant of attorney, taken by the chief justice of the court of Common Pleas for the purpose of suffering a common recovery, was not conclusive evidence of the capacity of the person acknowledging such a warrant of attorney.

2 Vez. 403.
3 Atk. 313.
Jones v.
Cave, Here-
ford Lent
Assizes,
1765, com-
ram Sir I. E.

Although no averment of idiocy or lunacy can be made against a recovery, where the parties appear in person, yet evidence of weakness of understanding has been admitted, to invalidate a deed to make a tenant to the *præcipe* for suffering a recovery; and the recovery has in that manner been set aside.]

Wilmot. Cruise on Recov. § 303.

10 Co. 43.
a. 2 Roll.
Abr. 395.

A recovery, as well as a fine by a feme covert, is good to bar her; because the *præcipe* in the recovery answers the writ of covenant in the fine to bring her into court, where the examination of the judges destroys the presumption of law, that this is done by the coercion of her husband, for then it is presumed they would have refused her.

(B) Of what Things a Recovery may be suffered, and by what Means.

Cruise on
Recov. 163.

[A Common recovery may be suffered of all things whereof a writ of covenant may be brought for the purpose of levying a fine, as of an honor, barony, castle, messuage, curtilage, land, meadow, pasture, underwood, warren, furze, heath, moor, &c. And in general a common recovery may be suffered of any thing whereof a writ of entry *sur disseisin*, or any other writ of entry will lie.

In consequence of the statute 32 Hen. 8. c. 7. § 7., a common recovery may now be suffered of every kind of ecclesiastical or spiritual profits, as of tithes, oblations, portions, pensions, &c.

4 Co. 40.
Poph. 22.
S. C.

It was determined in *Dormer's* case, that a common recovery might be suffered of an advowson in gross, upon a writ of entry.

Mr.

Mr. *Pigott* says, that this must be understood of an advowson appendant to a manor, but could not be of an advowson in gross, since the parson has the freehold; and that therefore it ought not to be by writ of entry *en le poſt*, but by writ of right of advowson.

A common recovery may, however, be suffered of an advowson in gross, and a small quantity of land on a writ of entry *sur diſſeiſin*.

A recovery may be suffered of a rent-charge issuing out of lands; but not of an annuity which is charged only on personal estate.

It is said in *Pigot* and *Viner*, that a common recovery cannot be suffered of a fishery, common of pasture, estovers, services to be done, nor of a quarry, a mine, or market, for they are not in demesne, but profit only.]

Recoveries being now settled as common assurances to establish men in their purchases, are very much favoured by the judges, and not compared to judgments in other real actions or adversary suits.

that though the statute of *Westminster 2. c. 5.*, says, *non ſint niſi tria brevia originalia* for the recovery of advowsons; yet a writ of entry in the *poſt*. has been admitted for an advowson in gross, because this being the original writ in these common recoveries, which are suffered by the consent of parties, the judges have allowed advowsons as well as rents, and other incorporeal inheritances, to pass by recoveries, *quia conſenſus partium tollit errorem*; so it is of commons in gross; and if this should not be allowed, there would be no method of barring the remainder or reversions depending upon estates-tail, which the tenant in tail in every other case has a power over. 5 Co. 40. *Dormer's case*.

If a man be seised of a reputed manor, which really is no manor, and he suffer a common recovery of this by the name of a manor, this is a good recovery of the lands which constituted the reputed manor; though strictly speaking there is no manor recovered; because the law supports this, as all other conveyances, according to the intention of the parties; for it would be severe to vacate this conveyance, when the purchaser recovered them by the assent of the vendor under such a denomination.

So, if a recovery be suffered of a manor with its appurtenances, lands which have been reputed parcel of the manor shall pass; for it is but equitable, *quod voluntas domini volentis rem suam in alium transferre rata habeatur*; and though the recovery does not mention the lands reputed parcel of the manor, but only the manor itself, yet this may be supplied by the indenture if that be of the manor, and all lands reputed parcel thereof, though occupied together but two years.

the books which report this case, it is said, that as to Sir Moyle Finch's case, (which *vide* 6 Co. 63.) all the judges of *England* gave their opinions under their hands, that the lands in reputation, belonging to that manor, should not pass; but that Coke, after he was made chief justice, got it adjudged otherwise, and so it hath been holden ever since; and well it was that it was so adjudged, because many settlements depend thereon.

If a man having a third part of a manor, suffers a recovery of a moiety of the manor, this is good to pass his interest in the third part; for where the words of a conveyance (which a recovery is agreed

Bayley v. University of Oxford, 2 Will. 116.

Pig. 97. Vide Turner v. Turner, 1 Br. Ch. Rep. 316.

Pig. 96. 18 Vin. Abr. 218.

2 Inst. 353. Poph. 22-23. 2 Vent. 322. Cowp. 346. Hence it is,

for the recovery of the recovery 2 Roll. Abr. 396. 6 Co. 64. 2 Roll. Rep. 67. 2 Vent. 32. S. P. vide Cro. Eliz. 524. 707. and Keb.

591. 691. cont.

Sid. 190. Lev. 27. Keb. 591. 691. 2 Mod. 235. S. C. between Thynn and Thynn; and note, that in all

Cro. Car. 109, 110. Itham v. Morris.

agreed to be) contain more than the grantor can convey, it would be an unreasonable interpretation to make this void and entirely useless, when they are sufficient to convey so much as he might lawfully pass; so if the recovery had been in this case, of the third part of the manor, by the name of the moiety, part and purparty of the manor, this had been good for the whole third part, and not only for a moiety of the third part.

2 Vent. 31,

32. Sir
John O'-
waye's case.

3 Keb. 277.

Mod. 250.

and 2 Mod.

233. S. C.

3 Keb. 771.

But for this

vide Hutt.

105.

Godb. 450.

Cro. Car.

269. 276.

2 Roll.

Abr. 20.

Cro. Jac.

574. 110.

Mod. 206.

2 Mod. 47.

2 Mod. 276.

Vent. 143.

170.

Mod. 78.

2 Keb. 802.

821. 848.

Owen, 60.

and 2 Mod.

236. Stock

v. Fox,

which seems

against this

case, but is reconcileable with this diversity, that in those cases there were lands upon which the fine

might operate, viz. the lands in the vill of *Street*, without taking in the parish of *Street* to carry the

lands in *Walton*, a vill of that parish; but here, if those in the parish should not pass, there was no

other to pass.

In ejectment a special verdict was found, that there was a parish of *Ribton*, and the vill of *Ribton*, but the latter not of equal extent with the former; and that *J. S.* was seised of land in tail in the parish, but not in the vill; and bargained and sold the land in the parish of *Ribton*, with covenant to levy a fine, and suffer a recovery to the uses in the deed; but the fine and recovery were only of the lands in *Ribton*: the question was, whether this recovery would serve for the said land in the parish of *Ribton*; and though it was objected, that where a place was named in a record, and no more said, it is always intended a vill; and consequently, that in this case, the fine and recovery being of lands in *Ribton*, shall pass only the lands in the vill of *Ribton*; and though it was further urged, that it was dangerous to extend the recovery farther than the words of the record, because the deed declares the intention of the parties to pass the lands in the parish, inasmuch as by such construction no man could tell what was conveyed by fines and recoveries, but must for greater certainty have recourse to a pocket-deed; yet the court, in favour of common recoveries, extended this recovery to the lands in the parish of *Ribton*; and the rather in this case, because the verdict found, that he that suffered the recovery had no lands in the vill, and consequently that the recovery must be void, if not extended to the parish; and though parishes are not so ancient as vills, and therefore till lately were never inserted in writs, yet now they are, and the law takes notice of them.

Cowp. 346.

[As to what shall be a sufficient description in a common recovery, see further the case of *Maffey v. Rice*.]

(C) What Estates and Interests may be barred by a common Recovery: And herein of the Single and Double Voucher.

Hcb. 262.

IN respect to estates tail and the barring of them by recovery, what is principally to be regarded is, that there must be a legal tenant to the *præcipe* at the time of the writ purchased, or at the return; for since estates-tail are only barred on account of the intended recompence which is to follow the descent of the tail, where there happens to be no tenant to the *præcipe*, the demandant

can really recover nothing; and consequently the supposed tenant can have no recompence in value against his vouchee, for that is only given against the vouchee in consideration of what the tenant lost.

As if there be tenant for life, the remainder in tail, the remainder in fee, and the tenant for life, with the remainder in tail, suffer a recovery, with voucher over, this shall not bar the remainder in tail, nor the remainder in fee, because the remainder-man in tail was not tenant to the *præcipe*, and consequently could not have the intended recompence, because that was given in lieu of the estate recovered, which was no greater than the estate for life, he only being legal tenant to the *præcipe*.

tween the tenant in tail and in fee-simple; for if tenant in fee-simple be disseised, and after a disseisin suffer a common recovery, this is good by the way of estoppel against the disseisee, his heirs and assigns; for they shall not be admitted, against their own act on record, to vacate the recovery; nor can the recoveror have any thing; because the tenant to the *præcipe* was out of possession, and consequently had nothing to lose: but if in this case *J. S.* disseise the disseisor, the recoveror may enter upon *J. S.*, because the recovery gave him a right against all persons, but the first disseisor, his heirs or assigns; and therefore, since *J. S.* did not claim from the first disseisor, he could not withstand the entry of the recoveror: but where tenant in tail suffers a recovery, being out of possession, this is no bar nor estoppel to the issue, because the statute *de donis* preserves the entail for the issue against all acts of the ancestor, and a common recovery is allowed to dock the entail on account of the intended recompence, which is wanting in this case; because where the tenant in tail is not seised at the time of the recovery he can lose nothing, and consequently can have no recompence over. Cro. Car. 388. Roll. Abr. 868.

[On a writ of error to reverse a common recovery, the error assigned was, that the tenant to the *præcipe* had not acquired the freehold until after the *teste* of the writ of *summoneas ad warrantizandum*, so that he was not seised of the freehold at the return of the writ of entry: but the court held it to be sufficient, if he acquires the freehold at any time before judgment is given. And if he has it when judgment is given (*a*), although the estate be afterwards defeated, yet the recovery will be good.

Although a person has acquired the freehold by disseisin, yet he will be a good tenant to the *præcipe*; and in all cases where the validity of a common recovery is contested, the court will suppose that there was a good tenant to the *præcipe*, if nothing appears to the contrary.

If a writ of entry is brought against the tenant of the freehold and a stranger, the recovery will be valid, for the recompence in value will go to the person who has really lost the estate. Skin. 3. 63. Shep. Tou. 41.

If there are two joint-tenants of a manor, and a writ of entry of the whole manor is brought against one of them, on which a common recovery is suffered, it will only be good for the moiety of the person against whom the writ was brought; but as to the other moiety, it will be void for want of a tenant to the *præcipe*.

As it is absolutely necessary that the tenant to the *præcipe* should have an estate of freehold, it follows, that no person who has not an estate of freehold can of himself suffer a common recovery, because he cannot convey a freehold to the person against whom the writ is to be brought.

2 Roll.
Abr. 395.
Dyer, 252.
Cro. Eliz.
670.
Moor, 255,
256. But
here we
must ob-
serve a dis-
ference be-

Lacey v.
Williams,
2 Silk. 563.
1 Ld. Raym.
222. 475.
Carth. 472.

(a) Anon.
4 Leon. 84.
Goldb. 82.

Lincoln
College case,
3 Rep. 58.
Griffin v.
Stanhope,
Cro. Ja. 454.

1 Vent. 358.
Paulin v.
Hardy,

Marquis of
Winchester's case,
3 Co. 1

1 Keb. 735.
785.
3 Atk. 155.
4 Br. P. C.
405.

Co. Lit.
42. a.
3 Co. 96. a.

It has been long settled, that a devise to executors for payment of debts, and until debts are paid, only gives the executors a chattel interest in lands thus devised, and therefore does not prevent the disposal or descent of the freehold; so that if after such a devise the testator gives the same lands to a person for life, the freehold will vest in such devisee immediately on the death of the testator, and he will be enabled to make a good tenant to the *præcipe*.

Carter v.
Barnardiston, 1 P.
Wms. 505.
2 Br. P. C.
1.

So, if a testator gives his executors full power to receive the mesne profits of his estates in a particular place upon trust to pay his debts, and afterwards devises those estates to a person for life, the freehold will become vested in such devisee on the death of the devisor, and he may make a good tenant to the *præcipe*.

As it is necessary, that the person who suffers a common recovery should have not only an estate of freehold in the lands, but also an estate in possession, it followed that either where the lands are let out on leases for lives, or where there was an estate for life prior to the estate of inheritance, that the persons entitled to the inheritance were disabled from suffering recoveries of them. To remove the disability in the first instance, it was usual for the person who intended to suffer the recovery to get a conditional surrender from the lessee for life, in order to become seised of a freehold in possession, and be thereby enabled to make a good tenant to the *præcipe*. But this being productive of several obvious inconveniences, it is enacted by stat. 4 Geo. 2. c. 20., with a retrospect and conformity to the ancient law (a), that a good tenant to the *præcipe* may be made, without the surrender of such leases, or the concurrence of the lessees. But this statute does not extend to estates for life, which are prior to the estate of which the recovery is intended to be suffered: such estates must, therefore, still be surrendered to the person against whom the writ of entry is brought, this case being expressly excepted in the statute 20 Geo. 2. c. 20. § 2.

(a) Pig 41.
1 Burr. 115.

Pigot, 50.

The prior estate for life ought to be surrendered to the person who has the remainder or reversion before he makes a tenant to the *præcipe*; but if the surrender is made after the execution of the deed, by which the lands are conveyed to the person who is to be tenant to the *præcipe*, it must then be made to him, otherwise it will be void, because the person who is to suffer the recovery has then no reversion in him for the surrender to operate upon.

Cruise on
Recov. 36.
(b) Green
v. Froud,
3 Keb. 310.
1 Mod. 117.
1 Ventr.
257.

(c) Warren
v. Grenville,
2 Str. 1129.
(d) Good-

Common recoveries having been long considered as common assurances of lands, and in the nature of conveyances by consent, the judges have, in consequence of particular circumstances, sometimes presumed that the tenant for life had surrendered his estate, although a surrender was not actually proved. As where the possession has accompanied a recovery for a long time (b). So where collateral evidence has been given of a surrender by the tenant for life (c). But where neither of these occur, such a presumption will not be admitted (d).

title v. Duke of Chandos, 2 Burr. 1065.

Where

Where indeed, after a recovery the deeds were suppressed by the tenant for life, so that it could not be made out whether he had surrendered his estate for life to the tenant to the *præcipe* or not, it was decreed in Chancery for the recovery, without allowing a trial at law; for where deeds are suppressed *omnia præsumuntur.*]

In a writ of error to reverse a common recovery, the tenant to the *præcipe* was made by a fine, the recovery was suffered, and the fine was reversed; yet it was holden a good recovery, for there was a good tenant to the *præcipe* at the time.

as if the person who levied it had no estate of freehold in the land, then the recovery will be void, because in that case the fine passeth no estate. *Dormer v. Parkhurst*, 3 Atk. 135. 4 Br. P. C. 405.]

[It hath been said by Sir *M. Hale*, that the cognizee of a fine *est. parif.* would be a good tenant to the *præcipe* in a recovery suffered the same day, and the court would presume a priority to support a conveyance.

If a fine be levied to a lessee for years of the same land for the purpose of making him tenant to the *præcipe* in a common recovery, the term for years will not be merged by the fine: for in the third section of the statute of Uses, 27 Hen. 8. there is a saying to all persons and their heirs, who shall be seised to any use, of all such former right, title, &c., as they had to their own use, in any manors, lands, &c., whereof they shall be seised to any other use.

Where a fine is levied for the purpose of making a tenant to the *præcipe*, it will be sufficient, although no use be declared on it.

A husband seised *jure uxoris* may make a tenant to the *præcipe* by fine without his wife's joining him in it.

It hath been heretofore thought that a good tenant to the *præcipe* might be made by a feoffment with livery of seisin: but this doctrine hath lately been denied.

A good tenant to the *præcipe* may be made by bargain and sale enrolled; and the bargainee may appear and vouch before entry, or before the bargain and sale is enrolled, provided it be enrolled within six months, as prescribed by the statute: for although the freehold does not pass from the bargainor until the enrolment, yet as soon as that is done, the freehold is considered as having passed from the bargainor at the time when the bargain and sale was executed, by relation.

As common recoveries are much favoured by the courts of law, a bargain and sale to make a tenant to the *præcipe*, will not be deemed void on account of any trifling mistake or inaccuracy.

A tenant to the *præcipe* may also be made by lease and release; and the reservation of a pepper-corn is a sufficient consideration to raise a use to support a common recovery.

Cartside v. Ratcliffe, 1 Ch. Ca. 292.

2 Salk. 568. pl. 1. *Lloyd and Evelin*. [But if the fine be in itself void,

as if the person who levied it had no estate of freehold in the land, then the recovery will be void, because in that case the fine passeth no estate. *Dormer v. Parkhurst*, 3 Atk. 135. 4 Br. P. C. 405.]

3 Keb. 597.

1 Vent. 195. 1 Mod. 107. Cro. Ja. 643. 2 Roll. Rep. 245.

Fig. 54. *Ld. Altham v. Ld. Anglesey*, Gilb. Rep. 16. 2 Salk. 676. 11 Mod. 210. 1 Str. 17.

Cruise on: Resov. 58, &c.

Taylor v. Ackins, 1 Burr. 60. Cowp. 689.

Hynde's case, 4 Co. 71. Ca. temp. Talb. 167.

Lloyd v. Ld. Say and Sele, 1 Salk. 341. 10 Mod. 40. 1 Br. P. C. 379.

Barker v. Keate, 1 Mod. 262. 2 Mod. 249.

10 Mod. 45.
 God. 147.

In some cases a common recovery may operate by estoppel, although there be no tenant to the *præcipe*; but this is only where the person who suffers the common recovery is tenant in fee, for the issue in tail cannot be bound by estoppel, as they do not claim from their immediate ancestors, but from the first purchasers, *secundum formam doni*.

The statute 14 Geo. 2. c. 20. § 5. enacts, that after twenty years a recovery shall be deemed valid, if it appears on the face of it, that there was a tenant to the writ, and if the persons joining in such recovery had a sufficient estate and power to suffer the same, notwithstanding the deed or deeds for making the tenant to such writ should be lost or not appear.

And § 7. of the same statute substantiates all recoveries, where the fine or deed to make the tenant to the *præcipe* is *subsequent* to the judgment given, and the writ of seisin awarded, provided it be of the same term.

Goodright
 v. Rigby,
 2 H. Bl.
 Rep. 46.
 5 Term
 Rep. 176.
 S. C. af-
 firmed in
 error.

Where it appeared from the return of the writ of seisin, that seisin had been delivered prior to the date of the conveyance for making the tenant to the *præcipe*, yet as all the proceedings were in the same term, the recovery was holden to be good under the above statute of 14 Geo. 2. c. 20. § 7., that act being a remedial act, and therefore to be extended to all cases of similar incon-
 [convenience.]

Moor, 95.
 Brabroke's
 case. If a
 husband te-
 nant in tail
 suffers a
præcipe to
 be brought
 against him
 and his wife,
 where she
 has nothing
 in the land;
 this is a good
 recovery to
 bar the entail;
 for though the
 feme was made
 tenant to the
præcipe, yet she
 shall have no
 share of the
 recompence in
 value, because
 she really lost
 nothing; but
 the whole
 recompence
 recovered
 against the
 vouchee shall
 go to the
 husband and
 his heirs, as
 the estate-tail
 should have
 done, because
 he only was
 seised of the
 land, and
 could lose it;
 yet the feme
 shall lose her
 jointure or
 dower by
 joining in the
 recovery, be-
 cause she is
 estopped to
 claim any
 thing in the
 land against
 her solemn
 act or record.
 Plow. 514.
 Vent. 358.
 Hob. 27.
 2 Co. 74.
 Plow. 515.

If a manor be given to a man and a woman, and the heirs of the body of the man begotten on the woman, and they intermarry, and then the husband suffer a recovery of the whole manor; this is good for a moiety, because the gift being made before marriage, they had each an undivided moiety, which they may transfer; but the recovery can operate but for a moiety, because the husband only was tenant to the *præcipe*, and consequently the demandant could recover only his interest in the manor, which was but a moiety.

Moor, 220.
 Owen and
 Morgan,
 3 Co. 5.
 2 Roll.
 Abr. 365.
 4 Leon. 93.
 And. 102.
 2 Salk. 568.
 pl. 2.
 Clithero and
 Franklin.

If lands are given to a man and his wife, and the heirs of the body of the husband, and a recovery is had against him only, this recovery will neither bar the reversion nor the tail; for the recompence being to go in succession, as the estate which the tenant lost would have done, the husband could not lose all the land, because he was not a legal tenant to the whole, his wife being jointenant with him, who was no party to the writ; nor could the recovery be good for a moiety, because there are no moieties between baron and feme, but both are considered as one person in law; but if the husband had levied a fine, and the consuee suffered a recovery, and vouched the husband, who vouched the common vouchee; this had been a good bar of the entail, for here the husband came in to defend

defend the estate-tail, which the wife was a stranger to, and the assets which he recovered over is a recompence for the estate-tail, which he only had a right to without the feme, and which the law gives him power to dispose of.

[*A.* being seised of a manor to him and his wife, and to the heirs male of the body of the husband; *A.* bargained and sold the manor to a stranger, who suffered a common recovery, in which *A.* was vouched, who vouched over the common vouchee. It was adjudged, that although *A.* alone was vouched, and not his wife, yet that the estate tail was barred, for the husband coming in as vouchee, the recovery barred all estates which were ever in him.]

So, in ejectment, upon special verdict the case was, *A.* seised in fee of the lands in question hath issue *B.* his eldest son, *C.* his second, and *D.* his third son; upon a marriage intended between *D.* his youngest son and one *E.*, he, before marriage, covenants to stand seised to the use of himself for life, remainder to *D.* and *E.* and the heirs male of their two bodies, remainder to *D.* and the heirs male of his body, remainder to *C.* and the heirs male of his body, remainder to *B.* and the heirs male of his body, the remainder to his own right heirs; *A.* dies, a *præcipe* is brought against one *Upton* as tenant of the freehold, and after, before the return of the writ, *D.* by bargain and sale conveys the land to *Upton* and his heirs, and the deed was enrolled after the return of the writ, and within the six months: *Upton* vouches *D.* only without his wife, and a common recovery was suffered to the use of *D.* and his heirs; then *E.* dies, and after *D.* dies without issue male, having issue four daughters; and between them and *C.* in remainder was the question, what was barred by this recovery. 1st, It was agreed on both sides, that here was a good tenant to the *præcipe*, the bargain and sale being made to *Upton* (*a*) before the return of the writ; and though the deed was not enrolled before the return, yet it being enrolled in due time, the freehold was in *Upton ab initio*. 2^{dly}, That this settlement being made before marriage, when the husband and wife took by moieties and not by entirties, the husband had absolute power over his own moiety, and therefore for that the recovery was an absolute bar, wherein this differs from the case of *Owen and Morgan*, 3 Co. 5. * where they took by entirties. 3^{dly}, That this recovery was no bar to the other moiety of *E.* because she was not party, but her estate-tail in that continued untouched, though it was urged also to be a bar for her moiety, she dying first, and so her husband in as sole tenant of the whole *ab initio*, and that during the coverture the husband had power to make a good tenant of the whole; but the court held otherwise. 4^{thly}, It was holden, that the estate-tail to *D.* and *E.* being determined, the remainder to *D.* in tail male general, and all the other remainders depending thereon were barred absolutely by this recovery; for *D.* coming in as vouchee, comes in, in privity and representation of all the estates he hath or had, and consequently he comes in representation

Fitzwill-
liam's case,
6 Co. 32.

Hallet v.
Saunders,
2 Lev. 107.
S. C.
(a) That if
the tenant to
the *præcipe*
gains a free-
hold before
judgment, it
is sufficient,
for it is not
enough in a
counterplea
of a voucher
to say, the
voucher had
nothing in
the lands at
the time of
the voucher,
without ad-
ding, *nec*
unquam
posse, and
so it is of
non-tenure.
2 Salk. 568.
Pl. 4.
Lacy and
Williams,
Carth. 472.
S. C.
Comb. 425.
S. C. Ld.
Raym. 227.
475.
Show. 347.
* *Ante*.

sensation of the remainder to himself in tail male general, and then the recompence in value goes to that, and also to all the other remainders depending thereupon, and by consequence, all are barred by the recovery.

Moody v.
Moody,
Ambl. 649.

[Where tenant in tail before marriage, conveyed his estate to the use of himself and his intended wife for their lives, with remainder to the heirs of their bodies, remainder to himself and his intended wife in fee, and afterwards suffered a recovery, in which he only was vouched; Lord *Camden* held, that the recovery was a severance of the jointure, and passed a moiety.]

Yelv. 51.
Freshwater
and Rois,
vide 2 Salk.
619. pl. 2.
which seems
contrary.

[There ad-
judged that
a covenant
by tenant in
tail to stand
seised to the
use of him-
self for life,

remainder to *A.* in tail, is void; because the remainder is to take effect after his death. And in the case in *Salkeld* the recovery was adjudged good.]

Cro. Eliz.
827.

Peck v.
Channel,
Moor, 634.

A. tenant for life, remainder to *B.* in tail, the remainder to *C.* in fee, *A.* and *B.* join in a fine *come coe*, &c., to a stranger, who renders it to *A.* for life, remainder to *B.* and his heirs; afterwards *A.* and *B.* suffer a recovery with single voucher to the use of *B.* and his heirs; this recovery did not bar the remainder in fee, because by the render they were seised of a new estate, and *B.* was not either tenant in possession, or seised in right of the entail; and consequently the recompence being given in lieu of the estate recovered, the tail could not be docked, nor the remainder-man barred by this recovery, because the tenants to the *præcipe* were not seised of it at the time of the recovery suffered.

Meredith v.
Lestie, 6 Br.
P. C. 209.

[*A.* tenant for life, remainder to trustees to preserve contingent remainders, remainder to the first and every other son in tail male, remainder to the daughters in tail general, remainder to the heirs of his body, with remainders over. *A.* suffers a recovery with single voucher, being himself tenant to the writ. Adjudged by the House of Lords, that this recovery with single voucher did not bar the remainders over.]

Bro. tit.
Recovery.
Yelv. 51.
3 Co. 5.
Moor, 256.

As to the use of the single and double voucher, it is to be observed, that the tenant who loses the land has, upon his vouching over, a recompence in value adjudged against his vouchee, which is to go in the same succession as the land recovered would have done: now a recovery with single voucher is sufficient to bar an estate-tail where the *tenant in tail* is tenant to the *præcipe*, and seised of the lands in tail at the time of the *præcipe* brought against him, for the recompence in value must follow the descent of the land which the tenant loses, and when that proves to be the estate-

tail,

tail, then the issue is supposed to have an equivalent for it, and consequently not prejudiced by the recovery; but because a single voucher can bar *only the estate which the tenant is seised of at the time of the præcipe* brought, and not *any right* which he hath, it was found necessary to admit the use of a double voucher; for should tenant in tail discontinue the tail, and take back an estate or disseise the discontinuee, a recovery against him with a voucher over could not bar the estate-tail; for the recompence comes in lieu of the land recovered, which was the defeasible estate, and consequently the issue has nothing in value for the estate-tail, without which he cannot be barred.

But if in this case the tenant in tail, after the disseisin, had either by fine, or lease and release, made a tenant to the *præcipe*, and come in himself as vouchee, and then vouched over the common vouchee; this double voucher had been sufficient to bar the tenant in tail and his heirs of every estate which he was at any time seised of; for when the tenant in tail comes in as vouchee, it is presumed he will, and he has an opportunity to set up every title he had, to defeat the demandant; and since what he offered was not sufficient to bar the demandant, the court takes it for granted, he had no other title than what he set up, and therefore will give him but one recompence for all.

Thus if *A.* be tenant for life, the remainder to *B.* in tail, and a stranger disseise *A.* and enfeoff *B.*; if a *præcipe* be brought against *B.* and a recovery suffered as usual; this shall not affect the estate-tail, because *B.* had only a *right* to that, and was not seised of it; and the recompence was not given in lieu of the tail, because the estate-tail was not in question on the recovery, for *B.* could not lose the estate he had not: but if in this case *B.* had made another tenant to the *præcipe*, and come in himself as vouchee, this would have barred the entail.

If *A.* be tenant for life, remainder to *B.* in tail, and *B.* disseise *A.* and suffer a common recovery, himself being tenant to the *præcipe*; this recovery with a single voucher, is sufficient to bar the estate-tail in *B.* because he was actually seised of that at the time of the *præcipe* brought against him; for his disseisin did not divest his own estate, but only gave him a defeasible estate for life, which was immediately merged in his remainder; because the estate for life and his inheritance could not subsist together at the same time in him.

Thus we see how estates-tail are barred by recoveries, and the use of the single and double voucher; and in this respect the operation of a recovery is correspondent to that of a fine; for they are but different ways of transferring estates-tail for the security of purchasers; but the operation of a *fine* differs from a recovery in respect to *strangers* who have *reversions* or *remainders expectant on estates-tail*; for a *fine* does not bar them, unless they omit to make their claim within *five* years after their reversion or remainder is to execute; but a recovery reaches them immediately, and at the same time bars the estate-tail and all reversions and remainders on account of this supposed and imaginary recompence.

3 Co. 6. b.
Plow. 8.
Maxwell's
case. Cro.
Eliz. 562.
Poph. 100.
Moor, 365.
Hob. 263.

3 Co. 58. b.
2 Roll.
Abr. 395.

2 Roll.
Abr. 395.

Co. Lit.
372. a.
2 Roll.
Abr. 396.
Moor, 156.
Bro. tit.
Recovery,
(28. 55.)

Moor, 158. And as a common recovery suffered by tenant in tail bars all
 Cro. Eliz. 718. reversions and remainders expectant, so it avoids all charges, leases
 Co. 62. and incumbrances made by those in reversion or remainder, and
 Capell's the recoveror shall enjoy the land free from any such charge for ever;
 case, 2 Roll. as where he in remainder upon an estate-tail granted a rent-charge,
 Abr. 396. and the tenant in tail suffered a recovery; it was adjudged, that
 Moor, 154. the grantee could not distrain the recoveror; for since the rent
 4 Leon. was only at first good, because of the possibility of the grantor's
 150, &c. remainder coming in possession, when that possibility ceases by the
 Poph. 5, 6. recovery of tenant in tail, such grant must then become void.
 [Hudson v. Benion,
 2 Lev. 28.
 1 Mod. 108. Sir T. Raym. 236. 1 Freem. 362. S. C.]

Mod. 110. If there be tenant in tail, remainder for years, remainder in fee,
 2 Lev. 30. and the tenant in tail suffer a recovery; this bars the remainder
 But where a for years as well as the remainder in fee.
 man devised lands to J. S. his son for life, the remainder to the first son of J. S. and the heirs male of the body of
 such first son, and so to the other sons, remainder to A. and B. for their lives, to secure the several
 remainders before limited, J. S. suffered a recovery, yet the contingent remainders were not barred, nor
 the remainders to A. and B., because the limitation to A. and B. being designed by the will to preserve
 the contingent estates limited to the first and other sons of J. S., the Chancery transposed the estates to
 preserve the intention of the will; and therefore the remainders to A. and B. were decreed to precede
 the contingent estate, and by that means preserved them from the recovery. 2 Chan. Cases, 10, 11.
 Green and Hayman.

Cro. Eliz. 792. If a gift in tail be made reserving rent, and the donee suffer a
 White v. recovery, this is no bar of the rent, but it remains a collateral
 West, charge on the land distrainable of common right; for since the
 2 Lev. 30. tenant in tail took the land subject to that charge by the original
 Mod. 103. donation, the recoveror who claims under him can only have the
 Pigot, 139. estate, as he who suffered the recovery had it; therefore if there
 be a limitation of a use upon condition, and the *cestui que use* suffer
 a recovery; this does not destroy the condition; for the estate of
 him who suffered the recovery being charged with it, he could not
 make his purchaser a better title than he himself had.

Mod. 109. For the same reason, if tenant in tail grant a rent-charge, and
 then suffer a common recovery, yet the land is still chargeable
 with the rent in the hands of the recoveror; for though the statute
de donis render such charges void as to the issue, where the estate-
 tail descends according to the form of the gift; yet that statute
 makes no such provision for any person who claims the land by
 another title than the gift in tail; and therefore the recoveror,
 who is not comprised in the first donation, must take it subject to
 the charges which lay on it when he purchased it.

Cro. Eliz. 718. But if there be tenant for life, the remainder to J. S. in tail,
 and J. S. make a lease for years, to commence after the death of
 Pledgard tenant for life, and the tenant for life suffer a common recovery
 v. Lake, and vouch J. S., this recovery does not destroy the lease for years,
 Poph. 5. but the lessee may falsify such recovery.

Smith v. [A. devised a rent of 50 l. *per annum*, to be issuing out of lands,
 Farnaby, to his son and his heirs; and if his son should die without heirs-
 Carter, 52. male of his body, then he devised it over; the son suffered a re-
 Sid. 285. covery of this rent, and died without issue male. Lord Chief
 Weeks v. Justice *Bridgman*, and all the other judges were of opinion, that
 Peach, the
 Lut. 1224.]

the recovery was good, and the remainder well barred; and this judgment was affirmed in the court of King's Bench.

A distinction has, however, been adopted between a grant of a rent-charge in tail, with a remainder over of the same rent-charge in fee, and a grant of a rent-charge in tail, without any subsequent limitation of it in fee. In the first case, the tenant in tail acquires an estate in fee-simple in the rent-charge by means of the common recovery; but in the second he only acquires a base fee, determinable on his decease and failure of the issue.]

Chaplin v. Chaplin, 3 P. Wms. 229. For the principles on which this distinction is founded, see Mr.

Butler's note, Co. Lit. 298. a. n. 2.

If baron and feme be tenants in special tail, the remainder to *A.* in tail, the remainder to *B.* in fee, and the husband levy a fine to *C.* in fee, and then die leaving issue, the conusee takes by the fine a qualified fee, and shall enjoy the land against the issue; but yet upon the death of the husband, the wife is again seised of the estate-tail, because she being no party to the fine could not be barred by it, and the remainders are again revested: and if the wife suffer a common recovery, either with single or double voucher, this shall bar the remainders in *A.* and *B.*, because she was seised of the tail at the time of the recovery, and, consequently, the recompence shall go to them when the tail is spent; but this recovery does not reach the interest which *C.* took by the fine, because the husband had power to bar the entail by the fine, and the recovery of the wife cannot transfer that which is already given by the fine; and therefore if the wife dies leaving issue, the conusee shall have the land while any issue inheritable to the entail is in being; and when the issue is spent, the recoveror shall have the land as they in the remainder should have had, if the recovery had not been suffered.

Hob. 259.
2 Lev. 27.

If tenant in tail be attainted of treason, and after suffer a common recovery, this shall not destroy the remainder; for a man attainted is not capable of taking any thing, but for the benefit of the king; and consequently, the recompence in value must go to the king, and he in remainder can have no benefit by it, and without that the remainder-man cannot be barred: besides, recoveries being common conveyances, this recovery of the person attainted seems to be void, as any other conveyance of his would be, and therefore the remainder cannot be barred.

2 Roll. Abr. 394.
If tenant in tail be attainted, and the king grant his land to *J. S.*, who bargains and sells it to *B.*, and a *præ-*

cipe be brought against *B.* who vouches *J. S.*, and he vouch over the common vouchee; this is no bar of the remainder; because *J. S.* was never seised of the estate-tail, but was always a stranger to the first gift; for the king's grant gave him a qualified fee, which was the estate he came in to defend, when he was vouched; and the remainder can never be barred when the tenant in tail is not concerned in the recovery. 2 Roll. Abr. 394.

If a husband, seised of land in right of his wife for life, the remainder to *A.* in tail, the remainder to *B.* in fee, bargain and sell the land to *J. S.* against whom a *præcipe* is brought, who vouches *A.* in remainder in tail, and he vouches over the common vouchee; this is good to bar the remainder, though not the wife, for here was a legal tenant to the *præcipe*, and he in remainder was called in to defend his estate-tail, and has recompence in value for the loss

2 Roll. Abr. 394.

loss of it, which is to go in succession to *B.* when the estate-tail fails.

2 Roll. Abr. 393. 3. 6. Co. Lit. 372. Moor, 195. Bro. tit. *Recovery*, 31. Tit. Tail, 41. When common recoveries were allowed to be common conveyances, the judges would no more allow a recovery than any other conveyance, to divest the king of his interest in the land, but preserved his reversion or remainder, though they suffered the recovery to bar the estate-tail on which it depended; for it were unreasonable to strip the king of any part of his revenue upon the consideration of an imaginary recompence; but yet the estate-tail is barred, because otherwise, where the reversion or remainder was in the crown, the estate in the subject must be perpetuated, which is against the policy of the law.

34 H. 8. c. 20. But in the reign of *H. 8.* there was a statute made to invalidate recoveries, even against the issue in tail, where the reversion or remainder was in the crown; the intention of the act was, to perpetuate those estates in families which the king himself had given, or, for money or other consideration, had procured to be given to any subject as a *premium* for his services to the crown; that the descendants of that stock might never forsake the interest of the crown that had so liberally rewarded their ancestor's loyalty; that where a generous emulation of their actions proved too weak a tie to engage them openly in the same interest, they might at least be prevailed on out of gratitude and prudence, not to attempt any thing to the prejudice of the crown, from whom they must acknowledge they derived their present support and splendor: but this statute does not preserve all estates-tail where the reversion or remainder is in the crown; but those only which were *given (a) by the king himself, or (b) procured to be given for money or other consideration.*

[(a) They must be of the gift of the king, by way of reward. Perkins v. Sewell, 4 Burr. 2223. 1 Bl. Rep. 654.]

(b) As if the king procures *A.* to make a gift in tail to *E.* by deed indented and enrolled, the remainder to the king in fee in tail; this entail in *B.* cannot be docked by a common recovery, because protected by the express words of the statute. Co. Lit. 372. b. But if a reversioner or remainder-man upon an estate-tail grant his reversion or remainder to the king, this is no security to the issue in tail, because the estate-tail was neither of the gift nor other provision of the king, and consequently not within the act. 2 Co. 15. Wiseman's case. Mo. 195. Yelv. 149. S. C. So, if the reversion on an estate-tail descend to the king from any collateral ancestor; this does not bring the estate-tail within the protection of the act, for the entail must be created by the king, and not by a subject, though the king be his heir; for the act specifies only gifts made to subjects, and none can have subjects but the king; nor is it sufficient within the act, that the king creates the estate-tail himself, but the *reversion must continue in the crown*; for whenever he grants that over, the estate-tail, though originally of the gift of the king, is out of the protection of the act, and subject to a common recovery, because the statute only preserves them where the reversion is in the king. Co. Lit. 372. Donee in tail of the gift of the king, the reversion being in the crown, makes a gift in tail, the second donee suffers a common recovery. It was resolved by eleven judges, 13 Car. 1, that his issue was not within the privilege of 34 H. 8. c. 20. for his estate, as far as it could, disaffirmed the reversion of the king, though it could not take it out of him, and his possession was injurious to the estate given by the king, and therefore no colour to allow it the protection of that act. 2 Jon. 250-1. Earl of Ormond's case.

Raym. 288. 358. 2 Jon. 251. Gardiner v. Banbridge. *H. 8.* gave lands to *Mich. Stanhope* and his wife, and the heirs of their bodies, in consideration of services; *Mich.* died, and his son and heir petitioned the queen to grant the reversion to some persons in fee, to the intent that he might make a lease for ninety-nine years by way of mortgage, and entered into a recognizance to the queen, conditioned that nothing should be done whilst the reversion was out of the crown, prejudicial to the queen, and accordingly

accordingly the queen conveyed the reversion to the Lord *Burleigh* and Sir *Walter Mildmay* in fee; then the son made a lease for ninety-nine years, and suffered a recovery, and then the trustees reconveyed to the queen; and it was resolved, 1st, That the grant of the queen was good: 2^{dly}, That during the time the reversion was out of the crown, the son was not restrained from aliening within 34 *H. 8. c. 20.* and so the recovery good to bind the issues; but a fine or recovery after the regrant of the queen would not have been good to bind the issue, as it seems, because that act doth not require that the reversion should always continue in the king; but it sufficeth if it be in him at the time of the fine levied, or recovery suffered.

Rich. 3. by letters patent gave several lands to the Earl of *Derby*, and the heirs male of his body, in consideration of great services to the crown, &c.; afterwards by a private act made 4 *Jac. 1.* several alterations were made in this estate, as that *Charles*, then Earl of *Derby*, should hold and enjoy them for his life, and after his death they should go to *James* his son and heir apparent, and the heirs male of his body, and so to the second, third, &c. and seventh son of Earl *Charles*, and then to several others in tail male, who by the limitation of the letters patent would have succeeded to the estate upon failure of issue male of Earl *Charles*, with power for Earl *Charles*, and the sons successively, to make leases for lives or years, and jointures for wives; after Earl *Charles's* death, his son Earl *James* levied a fine of these lands, and sold them to a stranger; yet upon special verdict in ejectment brought after his death by his son, it was resolved by all the judges of *England*, in the Exchequer-chamber, except three, that the fine was no bar, for that the reversion continued in the crown, and that these estates given by 4 *Jac. 1.* were no new estates, but all within the compass of the first estate-tail created by the letters patent, and only a distribution of the enjoyment of them, and all to the same persons who would have been entitled under the letters patent; and the power to make a lease was, with conformity to the power of tenant in tail; and that to make jointures was but in lieu of dower; besides, there was a saving to the king, and all other persons, all such rights, &c., so as the prerogative of the king, by his reversion, to restrain the tenant in tail from barring his issues, was saved, and the eighth and ninth, and all other sons inheritable by virtue of the entail let in, though the first, &c. and seventh only were named, and the alterations were only in accidents, not in the substantial parts of the limitations, and so within 34 *H. 8. c. 20.*

[*William* Earl of *Derby* conveyed lands to trustees, to the intent that they should convey the same to Queen *Elizabeth*, her heirs and successors, that the Earl might accept of a grant from the crown of the same lands to him and the heirs male of his body, leaving the ultimate reversion in the crown, which was accordingly done. It was determined, that this estate-tail was not within the protection of the above statutes, it being a fraudulent contrivance to create a perpetuity.]

an estate-tail whereof the reversion is fairly in the crown, is by an act of parliament, enacting that the reversion

Raym. 260.
28b. 350.
351., &c.
2 Jon. 249,
250., &c.
Earl of
Derby's
case, or
Murray v.
Eytan.

1 Will 275.

Johnson v.
Earl of
Derby,
Pigot, 201.
11 Mod.
304.
2 Show. 104.
The only
mode of
acquiring a
good title to
the reversion

reversion shall be devised out of the crown, and vested either in the tenant in tail, or in some other private person, by which means it becomes barrable by a recovery. Cruise on Recov. § 277. *Vid.* Strickland's Act, 30 Geo. 3. § 51.]

When men observed the effect of recoveries, and that they were construed by the judges, not only to transfer estates-tail, but even reversions and remainders dependant on them, except those vested in the crown; they began to grow as uneasy under this liberty, as they formerly were under the restriction of the statute *de donis*; for they thought it very severe, that they could not carve what estate they pleased out of their own inheritance, without any other security for the reversion they reserved to themselves than the generosity or promise of the donee. Hence we find men themselves endeavouring to create perpetuities, by annexing conditions of their own invention, and restraining their donees from alienating, under the penalties of losing their estates; but the judges had so long struggled with perpetuities, and found them so much against the interest of the long robe, and of the whole nation in general, as a great discouragement to industry, that they constantly condemned all those settlements which came before them, and not only resolved that a common recovery is inseparably incident to an estate-tail, but that it is an undeniable argument against any settlement, if it be found to tend to a perpetuity, and in such case a recovery has been allowed to bar it.

Co. 84.
Corbett's
case, 6 Co.
42. Co.
Lit. 224.
Mo. 73.

Cro. Jac.
591.
Palm. 131.
2 Roll.
Abr. 394.
Pell and
Brown,
Lev. 12.
vide tit.
Devise.
• It was said
in this case,
if the person
to whom the
executory
devise is
limited,
come in as

But in case of an executory devise, which is to vest upon a contingency to happen within a life in being, there a common recovery will not bar such future interest; as if lands be devised to *A.* and his heirs, and if he die without issue, living *B.* then to *B.* and his heirs; in this case, if *A.* suffer a common recovery, and die without issue in the life of *B.*, this recovery shall not bar the future interest of *B.*, for *B.* by the devise had only a possibility, and no present interest, and the recompence in value cannot go to those who were neither parties to the recovery, nor had any interest in the land at the time of the recovery suffered; nor is there any danger of a perpetuity in this case, because here the future interest of *B.* must vest on a contingency which is to happen within the compass of a life in being. *

vouchee, in a common recovery, that his possibility is thereby given up, and his heir barred. *Vide* Fearn's Essay on Contingent Remainders, third edition, 307.

Cro. Jac.
593.

If lands be given to *J. S.* and his heirs, as long as *B.* has issue of his body, *J. S.* by recovery shall not bind him that made the gift, but that upon the death of *B.*, without issue of his body, the lands shall revert to the donor, for that the donor had no interest in the land, for there can be no fee upon a fee; and a common recovery against tenant in fee-simple shall never bind any collateral title or possibility, because the recompence cannot go to those who had no interest in the land.

Palm. 135.
Cro. Jac.
593.

So, if the mortgagee in fee suffers a recovery, this shall not bind the mortgagor's right of entry upon performance of the condition; but in these cases, if the donor or mortgagor had been parties to the recovery, then their right had been bound, not only on account

account of the recompence; but because they are estopped by the recovery to claim the land against the recoveror, or his heirs, when they were called in before the judgment to defeat his title, but could not do it.

[A devise was to *A.* and the heirs of her body, upon condition and provided she intermarried with, and had issue male by one surname *Searl*, and in default of both conditions to *E.* in the same manner, &c. *A.* married one whose surname was *Cliff*, and with him levied a fine, and suffered a recovery of the lands, in which she and her husband (with another party not material to the present point) were vouched. It was adjudged by the whole court, *inter al.* that if the estate had been to *A.* and the heirs of her body by a *Searl* begotten, *provided* and upon condition, if she marry any but a *Searl*, that then it shall remain and be to *J. S.*, and his heirs: a common recovery suffered before marriage, would bar the estate-tail and remainders; and her subsequent marriage with another would not have avoided the recovery.

Page v.
Hayward,
2 Salk. 570.

So, lands were devised to several persons successively in tail, and a clause was inserted by the testator to the effect following; *viz.* "Provided always, and this devise is expressly upon this condition, that whenever it shall happen that the said estates shall descend or come to any of the persons hereinbefore named, that he or they do and shall then change their surname, and take upon them and their heirs, the name of *W.* only, and not other wise." But there was no devise over upon breach of the proviso. *A.* the first tenant in tail, two years after his coming to the possession of the estates, suffered a common recovery, in which he was vouched; but he never took upon him the surname of *W.* The person next in remainder entered for breach of the proviso in *A.*'s not having changed his name. The whole court agreed, that if this proviso were considered as a condition, it was collateral and subsequent, and was therefore destroyed by the recovery.

Gulliver
v. Shuck-
burgh Ath-
by, 4 Burr.
1929.

A. devised to his daughter an *express estate-tail*, but afterwards said, that such devise should be void as to *inheritance of heirs* if she should die *without issue*, and that in such case the estate should descend to his heir male. The daughter suffered a recovery to the use of herself in fee; such recovery is good.

Driver v.
Edgar,
Cowp. 379.

A person devised lands to his eldest son *Thomas* for life, and if he died without issue living at the time of his death, then he devised the lands to another son and his heirs; but if *Thomas* had issue living at the time of his death, then the fee should remain to right heirs of *Thomas* for ever. *Thomas* entered upon the death of his father, and suffered a common recovery, and afterwards died without issue. It was resolved, that *Thomas* was tenant for life, with a contingent remainder in fee to his right heirs, and that the contingent remainder was destroyed by the recovery.

Plunkett v.
Holmes,
1 Lev. 111.
Sir T. Ray.
28. Gilb.
Uses, 133.

So, where lands were devised to *A.* for life, without impeachment of waste; and in case he should have any issue male, then to such issue male, and his heirs for ever, and if he should die without issue male, then to *B.* and his heirs for ever. *A.*

Loddington
v. Kime,
1 Ld. Raym.
203.
Salk. 224.
3 Lev. 431.

Fearne, 282. entered, suffered a common recovery, and died without issue; and
 Carter v. it was held, that the remainders over being contingent, were
 Barnardiston, 1 P. barred by the recovery.
 Wms. 505. 2 Br. P. C. 1. S. P. Doe v. Holm, 3 Will. 237. S. P. Goodright v. Dynham,
 Dougl. 264. Goodright v. Billington, id. 753. S. P.

North v. Sir Francis North purchased certain lands in *Essex* from Richard
 Champer- Allington, who was *cestui que trust* in tail of them, with remainders
 noon, over; and had suffered a common recovery: but there was no
 2 Chan. Ca. legal tenant to the *præcipe*, the freehold being in the trustees, who
 63. 78. S. C. were not parties to the recovery. Yet decreed that the remainders
 1 Vern. 13. expectant on the estate-tail were well barred by this recovery.
 1 P. Wms. 91.

Robinson v. Recoveries of this kind only operate on the trust estate whereof
 Cumming, they are suffered, and the equitable remainders expectant thereon;
 Ca. temp. but do not affect any legal estate, so that a legal remainder can-
 Talb. 167. not be barred by an equitable recovery.
 1 Atk. 473.

Salvin v. Thus, John Thornton being seised of the premises for life, with
 Thornton, remainder to his first son, Thomas, in tail, remainder to his second
 cited in Br. son, James, in tail, forfeited in the rebellion in 1745. The estate
 Ch. Ca. 73. for life being put up for sale by the commissioners, was bought by
 Thomas (the tenant in tail), but in the name of a trustee. Thomas,
 thus having the equitable estate for the life of his father, and the
 legal estate tail, suffered a recovery, and soon after died, leaving
 issue a daughter, wife to the plaintiff. James, the second son,
 took possession, suffered a recovery, (after the death of his father
 and the trustee, in whom his estate vested,) and died, leaving two
 daughters, the defendants, who were in possession. The bill was
 filed by Salvin, in right of his wife, for an account of profits, and
 to have the estate delivered up. Upon the hearing at the *Rolls*,
 his honour ordered the bill to be retained for a year, with liberty
 for the plaintiff to try the validity of the recovery at law. But it
 was the opinion of the court, that Thomas's estate for life being an
 equitable estate, and his estate-tail a legal estate, he was not enabled
 to suffer either a perfect legal or a perfect equitable recovery, and
 therefore, the recovery suffered operated nothing.

Cruise on In recoveries of this kind, there must be an equitable tenant to
 Recov. 273. the *præcipe*, that is, the trust estate must be conveyed to a third
 person, against whom the writ must be brought, in the same
 manner as in recoveries of legal estates.

2 Ch. Ca. If there be a *cestui que trust* for life before the *cestui que trust* in
 64. tail, so that in case the legal estate had been conveyed according
 to the trusts, the tenant in tail could not bar the estate-tail by a
 common recovery, there, the *cestui que trust* in tail cannot bar his
 estate-tail by a recovery.

See Cruise Where an estate-tail is conveyed or devised to trustees and their
 on Recov. heirs, upon trust to pay debts, or such debts as are specified, and
 274. after payment of such debts or when such debts shall be paid, then
 in trust for A. B., or in trust to convey such parts of the estate as
 shall remain unsold to A. B.; in either of those cases A. B. has a
 trust estate in the surplus, vested in him immediately upon the
 execution

execution of the deed, or the death of the testator, and may suffer an equitable recovery of such estate.]

Lands were given to the use of *A.* in tail, remainder to *B.* provided that if there be a failure of issue male of the body of *A.*, that *J.* shall have a rent-charge out of the land; *A.* makes a lease of the land for 100 years, and then suffers a recovery; it was adjudged, that this contingent rent was barred, and that *J. S.* should not charge the land during the term, for this grant is subsequent to the estate-tail, and cannot take effect till the determination of that, and then, consequently, can issue out of the remainders when they commence and execute; therefore, if the recovery bars the remainders dependant on the estate-tail, it must also destroy all charges which are to issue out of them; for when by the recovery it becomes impossible that the remainders should ever execute, the rent-charge must necessarily be lost, which is to issue out of those remainders when executed.

If tenant in tail levies an erroneous fine, and the donee suffers a common recovery, in which the tenant in tail comes in as vouchee; this recovery shall bar the tenant in tail and his issue of a writ of error to reverse the fine, and the recoveror may plead the recovery in bar of the writ of error; for, since the tenant in tail by coming in as vouchee is barred of all right or title which he can have to the land, the writ of error, which is but a means to restore him to his right, must likewise be barred, since the recovery has left him no right to be restored to.

2 Lev. 26.
Mod. 108.
Benson and
Baron and
Hudson,
3 Keb. 274.
287. 292.

Moor, 365.
Cro. Eliz.
388.
Poph. 100.
Barton's
case.

(D) Of erroneous and void Recoveries, who may avoid them, and by what Method.

IT is already observed, that a recovery suffered by an infant in person shall not bind him: but though he may avoid it, yet it cannot be done by an entry *in pais*, but by writ of error, and this too during his minority; for the judgment of the court being on record must be set aside by an act of equal notoriety. And an infant may avoid a recovery by writ of error, as well where he comes in as vouchee, as where he is tenant to the *præcipe*; for though strictly speaking the recovery is not against him where he is not tenant to the *præcipe*, yet for the greater security of the purchaser, and to strengthen the recovery by the use of the double voucher, the person, who really has the right to the land in demand, comes in as vouchee, and then by vouching over the common vouchee, has one recompence for all his titles; and consequently, if he be the person that really loses the land, he ought in reason to reverse the recovery, as well where he comes in as vouchee, as where he is seised of the land, and is tenant to the *præcipe*.

If tenant in tail within age comes in as vouchee by attorney in a common recovery, he in remainder may assign this for error, for he is party in (a) interest to the recovery; and where a man's

Roll. Abr.
742.
Lev. 142.
Roll. Abr.
731.

Roll. Abr.
755. 796.
(a) But he
must have

the immediate interest, for where a writ of error was brought in *B. R.* to reverse a common recovery, and there was a *scire facias* issued against all the tertenants, and they made a default; though the recovery was reversed, yet it appearing afterwards that the plaintiff in the writ of error had no title, there being a remainder-man before him, the court reversed their former reversal. 5 Mod. 176. [The right to bring a writ of error descends to the person to whom the land would have descended in case the recovery had not been suffered. *Henningham v. Windham*, 1 Leon. 261. But it is not required of the plaintiff in error to set forth a complete title in the writ. *Sheepshanks v. Lucas*, 1 Burr. 412.]

Wynne v. Wynne, 1 Will. 42. Cruise on Recov. § 83. Swan v. Broome, 3 Burr. 1595. 1 Bl. Rep. 496. 526. 6 Br. P. C. 132. *Hume v. Burton*, Cruise on Recov. Append. [Although nothing can be assigned for error which contradicts the record, and, therefore, no incapacity in a vouchee can be assigned for error, where he appeared in person; yet if a vouchee appear by attorney, an averment may be then made, either that such vouchee died before the day on which judgment was given, or that he laboured under some personal disability which rendered him incapable of suffering a recovery, for this is matter collateral to the record, and triable by a jury.]

Cro. Eliz. 2, 3. Lord Norris and Marquis of Winchester. If *A.* be tenant in tail, the remainder to *B.* and *A.* suffer an erroneous recovery, and the common vouchee release to the recoveror; yet if *A.* die without issue, *B.* may, notwithstanding the release, reverse it by writ of error, for the common vouchee is only called in for form; and as he has really no interest in or title to the land, so really neither does he make any recompence to the person that loses the land; and therefore it were unreasonable to carry the notion of the imaginary recompence so far as to suppose him a real sufferer, and thereby giving him the privilege of setting aside a conveyance by which he is no way affected.

2 Saund. 94, 95. Mod. 48. Hefketh and Lee, Sid. 446. Vent. 732. Keb. 627. In a writ of error to reverse a recovery suffered by an infant, who appeared by guardian, the error assigned was in the entry of his admission by guardian, viz. *concess. est per curiam hic quod A. B. sequatur pro J. S. armig. qui infra etat. existit ut guardianus predict.* *J. S.* whereas it was objected, that since the infant was tenant to the writ, it ought to have been entered, that the guardian was admitted to defend for the infant; but this exception was disallowed, because the words *ad sequend.* for the infant signify the same with *ad defendend.* for the infant; for *ad sequend.* is to follow and attend the business and suit of the infant; and the guardian being assigned to do that, must likewise have been assigned to take care of, or take upon him the defence of the infant's suit.

Fortescue Aland v. Malone, Fitzg. 114. [In a writ of error in the King's Bench in *Ireland*, the case was, that in a writ of error to reverse a common recovery, the defendant pleaded that he was an infant, and prayed that the parol might demur. To this the plaintiff demurred; and judgment was given that the parol should demur; which judgment was affirmed.—*Note*, to the writ of error in this court, the defendant again pleaded his infancy, and prayed the parol might demur, which was disallowed. *Non datur enim exceptio ejusdem rei cujus petitur dissolutio.*

A recovery

A recovery ought not to be reversed, unless writs of *scire facias* are issued against the terre-tenants and the heir; because the errors in a recovery ought to be examined, until all the parties interested in supporting it, are before the court.]

Lord Pembroke's case, Rep. temp. Holt, 614. But the issuing of writs

of *scire facias* to the terre-tenants is not deemed to be *ex necessitate juris*, but only discretionary in the court. *Kingston v. Herbert*, 2 Show. 490. 3 Mod. 119. And per Lord Mansfield, by the established mode of proceeding, there must be a *scire facias* against the terre-tenants, otherwise it is an irregularity, but no more. *Hall v. Woodcock*, 1 Burr. 359.

In a common recovery the writ of entry bears date 1 Martii 7 Eliz. *ret. die lune in quartâ septimanâ quadragesim. proxim. futur.*, the first day of March being that year the first day of Lent; the recovery past in the usual form that Lent; and in a writ of error to reverse it, the error assigned was, that the words *proxim. futur.* should be referred to *quadragesim.*, and then the writ of entry was not returned till Monday in the fourth week of Lent, 8 Eliz. which was the time the tenant was to appear; and consequently, this recovery must be void, because here was judgment upon a voucher, and a recovery in value, before the writ was returned, before which the court has no power to proceed; but it was answered and resolved, that since *proxim. futur.* were not written at large, they may be indifferently applied either to *die lune*, by supposing them to stand for *proximo futuro*, or to *quartâ septimanâ*, by supposing them to stand for *proximâ futurâ*; and where words abbreviated may be indifferently referred, it is but reasonable to give them such a relation, as will best support the recovery, which is but a voluntary conveyance, *ut res magis valeat quam pereat*; but if the words had been at large *proxima futura*, then they must necessarily be referred to *quadragesima*, and then the objection had been good, and the recovery for that reason must have been void.

[Barton's case, Poph. 100. Cro. El. 388.]

In error to reverse a recovery, the errors assigned were, 1. That the writ of entry was brought of an advowson of a rectory, and also of a rent issuing out of the same rectory, which was a *bis petitum*, and therefore the writ vitious: but this was disallowed, because the advowson and rectory are different things; for he that has the advowson has only the right of presentation, but he that has the rectory has the profits of the church, out of which the rent issues; and consequently, there can be no *bis petitum* in this case, because by the demand of the advowson of the rectory, and of the rent issuing out of the rectory, the demandant recovers more than by a demand of the rectory only. Another error assigned, was in the demand of a rent or pension of four marks issuing out of the rectory, which is too uncertain a demand, a pension being a different thing from a rent, and recoverable in the spiritual court: but this too was disallowed, because it is plain there is but one sum of four marks demanded, and the pension or rent must be synonymous here, because they are demanded as issuing out of the rectory; and therefore, the pension cannot be in nature of an annuity, which charges the person only, because it is expressly to issue out of the rectory.

Poph. 33. 5 Co. 40.

5 Co. 41. 2. Poph. 23.

Anony-
mous, Lit.
Rep. 299.

[A common recovery was suffered, but no writ of entry was filed; in consequence of which, a writ of error was brought; it was moved that it might be examined, whether any writ of entry had been filed or not: but the court denied it, though if it appear upon record that a writ has been filed, then they would consider, whether a new writ should be filed or not; and it was said, that if a recovery was exemplified pursuant to the statute 23 Eliz. though some part of it was lost, yet it would be aided.]

1 H. Bl.
526.

By a rule of the court of *C. P.* made *Tr. 30 Geo. 3.* "It is ordered, that from and after the first day of *Michaelmas* term then next ensuing, in every common recovery wherein the vouchee or vouchees shall personally appear at the bar of that court for the purpose of suffering such recovery, the writ of entry shall be sued out and produced, at the time of the recording of the 'vouchee's or vouchees' appearance at bar, at the foot of the '*præcipe* in such recovery.'"]

Sid. 213.
Lev. 130.
Raym. 70.
S. C.
Wynn and
Lloyd.

In a writ of error to reverse a common recovery, the error insisted on was, that the warrant of attorney of the vouchee bore date before the *summoneas ad warrantizand.* issued; yet the judgment was affirmed, because the vouchee may come in, if he will, before the *summoneas ad warrantizand.* and make his attorney; and therefore, to support the common recovery, it shall be presumed the vouchee was present in court and appointed his attorney; and so the *dedimus* for the warrant and the *summoneas ad warrantizand.* void.

Barnard v.
Woodcock,
2 Bl. Rep.
1201.

[The court of Common Pleas will not enlarge the return of a writ of summons, so as to make a term intervene between the teste and return.]

Gibbons v. Stevenson, *id.* 1223.

2 Mod. 70.
Wakeman
and Black-
well.

In a *quare impedit* the plaintiff entitles himself to an advowson by a recovery suffered by tenant in tail; in pleading which recovery he alleges two to be tenants to the *præcipe*, but doth not shew how they came to be so, or what conveyance was made to them, by which it may appear that they were tenants to the *præcipe*; and after search of precedents as to the form of pleading common recoveries, the court inclined that it was not well pleaded, but delivered no judgment.

Lloyd v.
Vaughan,
2 Str. 1257.

[By statute 10 & 11 W. 3. c. 14. the writ of error to avoid a recovery must be brought within twenty years; which twenty years are to be reckoned, it hath been adjudged, not from the time when the title accrued to the person seeking to avoid it, but from the time when the recovery was suffered.]

Cruise on
Recov.
§ 300.
Booth, 77.
Pigot, 156.
3 Recv.
362. Hence
too it may
be invalid-
ated on a
trial in
ejectment,
as in 2 Vez. 403., and 3 Atk. 313. *supr.* B.

Although none but those who have an immediate interest in the lands are allowed to bring a writ of error to reverse a recovery; yet it is permitted to strangers whose interests are affected by a recovery to falsify it. And a recovery may be falsified by several ways: 1. By entry and plea. 2. By action. 3. By action and plea. 4. By plea only. By entry and plea, when the party's entry is not taken away by the recovery and he brings an assise, and the recovery is pleaded against him, then he pleads matter to avoid the recovery.

A recovery

A recovery may also be falsified by action and plea, when the entry of the party that hath right is taken away by the recovery, and upon a real action brought, the recovery is pleaded in bar of his right. This may be falsified by plea. Booth. 77.
6 Co. 8. b.

By the common law, if the tenant of the freehold had suffered a common recovery, it operated as a good bar to all terms for years derived out of the freehold; for the person who recovered the lands, was supposed to come in by a title paramount, so that he was not bound by the leases of the person against whom he recovered: besides, a termor for years, could not in any case falsify a common recovery. Co. Lit.
46. a.
Plow. 83.

By the statute of *Gloucester*, 1 *Edw.* 1. c. 11. a remedy was given to the lessee for years, by way of receipt and trial, whether the recovery was upon good title, or by way of collusion; and in case it appeared that the recovery was by collusion, then the lessee for years was permitted to enjoy his term, and the execution was staid until the determination of the term.

The operation of this statute not having been found sufficiently extensive, another act was made 21 *Hen.* 8. c. 15. whereby it was provided that a tenant for years might falsify a feigned recovery had against the person in reversion; and that no estate held by statute merchant, staple, or elegit, should be avoided by means of any feigned recovery. Bro. Ab.
tit. *Lease*,
26. Fitz.
N. B. 198
& 220.
Vaugh. 127.

A recovery, as well as a fine may be invalidated by the court of Chancery: for where it appears to have been unduly obtained, that court will either compel the recoveror to convey the estate to the person who is entitled in equity to have it, or declare the recoveror to be a trustee for such person. Ferre v.
Ferre,
2 Eq. Ca.
Abr. 695.
Stanhope v.
Thacker,
Pr.Ch. 435.

The court of Common Pleas will permit an amendment of recoveries, as well as of fines, where an evident mistake has been made in the names or descriptions of the parties (a), or in the description of the estates (b), or when there has been a clerical mistake in the entry of the judgment (c), or in the return of the writ of seisin (d). Chapman
v. Bacon,
Pigot, 170.
Thurban
v. Pantry,
id. 171.
Mayor v.
Coulthaid,
2 Bl. Rep. 1230. Lord and Biscoe, Barnes, 24. (b) Skinner v. Land, Pigot, 172. Brooke v. Bid-
dolph, id. *ibid.* Henzell v. Lodge, 2 Bl. Rep. 747. 3 Wils. 154. Watson v. Cox, 2 Bl. Rep. 1065,
(c) Barnes, 20. 22. (d) Wilton v. Fairfax, Barnes, 23. Watson v. Lockley, 2 Wils. 2.

But an amendment will not be permitted on affidavit only: it must appear on the face of the deed to lead the uses, that there is sufficient ground for an amendment. 1 H. Bl.
72.

Nor will it be allowed in the description of the estates comprehended in a recovery, where the recovery, as it stands, has lands of the vouchee to operate upon. Acton v.
Baldwin,
2 Bl. Rep.
874.

And in general no amendment will be allowed in a common recovery, unless there is an evident mistake of the clerk, or something to amend by.] 1 Wils. 35.
Cruse on
Recov.
§ 83.

[See Stat. 23 El. c. 3. § 10. and 27 El. c. 9. § 10.]

Forcible Entry and Detainer,

Dalton's
Justice, 297.
Lamb. 135.
Crom. 70.

a. b.

[An indictment will lie at common law for a forcible entry, 3

Burr. 1731. for this is an offence at common law, and not one created by statute.

Sayer's Rep. 226. And if there be two counts in an indictment, one upon the statute, and the other, general, at common law, and the former be bad, and the latter good, the indictment may be supported.

R. v. Bathurst, Say. 225.]

AT common law, if a man had a right of entry in him, he was permitted to enter with force and arms, and to detain his possession by force, where his entry was lawful. This created great inconvenience by arming the tenants of the lords, and in a manner encouraging those in mischief, who were always too forward in rebellions and contentions in their neighbourhood: also, it gave an opportunity to powerful men, under the pretence of feigned titles, forcibly to eject their weaker neighbours. The legislature, therefore, finding it necessary to interpose, we will set down and consider,

(A) The several Statutes made relating to this Subject.

(B) What shall be a forcibly Entry and Detainer within these Statutes.

(C) Of the Nature of the Possessions with respect to which one may be guilty of a forcible Entry or Detainer.

(D) What Persons may be guilty thereof.

(E) What ought to be the Form of a Record grounded upon these Statutes.

(F) Of the awarding of Restitution, by whom, and in what Manner: And herein of the Nature of the Possessions, and to whom such Restitution is to be made.

(G) What shall be a Bar or Stay to such Award of Restitution: And herein of superseding and setting it aside after it is executed.

(A) The

(A) The several Statutes made relating to this Subject.

BY the 2 *Ed. 3. cap. 3.* called the statute of *Northampton*, it is provided, "that no persons, but the king's ministers, should ride armed, by night or day, under pain of losing their arms, and their bodies to be imprisoned." Plow. 86. Upon this statute there was a writ formed to take and

appraise the arms of such as rode armed, and also to take and imprison their bodies; for which *vide* *F. N. B. 249.* But this was no sufficient provision against the entering and detaining possession by force.

By the 5 *R. 2. cap. 8.* it is provided, "That none from thenceforth should make any entry into any lands and tenements, but in cases where entry is given by the law; and in such cases not with strong hand, nor with multitude of people, but only in a peaceable and easy manner; and if any man from henceforth should do to the contrary, and thereof be duly convicted, he should be punished by imprisonment of his body, and thereof ransomed at the king's will." This statute gave no speedy remedy, leaving the party injured to the common course of proceeding by way of indictment

or action, and made no provision at all against forcible detainers,

By the 15 *R. 2. cap. 2.* it is enacted, "That the said statute, and all others made against forcible entries, &c. shall be duly executed; and farther, that at all times that such forcible entries shall be made, and complaint thereof cometh to the justices of peace, or to any of them, that the same justices or justice take sufficient power of the county, and go to the place where the force is made; and if they find any that hold such place forcibly, after such entry made, they shall be taken and put into the next gaol, there to abide, convicted by the record of the same justices or justice, until they have made fine and ransom to the king; and that all the people of the county, as well the sheriff as others, shall be attendant upon the same justices, to go and assist the same justices to arrest such offenders, upon pain of imprisonment, and to make fine (a) to the king; and in the same manner it shall be done of them that make such forcible entries in benefices or office of holy church." This statute gives no remedy against those who are guilty of a forcible detainer after a peaceable entry, nor against those who were guilty of both a forcible entry and forcible detainer, if they were removed before the coming of a justice of

peace; neither does it give the justice any power to restore the party to his possession, nor inflict any penalty on the sheriff for disobeying the precepts of the justices in the execution of the statute. [(a) The justices must set the fine, and they must do it before they commit the offender, though they may take a reasonable time to consider of it. But if no fine is set by the justices, the King's Bench cannot set it; but, upon having the proceedings removed before them by *certiorari*, will quash the conviction. *R. v. Elwell*, 2 Str. 794. 2 Ld. Raym. 1515. *R. v. Layton*, 1 Salk. 353. The conviction too will be quashed if there be no adjudication that the person upon whom the fine is imposed shall be committed until it is paid. *R. v. Lord, Say. Rep.* 176. And the fine must be assessed upon every offender separately, and not upon the offenders jointly: and the justice ought to estreat the fine, and to send the estreat into the exchequer, that from thence the sheriff may be commanded to levy it for his majesty's use. *Dalt. c. 44.* But upon payment of the fine to the sheriff, or upon sureties found (by recognition) for the payment thereof, it seemeth, that the justice may deliver the offenders out of prison again at his pleasure. *Ibid.*]

By the 8 *H. 6. cap. 9.* it is enacted, "That from henceforth where any doth make any forcible entry in lands and
11
tenements,

Forcible Entry and Detainer.

“tenements, or other possessions, or them hold forcibly after complaint thereof made, within the same county where such entry is made, to the justices of the peace, or to one of them by the party grieved, that the justices or justice so warned within a convenient time, shall cause, or one of them shall cause, the said statute to be duly executed, and that at the costs of the party so grieved.”

By the said statute it is further enacted, “That though such persons making such entries be present, or else departed before the coming of the said justices or justice, notwithstanding the same justices or justice, in some good town next to the tenements so entered, or in some other convenient place, according to their discretion, shall have, and either of them shall have authority and power to inquire by the people of the same county, as well of them that make such forcible entries in lands and tenements, as of them which the same held with force; and if it be found before any of them, that any doth contrary to this statute, then the said justices or justice shall cause to re seize the lands and tenements so entered and holden as aforesaid, and shall put the party, so put out, in full possession of the same lands and tenements so entered or holden as before.”

And it is further enacted by the said statute, “That when the said justices or justice make such inquiries as before, they shall make, or one of them shall make, their warrants and precepts to be directed to the sheriff of the same county, commanding him, of the king’s behalf, to cause to come before them, and every of them, sufficient and indifferent persons, dwelling next about the lands so entered as before, to inquire of such entries; whereof every man which shall be impanelled to inquire in this behalf, shall have land or tenement of the yearly value of forty shillings by the year at the least, above reprises; and that the sheriff return issue upon every of them; at the day of the first precept returnable twenty shillings, and at the second day forty shillings, and at the third time an hundred shillings, and at every day after the double; and if any sheriff or bailiff within a franchise, having return of the king’s writ, be slack and make not execution duly of the said precepts to him directed to make such inquiries, that he shall forfeit to the king twenty pounds for every default, and moreover shall make fine and ransom to the king; and that as well the justices or justice aforesaid, as the justices of assises, shall have power to hear and determine such defaults of the said sheriffs and bailiffs at the suit of the king, or of the party grieved, &c.”

And it is further enacted by the said statute, “That mayors, justices or justice of the peace, sheriffs and bailiffs of cities, towns, and boroughs, having franchise, have in the said cities, towns, and boroughs, like power to remove such entries, and in other articles aforesaid, rising within the same, as the justices of peace and sheriffs in counties and countries aforesaid have.”

But it is provided by the said statute, "That they who keep their possessions with force, in any lands and tenements, whereof they or their ancestors, or they whose estate they have in such lands and tenements, have continued their possessions by *three* years or more, be not endamaged by force of this statute."

Note: this statute also founds a remedy by assise of *novel disseisin*, or action of

trespas, to recover the treble damages, to which if the defendant pleads the matter in bar, he must also traverse the force; but if the matter in bar be found for the defendant, so that he hath good title at law, the defendant is excused from the force, for the plaintiff cannot recover in the action if he hath no right; but if the plaintiff prevails, then the force must be inquired of, and treble damages assessed to plaintiff; but a person is punished criminally for entering with force even where he has a right, though not for peaceably detaining a possession by force, especially if he has holden it for *three* years in quiet. F. N. B. 249. Bro. tit. *Force*, 5. 11. 29. 17 H. 7. 17. b.

By the 31 *Eliz. cap. 11.* the proviso in the above statute is farther enforced and explained, by which it is declared and enacted, "That no restitution upon any indictment of forcible entry, or holding with force, be made to any person, if the person so indicted hath had the occupation, or been in quiet possession for the space of *three* whole years together next before the day of such indictment so found, and his estate therein not ended, which the party indicted may allege for stay of restitution, and restitution to stay till that be tried, if the other will deny or traverse the same; and if the same allegation be tried against the same person so indicted, he is to pay such costs and damages to the other party, as shall be assessed by the judges or justices before whom the same shall be tried; the same costs and damages to be recovered and levied, as is usual for costs and damages contained in judgments upon other actions."

By the 21 *Jac. 1. cap. 15.* it is enacted, "That such judges, justices or justice of the peace, as by reason of any act or acts of parliament then in force, were authorised and enabled upon inquiry, to give restitution of possession unto tenants, of any estate of freehold of their lands or tenements which shall be entered upon with force, or from them with-holden by force, shall by reason of that act have the like and the same authority and ability from thenceforth (upon indictment of such forcible entries, or forcible with-holding before them duly found) to give like restitution of possession unto tenants for term of years, tenants by copy of court-roll, guardians by knight-service, tenants by *elegit*, statute-merchant and staple, of lands or tenements by them so holden, which shall be entered upon by force, or holden from them by force."

(B) What shall be a forcible Entry and Detainer within these Statutes.

H. P. C. 138.
Dalt. 300.
Hawk. P. C. c. 64. § 25.

A Forcible entry must regularly be with a strong hand, with unusual weapons, or with menace of life or limb.

Dalt. 299.
But threatening to spoil his goods, or destroy his cattle, if he will not quit his possession, will not make a forcible entry, Bro. tit. *Durefs*, 12. 16. Inst. 257.

If a man enters peaceably into an house, but turns the party out of possession by force, or by threats frights him out of possession, this is a forcible entry.

2 Roll. Rep. 2.
2 Inst. 235.
Crom. 70. a.
(a) Noy, 336, 137.
cont. who says, that there can be no entering if the door be latched; *vide* 1 Hawk. P. C. c. 64. § 26.
cont. who says, that such an inconsiderable circumstance as this, which commonly passes between neighbour and neighbour, will never bring a man within the meaning of those statutes; and it hath been holden, that an entry into a house through a window, or by opening a door with a key, is not forcible, Lamb. 143. 2 Roll. Rep. 2.

If a house be bolted, it is forcible to break it open, but it is not so to (a) draw a latch and enter into the house; and if a man, whose entry is lawful, shall notice the other out of the house and enter, the door being open or only latched, his entry is justifiable.

1 Hawk. P. C. c. 64. § 26.

If one find a man out of his house, and forcibly with-hold him from returning to it, and send persons to take peaceable possession thereof in the party's absence, this, by some opinions, says *Hawkins*, is no forcible entry, inasmuch as he did no violence to the house, but only to the person of the other; but he himself is of a contrary opinion, for though the force be not actually done upon the land, nor in the very act of entry, yet since it is used with an immediate intent to make such entry, and the manner of doing it only prevents the opposition, it cannot be said to be without force, which, whether it be upon or off the land, seems equally within the statute.

Bridg. 175.
20 H. 6.
11. a.
Crom. Just. 62.
Dalt. 300.

If a man enters to distrain for rent in arrear with force, this is a forcible entry, because though he doth not claim the land itself, yet he claims a right and title out of it, which by these statutes he is forbid to exert by force: but if a man hath right to lands, and rides over them with company armed to church or market, without expressing any intent to claim them, this is no forcible entry, because his actions shall be interpreted according to his intent: but if a man that has a rent be resisted from his distress by force, this is a forcible disseisin of the rent, for which he may recover treble damages in an assise, or may fine and imprison the party; but he cannot have a writ of restitution; for though the statute gives a remedy by fine and imprisonment for the unjust force that is offered to any person's right, yet it doth not give the justices power to reseise the rent, but only the lands and tenements themselves; and therefore no writ of restitution can be awarded.

A man

A man may be guilty of a forcible entry in a dwelling-house, though there be nobody in the house at the time; and so he may by an entry into lands where any person's wife, children, or servants are upon the lands to preserve the possession; because whatever a man does by his agents is his own act: but his cattle being upon the ground do not preserve his possession, because they are not capable of being substituted as agents; and therefore their residing upon the land continues no possession.

2 Roll.
Rep. 2.
Perk. 45.
Crom. Just.
164.
Dalt. 315.
Moor, 656.

If several come in company where their entry is not lawful, and all of them, saving one, enter in a peaceable manner, and that one only use force, it is a forcible entry in them all, because they come in company to do an unlawful act; and therefore, the act of the one is the act of them all, and he is presumed to be only the instrument of the rest: but otherwise it is, where one had a right of entry, for there they only come to do a lawful act, and therefore, it is the force of him only that used it.

Dalt. 303.
9 Co. 67.
112. 115.
Fitz. tit.
Coron. 314.
315. Co.
Lit. 157.

If divers enter by force to the use of *A.*, and *A.* afterwards agrees to it, this makes it a disseisin in *A.*, but not a forcible entry within the statute, because the statute doth not punish an agreement, but only the force and violence of an actual entry.

2 H. 7. 16.
b. 20 H. 6.
11. a.
Cromp. Just.
62. a.
Dalt. 300.

If he, who hath an estate in land by a defeasible title, continues with force in the possession thereof, after a claim made by one who had a right of entry thereto, he shall be adjudged to have entered forcibly.

Hawk. P.C.
c. 64. § 34.

The same circumstances of violence or terror, which will make an entry forcible, will make a detainer forcible also; from hence it follows, that whoever keeps in the house an unusual number of people, or unusual weapons, or threatens to do some bodily hurt to the former possessor, if he dare return, shall be adjudged guilty of a forcible detainer, though no attempt be made to re-enter: and it hath been said, that he also shall come under the like construction, who places men at a distance from the house in order to assault any one who shall make an attempt to enter into it; and that he also is in like manner guilty who shuts his doors against a justice of peace coming to view the force, and obstinately refuses to let him come in: but it is said, that a man ought not to be adjudged guilty of this offence for barely refusing to go out of a house, and continuing therein in despite of another.

Cro. Jac.
199.
Crom. 70.
Lamb. 145.
Hawk. P.C.
c. 64. § 30.

If a man holds the possession by force, though his entry was peaceable, the justices may remove him, if he had no right to enter; but where the entry is at first peaceable and lawful, there, whether the justices may remove a forcible detainer, where it hath not been peaceably holden for three years, is a question; for that the justices are not judges of the right, but of the possession only; and if a man be gotten peaceably into his own, it seems he may defend it by force; and where the jury have found *quoad* the entry *ignoramus*, and *quod* the detainer *billa vera*, such indictment hath been quashed, and the restitution granted upon it set aside, and a re-restitution awarded.

Dalt. 302.
Yelv. 99.
100. Cro.
Jac. 151.
Sid. 97.
414.
H. P.C.
149. *quod*
vide, and
Hawk. P.C.
c. 64. § 32.

Dalt. 315.

If two are in possession of a house, and the one enters by one title, and the other by another, he that hath right shall be supposed to be in the possession; but the justices have nothing to do to intermeddle, because there is no appearance of any force in either; and therefore, either party that thinks himself injured must apply himself to an action at law to be redressed.

(C) Of the Nature of the Possessions, with respect to which one may be guilty of a forcible Entry and Detainer.

Sid. 101.

Lev. 99.

Keb. 433.

Cro. Jac. 41.

Cro. Car.

201. 486.

but the justices cannot award restitution for

these because no man can be put out of possession of them but at his own election. (a) *Quare*, Whether such indictment will lie for a common or office, and *vide* Hawk. P. C. c. 64. § 31., who says, that he can find no good authority that such indictment will lie; and note, that a man cannot be convicted upon view, by force of the 15 R. 2. c. 2. of a forcible detainer of any incorporeal inheritance, because he cannot be said to have made a precedent forcible entry.

Mod. 73.

2 Keb. 709.

Note: It is

said to be

general rule, that one may be indicted for entering into any inheritance, for which a writ of entry will lie. Hawk. P. C. c. 64. § 31. Cro. Car. 201.

ONE may be guilty of this offence by a force done to ecclesiastical possessions, as churches, vicarage houses, &c. as much as if the same were done to any temporal inheritance.

Also, an indictment of forcible detainer lies against one, whether he be tertenant or stranger, who shall forcibly disturb any in the enjoyment of an incorporeal inheritance, as rent, tithes, (a) common, or an office.

No one can come within the danger of these statutes by a violence offered to another, in respect of a way, or such like easement, which is no possession.

(D) What Persons may be guilty thereof.

Cro. Jac. 18.

Moor, 786.

2 Keb. 495.

but Serjeant

Hawkins

makes a

quare, whether a man's entering forcibly into the land in the possession of his own lessee at will, be within these statutes. Hawk. P. C. c. 64. § 32.

Litch. 224.

Palm. 419.

Hawk. P. C.

c. 64. § 33.

Dalt. 315.

316.

Ca. temp.

Hardw. 174.

A Man who breaks open the doors of his own dwelling-house, or of a castle, which is his own inheritance, but forcibly detained from him by one who claims the bare custody of it, cannot be guilty of a forcible entry or detainer within the statutes.

A jointenant or tenant in common may offend against the purport of these statutes, either by forcibly ejecting or forcibly holding out his companion; for though the entry of such a tenant be lawful *per my & per tout*, so that he cannot in any case be punished in an action of trespass at the common law; yet the lawfulness of his entry no way excuses the violence, or lessens the injury done to his companion, and consequently an indictment of forcible entry into a moiety of a manor, &c. is good.

Co. 69.

A man cannot be indicted for entering into the king's possession by force, for that he cannot be disseised.

An

An infant at the age of eighteen, and some say fourteen, or a feme covert, by their own acts, may be guilty of a forcible entry, and they may be fined for the same; but it is doubted, whether the infant may be imprisoned, because his infancy is an excuse by reason of his indiscretion; and he shall not be subject to corporal punishment by force of the general words of any statute, wherein he is not expressly named; but it is clearly agreed, that the command of an infant or feme covert to enter is void, and therefore the person entering is only punishable.

Brig. 173.
Cromp. Just.
62.
Dalt. 300.

(E) What ought to be the Form of a Record grounded upon these Statutes.

THESE statutes seem to require, that in the indictment the entry must be laid *manu forti*, or *cum multitudine gentium*, and that without these the statute is not pursued; but some have holden that equivalent words will be sufficient, especially if the indictment concludes *contra formam statuti*, and that these words in the statute are put in *ex abundanti cautela*: but it is not sufficient to say only, he entered *vi & armis*, since that is the common allegation in every trespass.

Collins. Noy, 155. Vent. 265.

It is sufficient in the caption of such an indictment to say, that it was taken before *A. B. and C. D. justiciariis ad pacem domini regis conservandam assignatis*, without shewing, that they had authority to hear and determine felonies and trespasses, for the statute enables all justices of the peace, as such, to take such indictments.

Style, 135.
2 Bulst. 258.
2 Roll.
Rep. 46.
2 Roll.
Abr. 80.
Mod. 80.
81. Cro.
Eliz. 461.
Warner v.
2 Keb. 133.

An indictment of forcible entry into a (*a*) tenement, (which may signify any thing whatsoever (*b*) wherein a man may have an estate of freehold,) or into a house (*c*) or tenement, or into two closes of meadow or (*d*) pasture, or into a rood (*e*) or half a rood of land, or into (*f*) certain lands belonging to such a house, or into such a house, without shewing in what (*g*) town it lies, or into a (*b*) tenement with the appurtenances called *Trucpenny* in *D.* is not good, for the place must be described with convenient certainty, for otherwise the defendant will neither know the special charge to which he is to make his defence, neither will the justices or sheriff know how to restore the injured party to his possession.

Palm. 277. (*d*) 2 Roll. Abr. 81. pl. 4. (*e*) Bulst. 201. (*f*) 2 Leon. 186. 3 Leon. tit. For. Ent. 23. (*g*) 2 Leon. 186. (*b*) 2 Roll. Abr. 80. pl. 7.

Palm. 277.
Crom. Jac.
633.

(*a*) Dal. 15.
2 Roll.
Rep. 46.
2 Roll.
Abr. 80.
pl. 8.
3 Leon. 102.
(*b*) Co. Lit.
6. a.
(*c*) 2 Roll.
Abr. 80.
pl. 4, 5.
Roll. Rep.
334. Cro.
Jac. 633.
101. Bro.

But it hath been resolved, that an indictment for a forcible entry in *domum mansionalem sive messuagium*, &c. is good, for these are words equipollent.

ment for an entry into a close, called Serjeant Hern's Close, &c. without adding the number of acres, is good, for here is as much certainty as is required in ejectment. Cro. Eliz. 458. 2 Roll. Abr. 80. pl. 8.

Cro. Jac.
633.
Palm. 277.
An indict-

Also, such indictment may be void as to such part thereof only as is uncertain, and good for so much as is certain; therefore an indictment

2 Leon. 186.
3 Leon. 102.
Hawk. P.C.
c. 64. § 37.

indictment for a forcible entry into a house and certain acres of land thereto belonging may be quashed as to the land, and stand good as to the house.

2 Keb. 495.
3 Bulst. 71.
Vent. 23.
25.

An indictment on the 5 *R. 2. c. 8.* or 15 *R. 2. c. 2.* needs not shew who had the freehold at the time of the force, because these statutes equally punish all force of this kind, without any way regarding what estate the party had on whom it was made: yet it seems that such indictment ought to shew, that such entry was made on the possession of some person who had some estate in the tenements, either as of freehold or as lessee for years, &c. for otherwise it doth not appear that such entry was made injuriously to any one.

2 Keb. 495.
Salk. 260.
pl. 2.
Hutley, 73.
Latch. 109.

But it is said, that an indictment on 8 *H. 6. c. 9.* must shew, that the place was the freehold of the party grieved at the time of the force, and therefore that it is not sufficient to say, that the defendant entered into such a house *existens liberum tenementum* *J. S.* without saying *ad tunc existens liberum tenementum* *J. S.*, for otherwise it may be intended, that it was his freehold at the time of the indictment only.

(a) As where it is said, that the defendant disseised *J. S.* which could not be unless *J. S.* had been seised; and it hath been holden, that the words *possessionatus pro terminis vite*, though not strictly proper in such indictment, are sufficient; neither is it necessary to shew in particular what estate the party had. Palm. 426. Sid. 102. Yelv. 28. Cro. Jac. 633. Bulst. 177. Vent. 306.

It is therefore a general rule, that an indictment cannot warrant a restitution, unless it find that the party was seised at the time; but yet such seisin (a) is sufficiently shewn by a necessary implication.

2 Roll. Abr. 80.
pl. 3. adjudged; but in this case the want of shewing that the farmer was ousted, would have been an incurable fault. Yelv. 165.

An indictment on the 8 *H. 6. c. 9.* for entering and forcibly expelling my farmer, and disseising me, is good, without shewing what estate he had; for the forcible disseisin to me being the main point of the indictment, it is sufficient to set it forth in substance.

Vent. 306.
Sid. 102.
Mod. 73.
2 Keb. 709.
Salk. 260.
pl. 1. Ld. Raym. 610.

Also an indictment on 21 *Jac. 1. cap. 15.* must shew, that the party injured was possessed of such an estate as will bring him within that statute; and therefore it is not sufficient for it to shew in general, that he was possessed, or that he was possessed of a certain term, without adding, for years; for in the first case it may be intended, that he was tenant at will, and in the second, that he was possessed for term of life; in neither of which cases is he within the statute: but it is said to be sufficient, to set forth a possession within the statute in the reciting part of an indictment, as thus, *quod cum J. S.* was possessed for a certain term of years, &c.

Rex v. Wanhope, Say. Rep. 242.

[In a late case in which the court of *K. B.* quashed an indictment, because it did not appear, what estate the person expelled had in the premises; they said, that it was absolutely necessary that this should appear, otherwise it will be uncertain, whether any one of the statutes relative to forcible entries does extend to the estate

estate from which the expulsion was. The 5 R. 2. c. 7. the 15 R. 2. c. 2. and the 8 H. 6. c. 9. extend only to freehold estates; and the 21 Ja. 1. c. 15. extends only to estates holden by tenants for years, tenants by copy of court roll, and tenants by elegit, statute merchant, and statute staple.]

A repugnancy in setting forth the offence in an indictment on these statutes is an incurable fault; as where it is alleged, that the defendants *pacifice intraverunt, & J. S. adtunc & ibidem vi & armis disseiserunt*, or that the party was possessed of a term for years, or of a copyhold estate, and that the defendants disseised him, or that the defendants disseised J. S. of land, then and yet being his freehold; for it implies that he always continued in possession; and if so it is impossible he could be disseised at all: but some say, that this may be reconciled, by intending that he re-entered after the disseisin, and before the indictment; but it seems clear, that if the words *adhuc extra tenet* be added, such a repugnancy cannot be helped by any intendment, and that no restitution can be awarded on such indictment, whether these words be added, or not, because the party grieved appears by the indictment to have had the freehold at the time it was so found.

A conviction on 15 R. 2. c. 2. of a forcible detainer on view, cannot be good, unless it shew, that the defendant was also guilty of a forcible entry; for it seems plain from the express words of that statute, that the justices have no jurisdiction by it over a forcible detainer, where there has not been a forcible entry; but it seems that such forcible entry is sufficiently set forth in the complaint recited in the conviction; and it seems a reasonable opinion, that an indictment on 8 H. 6. c. 9. setting forth an entry and forcible detainer is good, without shewing whether the entry was forcible or peaceable, for the words of the statute are, *where any doth make forcible entry in lands, &c. or them hold forcibly*; but it must set forth an entry, for otherwise it appears not, but that the party hath been always in possession, in which case he may lawfully detain it by force.

The time and place of the disseisin are sufficiently set forth in an indictment, alleging, that the defendant *tali die intravit, &c. & ipsum A. B. manu forti disseisivit*, without adding the words *adtunc & ibidem*; for the entry and disseisin being both of the same nature, and the one plainly tending to the other, it is a natural intendment that they both happened together.

It has been resolved, that a disseisin is sufficiently set forth, by alleging, that the defendant entered, &c. into such a tenement, and disseised the party, without adding either the words *illicite* or *expulit* or *inde*, for the word *disseisivit* implies as much*.

viotion is in the præterperfect tense, *accessimus & vidimus*, instead of the present tense; it shall be quashed. Stra. 443.

Poph. 205.
Raym. 67.
Keb. 423.
428. 435.
472.
Alleyne, 50.
Vent. 108.

2 Roll.
Rep. 311.
Show. 272.
2 Bulst. 121.
Sid. 102.

2 Roll.
Abr. 80.
pl. 10.
Palm. 195,
196, 197.
Cro. Jac.
19, 20, 21.
Cro. Eliz.
915.
Salk. 353.
pl. 15.

Cro. Jac. 41.
Hawk. P.C.
c. 64. § 42.

Noy, 125.
Cro. Jac. 32.
Cro. Eliz.
186. Noy,
120. cont.

* If the con-

(F) Of the awarding of Restitution, by whom, and in what Manner: And herein of the Nature of the Possessions, and to whom such Restitution is to be made.

H. P. C.

140.

Brigdm.

175.

Kel. 204.

11 Co. 59.

65. Dal-

lison, 25.

pl. 8.

9 Co. 118.

Dalton's

Just. 314.

Lamb. Just.

160, 161.

Vent. 308.

Keb. 88.

Sid. 166.

The justices

or justice

may execute

the same in person,

THE same justice or justices, before whom an indictment of forcible entry or detainer shall be found, may award restitution, but no other justices, but those before whom the inquest was found, can award restitution, unless the indictment be removed by *certiorari* into the King's Bench, and they by the plenitude of their power can restore, because that is supposed to be implied by the statute; for that whenever an inferior jurisdiction is erected, the superior jurisdiction must have authority to put it in execution. So, if an indictment be found before the justices of the peace at their quarter-sessions, they have authority to award a writ of restitution, because the statute having given power to the justices or justice to rescise, it may as well be done by them in court as out of it; but the justices of *oyer and terminer* or general gaol-delivery, though they may enquire of forcible entries, and fine the parties, yet they cannot award a writ of restitution.

yet they cannot award a writ of restitution. Dyer, 187. Hawk. P. C. 152.

Lamb. Just.

157.

Hawk. P. C.

c. 64. § 52.

The sheriff, if need be, may raise the *posse comitatus* to assist him in the execution of the writ of restitution; therefore if he return, that he could not make restitution by reason of resistance, he shall be amerced.

Lamb. Just.

133. Co.

Lit. 323.

Hawk. P. C.

c. 64. § 45.

Restitution ought only to be awarded for the possession of tene-ments visible and corporeal; for a man, who has right to such as are invisible and incorporeal, as rents or commons, cannot be put out of possession of them, but only at his own election, by a fiction of law, to enable him to recover damages against the person that disturbs him in the enjoyment of them; and all the remedy that can be desired against a force in respect to such possessions, is to have the force removed, and those who are guilty of it punished; which may be done by 15 R. 2. c. 2.

Lamb. 153.

154. Dal.

c. 23. Cro.

Jac. 199.

Hawk. P. C.

c. 64. § 46.

* When the

conviction is

quashed,

restitution

must be

Restitution shall only be awarded to him who is found by the indictment to have been put out of *actual* possession, and consequently it shall not be awarded to one who was only seised in law; as to an heir on whom a stranger abateth upon the death of the ancestor, before any actual entry made by such heir; and from the same ground it followeth, that it shall not be granted to an heir upon an indictment finding a forcible entry made upon his ancestor*.

awarded, though the party's title is expired since the conviction. Stra. 474.—If the indictment is removed by *certiorari*, B. R. may award a restitution, discretionally; and will do it, unless defendant plead very soon, and take notice of trial within term. Ca. temp. Hardw. 174.

(G) What shall be a Bar or Stay to such Award of Restitution : And herein of superseding and setting it aside after it is executed.

IT appears by the proviso in the statute of 3 H. 6. c. 9. and also by the 31 Eliz. cap. 11. that any one indicted upon these statutes may allege quiet possession for three whole years to stay the award of restitution; in the construction whereof, saith Serjeant *Hawkins*, it hath been holden, that such possession must have continued without interruption during three whole years next before the indictment; and therefore that he, who, having been in possession of land for three years or more, is forcibly ousted, and then restored by force of the statute of 3 H. 6. c. 9. cannot justify a forcible detainer till he hath been in possession again for three years after such restitution; and also for the same reason it hath been said, that he, who under a defeasible title hath been never so long in possession of land to which another hath a right of entry, cannot justify such a detainer at any time within three years after a claim made by him who hath such right, and the subsequent continuance in possession amounted to a new entry.

Also it is said, that the three years possession must be of a lawful estate, and therefore that a disseisor can in no case justify a forcible entry or detainer against the disseisee having a right of entry, as it seems that he may against a stranger, or even against the disseisee, having by his laches lost his right of entry.

may justify against a stranger, or even against the disseisee, if his right of entry is taken away. Hawk. P. C. c. 64. § 54.

Wherever such possession is pleaded in bar of a restitution either in the King's Bench, or before justices of the peace, no restitution ought to be awarded till the truth of the plea be tried, and such plea need not shew under what title, or of what estate such possession was, because not the title, but the possession only is material.

If one, who has been three years in possession, be afterwards ousted, and the same day re-enter with force, and be also indicted on the same day; yet it seems, that by the plain meaning and reason of the statute, he can no more bar the restitution of the party forcibly entered upon, than if he had been indicted on another day, though the words of the statute are, *that there shall be no restitution, &c. if the person indicted have been in quiet possession for three years next before the day of the indictment found*, for the import hereof seems to be no more than if it had been said, *for three years next before the indictment*.

The justices must not award restitution in the defendant's absence, and without calling him to answer for himself; for it is implied by natural justice, in the construction of all laws, that no one ought to suffer any prejudice, without having an opportunity to defend himself.

Hawk. P. C. c. 64. § 53. and the authorities cited are Dal. c. 79. Crom. 71. H. P. C. 139. Dyer, 141. pl. 48. 22 H. 6. 18. Bro. tit. Force, 22. 29. Inst. 236.

Dalt. c. 79. 22 H. 6. 18. b. Crom. 71. For by *Hawkins*, such disseisor

Keb. 538. Salk. 261. Hawk. P. C. c. 64. § 56. Sid. 149. Keb. 538. Raym. 84. Vent. 265. Hawk. P. C. c. 64. § 57.

All. 78, 79. Hawk. P. C. c. 64. § 60. Savil, 68. pl. 147.

Keb. 343. If the defendant tender a traverse of the force, (which must be
427. in writing) no restitution ought to be till such traverse be tried,
2 Keb. 49. in order to which the justice, before whom the indictment is found,
571. ought to award a *venire* for a jury; but if such jury find so much
Sis. 77. 99. of the indictment to be true as will warrant a restitution, it will
284. be sufficient, though they find the other part of it to be false.
2 Salk. 587.
Pl. 3. 83.

D. 7. 87. The same justices, who have awarded a restitution on an indict-
pl. 6. ment of forcible entry, &c., or any two or one of them, may
H. C. afterwards supersede such restitution upon an insufficiency in the
110. indictment appearing unto them; but no other justices or court
Cro. 165. whatsoever have such power, except the court of King's Bench;
Dalt. c. 81. but a *certiorari* from thence wholly closes the hands of the justices
84. c. 10. of peace, and avoids any restitution which is executed after its
Eliz. 915. *teste*, but does not bring the justices into a contempt without
Yelv. 32. notice.
Mo. 677.
pl. 621.

Keb. 93. Also the court of King's Bench has such a discretionary power over
Savil. 68. these matters, from an equitable construction of the statutes, that
pl. 141. if a restitution shall appear to have been illegally awarded or
H. P. C. executed, the said court may set it aside, and grant a re-restitution
140. Cro. to the defendant; as where the indictment on which the justices
T. 2. 21. proceeded is quashed for insufficiency, or where it appears that
Noye 17. the justices of peace were irregular in their proceedings, as by
Yelv. 79. refusing to try a traverse of force, &c. or where the defendant
Cro. Jac. traverses the force and gets a verdict in the King's Bench; but
148. the defendant cannot get such verdict if the force be pardoned by
a general statute-pardon before the trial, because the offence ap-
pearing to the court to be discharged, it can no longer be pro-
ceeded upon, though the defendant would wave the benefit of the
pardon.

Raym. 85. Neither can a defendant in any case whatsoever *ex rigore juris*
Keb. 313. demand a restitution, either upon the quashing of the indictment,
Sc. 5. or a verdict found for him on a traverse thereof, &c. for the power
2 Keb. 105. of granting a restitution is vested in the King's Bench only by an
H. P. C. equitable construction of the general words of the statutes, and is
141. Cro. not expressly given by those statutes, and is never made use of by
Eliz. 916. that court, but when, upon consideration of the whole circum-
2 Salk. 587. stances of the case, the defendant shall appear to have some right
pl. 3. to the tenements, the possession whereof he lost by the restitution
Dyer, 123. granted to the prosecutor.
pl. 34.
2 Keb. 571.
Savil. 68.
pl. 141.

Cro. Eliz. The court of *B. R.* hath been so favourable to one, who upon
41. Hawk. his traverse of an indictment upon these statutes being found for
P. C. c. 64. him, hath appeared to have been unjustly put out of his possession,
§ 66. that they have awarded him a re-restitution, notwithstanding it
hath been shewn to the court, that since the restitution granted
upon the indictment, a stranger hath recovered the possession of
the same land in the lord's court.

Forestalling.

(A) What it is at Common Law, and how punished.

(B) What it is by Statute, and how restrained and punished.

(A) What it is at Common Law, and how punished.

ALL unlawful endeavours to enhance the price of any commodity, practices so prejudicial to trade and commerce, and injurious to the publick in general, come under the notion of forestalling, which includes engrossing, regrating, and all other offences of the like nature. It is punishable by fine and imprisonment, answerable to the heinousness of the offence, upon an indictment at common law.

3 Inst. 105.
43 Aff. 18.
Bro. In. act-
ment, 40.

Offences of this kind are those of spreading false rumours, buying things in a market before the accustomed hour, or buying and selling again the same thing in the same market, and other such like devices.

Crom. 80.
Hawk. P.C.
c. 80. § 1.

Also, if a person (*a*) within the realm buys any merchandize in gross, and sells the same again in gross, it is an offence of this nature, for hereby the price is enhanced, because, passing through several hands, each will endeavour to make his profit of it.

3 Inst. 196.
Hale's P.C.
152.

(*a*) But any merchant, whether he

be a subject or a foreigner, bringing victuals, or any other merchandise, into the realm, may sell the same in gross. 3 Inst. 196. Hale's P.C. 152.

So, the bare engrossing of a whole commodity with an intent to sell it at an unreasonable price, is an offence indictable at the common law; for if such practices were allowed, a rich man might engross into his hands a whole commodity, and then sell it at what price he should think fit.

Cro. Car.
231.
Hawk. P.C.
c. 80. § 3.

Also, even the buying of corn in the sheaf is an offence at common law, because it tends to enhance, which shews how jealous the law is of all practices of this kind.

3 Inst. 197.
Hale's P.C.
152.

(B) What it is by Statute, and how restrained and punished.

THE statutes relating hereunto, are 23 *E. 3. cap. 6.* 6 *Rich. 2. cap. 10.* 11 *Rich. 2. cap. 7.* 1 *H. 4. cap. 17.* 14 *H. 6. cap. 6.* 25 *H. 8. cap. 2.* 2 & 3 *E. 6. cap. 15.* 3 & 4 *E. 6. cap. 21.* 5 & 6 *E. 6. cap. 14.* 5 *Eliz. cap. 5* and 12. 13 *Eliz. cap. 25.* 21 *Jac. 1. cap. 22.* and *W. & M. sess. 1. cap. 12.* 31 *Geo. 2. cap. 40.*

(a) On this clause it hath been adjudged, that an indictment, charging the defendant with meeting *J. S.* at such a place near *B.*, and there buying of him certain goods, which he was about to sell in the market of *B.*, is insufficient,

But the principal statutes are: 1st, the 5 & 6 *E. cap. 14.* by which it is enacted, “that whosoever shall buy, or cause to be bought, any merchandize, victual, or any other thing whatsoever (a) coming by land or by water toward any market or fair to be sold in the same, or coming toward any city, port, haven, creek or road of this realm, or *Wales*, from any parts beyond the sea to be sold, or make any bargain, contract or promise, for the having or buying the same, or any part thereof so coming as aforesaid, before the same shall be in the market, fair, city or port, &c. ready to be sold, or shall make any motion by word, letter, message, or otherwise, to any person or persons, for the enhancing of the price or dearer selling of any thing abovementioned, or else dissuade, move or stir any one coming to the market, or fair, to abstain or forbear to bring or convey any of the things above rehearsed, to any market, fair, city or port, &c. to be sold, shall be deemed a forestaller.”

without alleging expressly, that the goods were coming to the market to be sold. Roll. Rep. 421.

(b) That the buying of corn, with an intent to make starch of it, and then to sell it, is not within the statute, because it is not bought

And by the said statute, § 2. it is enacted, “that whosoever shall by any means regrate, obtain, or get in his hands or possession, in any fair or market, any (b) corn, wine, fish, butter, cheese, candles, tallow, sheep, lambs, calves, swine, pigs, geese, capons, hens, chickens, pigeons, conies, or other dead (c) victual whatsoever that shall be brought to any fair or market to be sold, and do sell the same again in any fair or market holden in the same place, or within four miles thereof, shall be taken for a regrator.”

to be sold again in the same nature in which it was bought, but to be first altered by a trade or science, and then sold again. *Bridg. 5, 6.* *Hawk. P. C. c. 80. § 18.* — Nor for the same reason does the buying of corn in order to make meal of it seem to be within the statute. *Moor, 595. pl. 810.* *Cro. Car. 231. cont. Owen, 135.* Nor the buying of barley with an intent to make malt of it. *Cro. Car. 231.* 3 *Inst. 196. cont. Owen, 135.* But this last is excepted by an express proviso, § 7. in the statute. — But the buying of corn, and turning it into malt in another's house, being so large a quantity that it could not be malted in the buyer's own house, is not within the benefit of this exception. *Owen, 135.* (c) It hath been holden, that buying salt is a victual within this statute, as being necessary for the food and health of man, and seasoning and making wholesome other victuals. 3 *Inst. 195.* *Hale's P. C. 152.* *Cro. Car. 231.* — But neither apples, cherries, nor other such like fruits, are within the intent of the statute. 3 *Inst. 195.* *Hale's P. C. 152.* *Cro. Car. 231.* *Owen, 135.* *Cro. Jac. 214.* — Nor hops. *Cro. Car. 231.* — Nor malt. 3 *Inst. 196.* *Hale's P. C. 152. cont. Owen, 135.* Roll. Rep. 12.

(d) That an indictment, which

And it is further enacted by the said statute, § 3, “that whosoever shall, (d) engross or get into his hands, by buying, contract-

ing,

"ing, or promise of taking, other than by (a) demise, grant or lease of land, or tithe of any corn, growing in the fields, or any other corn or grain, butter, cheese, fish, or other dead victuals whatsoever, within the realm of *England*, to the intent to sell the same again, shall be reputed unlawful engrosser."

charges the defendant with having bought so much corn, &c. is insufficient, for

the words are, *shall engross or get into his hands by buying, &c.*, and therefore must be precisely pursued. 2 Leon. 39. (a) That there is no necessity in an information or indictment to say that the defendant did not come by it by a demise of land, &c.; but that the defendant, if he have any such matter to allege in his defence, may give it in evidence. Jon. 157.

And it is further enacted by the said statute, § 4, 5, and 6, (b) And therefore no information for engrossing corn, &c. contrary to the statute, is good, which doth not expressly shew the

"that whoever shall offend in any of the things before recited, and be thereof duly convicted, shall for the first offence suffer imprisonment for two months, and forfeit the value of the goods so by him bought or had; and for the second offence shall suffer imprisonment for one half year, and forfeit the (b) double value of the goods, &c. and for the third offence shall be set on the pillory, and forfeit all his goods, and be committed to prison during the king's pleasure."

quantity of the thing engrossed; and on this foundation it was adjudged, that an information for engrossing corn, the quantity whereof was expressed by the word *cumulus*, was insufficient. 2 Bull. 317. Cro. Car. 381. — But it is said, that an indictment for engrossing *magnam quantitatem frumenti* is sufficient. 6 Mod. 32. — The stat. 12 Geo 3. c. 71. repeals 3 & 4 Ed. 6. 5 & 6 Ed. 6. 3 Ph. & M. 5 Eliz. 15 C. 2. and part of 5 Ann. and all acts enforcing them.

Forfeiture.

FORFEITURE is a word often made use of in the law, and in civil cases is usually applied to alienations and dispositions made by those who have but a particular estate or interest in lands or tenements, to the prejudice of those in remainder or reversion; also, the omission or neglect of a duty which the party binds himself to perform, or to the performance of which he is enjoined by the law, is upon the breach or neglect thereof called a forfeiture, that is, the advantages accruing from the performance of the thing are by his omission defeated and determined.

In this sense of the word the principal matters relating to forfeiture are considered under the titles *Estates for Life, Copyhold, Conditions, Obligations*, and *title Offices*; and therefore in this place we shall consider it only as it relates to crimes and offences, for which the party is punished in his estate and posterity*.

High Treason. — In *high treason*, the forfeiture accrues to the crown, (of whomsoever the land is holden) *propter delictum tenentis*; and this though the blood of the heir is saved, for the offence is purged by that; but in *felony*, saving the blood preserves the descent to the heir, because the lord is entitled by *escheat* *propter defectum sanguinis*. Foster, 223.

* See this subject fully considered, in *Considerations on the Law of Forfeiture for*

- (A) For what Crimes an Offender shall forfeit his Lands at Common Law.
- (B) For what Crimes his Goods and Chattels.
- (C) For what Crimes by Statute.
- (D) To what Time the Forfeiture shall have Relation.
- (E) What is to be done with the Offender's Goods before Conviction.
- (F) Where the Wife shall lose her Dower.
- (G) How far the Blood of the Offender is corrupted.

- (A) For what Crimes an Offender shall forfeit his Lands at Common Law.

Co. Lit. 8.
3 Inst. 19.

BY the common law, all lands of inheritance whereof the offender is seised in his own right, and also all rights of entry to lands in the hands of a wrong-doer, are forfeited to the king on an attainder of high treason, although the lands are holden of another; for there is an exception in the oath of fealty, which saves the tenant's allegiance to the king; so that if he forfeits his allegiance, even the lands holden of another lord are forfeited to the king, for the lord himself cannot give out lands but upon that condition.

3 Inst. 19.

Also, upon an attainder of petit treason or felony, all lands of inheritance whereof the offender is seised in his own right, as also all rights of entry on lands in the hands of a wrong-doer, are forfeited to the lord of whom they are immediately holden; for this by the feudal law was deemed a breach of the tenant's oath of fealty in the highest manner, his body with which he had engaged to serve the lord being forfeited to the king, and thereby his blood corrupted, so that no person could represent him; and consequently, dying without heir, the lord is in by escheat.

Stamf. P.C.
191.
2 Hawk.
P. C. c. 49.
§ 3.

But the lord cannot enter into the lands holden of him upon an escheat for petit treason or felony without a special grant, till it appear by due process, that the king hath had his prerogative of the year, day and waste.

2 Inst. 36,
37.
4 Co. 124.
Et vide
2 Hawk.
P. C. c. 49.
§ 8.

And as to this, since the statute of *prærogativa regis*, it seems to have been generally holden, that the king has a right, not only to waste the lands of inheritance, which a person attainted of felony held immediately of any other lord, but also to hold them over for a year and day; and by some he had always this right, but accord-

ing to others he had anciently a right only to the waste, and the year and day was given him in lieu of it.

As to lands whereof a person attainted of high treason (*a*) dies seised of an estate in fee, they are actually vested in the king without any office, because they cannot descend, the blood being corrupted, and the freehold shall not be in abeyance.

Co. Lit. 2.
4 Co. 58.
Leon. 21.
(*a*) But by the common law such

lands were not vested in the actual possession of the king during the life of the offender. 3 Co. 10. Stamp. P. C. 191. Bro. Coron. 208. 210. Leon. 21. Co. Lit. 2.

It is said, that the inheritance of things not lying in tenure, as of rent-charge, rent-seck, commons, &c. are forfeited to the king by an attainder of high treason; and that the profits of them are also forfeited to him by an attainder of felony during the life of the offender, and that the inheritance shall be extinguished by his death; for it cannot escheat, because it lies not in tenure; neither can it descend, because the blood is corrupted.

3 Inst. 19.
21.
2 Hawk.
P. C. c. 49.
§ 4.

It seems agreed, that no (*b*) right of action to lands of inheritance could ever be forfeited; neither could (*c*) a right of entry into lands whereof there was a tenant by title, nor an (*d*) use, except where land had been (*e*) fraudulently conveyed with an intent to avoid a forfeiture; nor could a (*f*) condition be forfeited before 33 H. 8. c. 20. neither could land in (*g*) tail be forfeited after the making of *Westm.* 2. 13 *Ed.* 1. c. 1. any longer than for the life of the tenant in tail, till 26 H. 8. c. 13.

(*b*) 3 Co. 23.
7 Co. 17.
(*c*) 3 Inst. 19.
3 Co. 2, 3.
(*d*) 3 Inst. 19.
(*e*) 2 Roll. Abr. 34.
(*f*) 3 Inst. 19.
(*g*) 3 Inst. 19.

19. Stamp. P. C. 187. Plow. 554. Dyer, 289. pl. 55. Co. Lit. 130. 372. 391. of Captain John Gordon, Foss. 95.

The case

The profits of lands, whereof one attainted of felony is seised of an estate of inheritance in his wife's right, or of an estate for life only in his own right, are forfeited to the king, and nothing shall go to the lord.

3 Inst. 19.
Fitz. Assise, 166. Forfeiture, 23.
4 Ass. pl. 4.

All customary estates of inheritance are forfeited by an attainder of treason or felony, unless there be some particular custom to the contrary, as in *Gavelkind*, because the person is *civiliter mortuus* by the attainder, and therefore is disabled to have or hold any estate, or to have any property in any thing; and therefore if a person be seised in fee of a copyhold, and be attainted of treason or felony, the copyhold is in the lord without any presentment of the homage, because it is against the nature of a court-baron to inquire of criminal matters or offences against the king; and such homage is at the will of the lord, and often influenced by him: but if a copyholder be convicted of felony, and presented by the homage, by *special custom* the estate may be forfeited to the lord; but this is *only* by the *special custom*, since the copyholder is not disabled by the *conviction* to hold the estate, as he is, if he was *attainted*; and therefore since it is by the *custom only* that such forfeiture accrues, it must be in the manner which the custom has settled it, which is, by presentment of the homage. But if a copyhold is granted for life, and by another copy the reversion is granted to another, *habend.* after the death of the first copyholder,

Bulf. 13.
2 Brownl.
217., &c.
Leon. 1.
Godb. 267.
2 Jon. 151.
189.
Lev. 263.
2 Keb. 451.
2 Vent. 38.
5 Co. 117.
Co. Cop.
§ 53.
Pollex. 615
to 621.

or

or surrender, forfeiture or other determination of the first estate; the first copyholder commits murder, and is thereof attainted, the king pardons the murder and the attainder and all forfeitures thereby; in this case, he in the reversion is entitled to the estate; for the king cannot have it for the baseness of the tenure, since he cannot be tenant at will to any person; and the lord cannot have it, because he cannot be tenant to himself; therefore the particular estate of tenant for life being extinguished, the reversion immediately commences.

(B) Of the Forfeiture of Goods and Chattels.

Staundf.
Prerog. 45.
46.
12 Co. 12.
(a) But not
those which
he hath as
executor or

ALL things whatsoever, which come under the notion of a personal estate, and which a man is entitled to in his (a) own right, whether they be in action or possession, are forfeitable in the following instances to the (b) king, for the trouble and charge he has been at in holding courts and bringing the offenders to justice.

administrator to another. Cro. Car. 566.—Also, a term limited to executors, and not vested in the party himself, is not forfeitable. 2 Leon. 5, 6. And. 19. Moor, 100. Dyer, 309, 310. (b) That the lord of the manor, or other private person, may have *bona felonum & fugitivorum*, but they must be claimed by way of grant, and not by prescription, because no man can prescribe for them; for every prescription must be immemorial; and the goods of felons and fugitives cannot be forfeited without matter of record, which presupposes the memory of that continuance. 5 Co. 109. 46 E. 3. 16.

Cro. Jas.
312.
Hob. 214.

Also, personal things, settled by way of trust on the offender, are as much forfeited as if he had the legal interest, or were in possession of them; as, if a bond be taken in another's name, or a lease made to another in trust for a person who is afterwards convicted of treason or felony; these are as much liable to be forfeited, as a bond made to him in his own name, or a lease in possession.

2 Keb. 564.
608. 644.
763. 772.
Lev. 279.
Lane, 54.
113. Mod.
16. 38.
Hard. 466.
And. 294.
Raym. 120.
2 Roll.
Abr. 34.

Also, the trust of a term granted by a man for the use of himself, his wife and children, &c. is liable in like manner to be forfeited, if fraudulently made with an intent to avoid a subsequent forfeiture, but it shall be forfeited so far only, as it is reserved to the benefit of the party himself, if made *bona fide*, whether before or after marriage, for good consideration without fraud, which is to be left to a jury on the whole circumstances of the case, and shall never be presumed by the court where it is not expressly found.

Roll. Abr. 343. March, 45. 88. Sid. 260. 403. Keb. 909.

2 Keb. 564.
Lev. 279.
Mod. 16.
38.
Vent. 128.

But the power of revocation of the trust of a settlement reserved to the grantor is not liable to be forfeited, if it depend upon something personal to be done by the grantor himself, as, making the deed of revocation under his hand and seal.

A man forfeits all such personal estate in the following instances.

5 Co. 109.
(c) And
therefore 2

1. Upon a conviction of treason or (c) felony, as is clearly agreed by all the books.

person convicted of manslaughter, and making purgation, as was the ancient practice, or burnt in the hand

hand according to the present, forfeits his goods and chattels, but not his lands, for the king hath lost a subject; and therefore the party is punishable, though in a more gentle manner than when there is a sedate and deliberate revenge. 5 Co. 110.—That a person convicted of heresy forfeited neither lands nor goods, because the proceedings against him were only *pro salute animæ*. Doct. and Stud. l. 2. c. 29. Hale's P. C. 5.

2. Upon the coroner's inquest taken on (a) view of a dead body, and finding him guilty either as principal or as accessory (b) before the fact, and that he fled for the same, whereby he forfeits his goods absolutely, and the issues of his lands, till he be acquitted or pardoned.

5 Co. 110. (a) And that in such cases where the coroner cannot have the view of the body, the king shall entitle himself to the goods and chattels upon a presentment. 5 Co. 109. (b) *Secus*, if he be found accessory after, for the indictment is so far void. Staundf. P. C. 184.

3. Upon a jury's finding that the defendant fled at the same time that they acquit him of an indictment of capital felony, or, as some say, of larceny, before justices of *oyer, &c.*, but such a finding causes no forfeiture of the issue of the land, because by the acquittal the land is discharged; neither will it have any effect as to the goods, if the indictment were insufficient, or if the flight be disproved on a traverse, which, as all agree, may be taken to be any such finding, except that by a coroner's inquest, and as (c) some say, even to that, as well in respect of the flight, as of the particulars of the goods.

4. The goods of persons outlawed are forfeited to the king; for the retiring from the inquiries of justice is holden so criminal in the eye of the law, that it is punished with the loss of goods so long as the outlawry stands in force. So, (d) if a person make default till the award of an *exigent*, either upon an appeal or indictment of a capital felony, he forfeits his goods, unless he was pardoned before the *exigent* was awarded; and it is (e) holden, that the law is the same as to such a default upon an indictment of petit larceny, and that wherever goods are so forfeited they are not saved by an acquittal at the trial; (f) but by a reversal of the award of the *exigent* they are saved, whether such reversal be for an error either in fact or in law, as for the imprisonment of the defendant at the time when the *exigent* was awarded, or for a defect in the indictment, appeal or process.

pl. 11. Cro. Eliz. 4. 72. (e) Hale's P. C. 271. (f) 5 Co. 110, 111. 43 E. 3. 17. 271. Co. Lit. 259. Cro. Jac. 464. Staundf. Prerog. 47.

5. If a man be *felo de se*, or if a felon be killed in the robbery, or by resisting in order to escape, he forfeits his goods and chattels; for when a man thus forsakes life, all his goods and chattels are derelict; and therefore the king shall have them as the maintainer of publick justice.

6. If a felon waives, that is, leaves any goods in his flight from those who either pursue him, or are apprehended by him so to do, he forfeits them, whether they be his own goods, or goods stolen by him; and at common law, if the owner did not pursue and appeal the felon, he lost the goods for ever; but by the (g) 21 H. 8.

Staundf. P. C. 813. Hale's P. C. 271. Keilw. 68. b. Dyer, 239. pl. 36. 5 Co. 110. (a) And that in such cases where the coroner cannot have the view of the body, the king shall entitle himself to the goods and chattels upon a presentment. 5 Co. 109. (b) *Secus*, if he be found accessory after, for the indictment is so far void. Staundf. P. C. 184.

(c) For this *vide tit. Coroner.*

5 Co. 110, 111. *vide tit. Outlawry.* (d) Fitz. Coron. 181. Forfeiture, 28. Staundf. P. C. 183. 184. Staundf. Prerog. 47. Bro. Coron. 8. Finch. 352. Roll. Abr. 793. 41 Aff. pl. 13. 22 Aff.

Hale's P. C. 5 Co. 109. Fitz. Coron. 289. 312. Staundf. P. C. 184. 3 Inst. 56. 227. Plow. 260.

5 Co. 109. 3 Inst. 134. Cro. Eliz. 694. (g) But for this *vide* 2 Hawk.

P. C. c. 23. *cap.* 11. for encouraging the prosecution of felons it is provided, § 53. And that if the party come in as evidence on the indictment, and at taint the felon, he shall have a writ of restitution. in a market overt does not so far alter the property of the goods, but that upon a prosecution by the person from whom they were stolen, he shall have them again. *Tit. Fairs and Markets.*

5 Co. 109.
Foxley's
case.

And here we may observe a difference between goods waived, strays and the like, and goods forfeited for felony or flight; for, as it has been observed, goods forfeited for felony are not in the king without an office found of such felony or flight, because the property cannot alter without matter of record; but goods waived are in the king without office, because there the property is in no body; and therefore by publick agreement are put out of the finder, in whom they were by the state of nature, and are vested in the king as a recompence for his trouble and charge in the execution of justice.

(C) For what Crimes by Statute.

BY the 26 *H. 8. cap.* 13. it is enacted, "That every offender and offenders, being hereafter lawfully convicted of any manner
" of high treasons by presentment, confession, verdict or process
" of outlawry, according to the due course and custom of the com-
" mon laws of this realm, shall lose and forfeit to the king, his
" heirs and successors, all such lands, tenements and heredita-
" ments, as any such offender or offenders shall have of any estate
" of inheritance in use or possession, by any right, title, or means,
" within the realm of *England*, or elsewhere within any of the
" king's dominions, at the time of any such treason committed,
" or at any time after, saving to every person and persons, their
" heirs and successors, other than the offenders in any treasons,
" their heirs and successors, and such person and persons as claim
" to any their uses, all such rights, titles, interests, possessions,
" leases, rents, offices and other profits, as they shall have at the
" day of committing such treasons, or at any time before, in as
" large and ample manner, as if this act had never been had nor
" made."

And by the 33 *H. 8. cap.* 20. it is enacted, "That if any person
" or persons shall be attainted of high treason, by the course of the
" common law or statutes of this realm, in every such case every
" such attainder by the common law shall be of as good strength,
" value, force, and effect, as if it had been done by authority of
" parliament; and that the king, his heirs and successors, shall
" have as much benefit and advantage by such attainder, as well
" of uses, rights, entries, conditions, as possessions, reversions,
" remainders, and all other things, as if it had been done and
" declared by authority of parliament; and shall be deemed and
" adjudged in actual and real possession of the lands, tenements,
" hereditaments, uses, goods, chattels, and all other things of the
" offenders so attainted, which his highness ought lawfully to
" have,

" have, and which they, being so attainted, ought or might lawfully lose or forfeit, if the attainder had been done by authority of parliament, without any office or inquisition to be found of the same; any law, statute or use of the realm to the contrary thereof in any wise notwithstanding.

" Saving to all and every person and persons, and bodies politic, and their heirs, assigns and successors, and every of them, (other than such person and persons as hereafter shall be attainted of high treason, and their heirs and assigns, and every of them, and all and every other person and persons claiming by them or any of them, or to their uses, or to the uses of any of them, after the said treasons committed) all such right, title, use, possession, entry, reversions, remainders, interests, conditions, fees, offices, rents, annuities, commons, leases, and all other commodities, profits and hereditaments whatsoever they or any of them should, might, or ought to have had, if this act had never been had or made*."

And *vide* 7 Ann. c. 21. and 17 Geo. 2. c. 29. For the treasons in 8 & 9 W. 3. c. 25. and 15 & 16 Geo. 2. c. 28. the lands are forfeited.—The blood is not corrupted for either. Foster, 223.

* For the treasons in 5 Eliz. c. 1. concerning the papal supremacy, 5 Hen. c. 11. and 18 Eliz. c. 1. touching the coin, no forfeiture of lands shall be but during the life of the offender.

In the construction of these statutes the following opinions have been holden.

1. That neither of these statutes are repealed by 1 *Ma. Sess.* 1. cap. 1. which enacts, " That no pains of death, penalty or forfeiture, shall ensue to any offender, for the doing any treason, petit treason, or misprision of treason, other than such as be within the statute of 25 *E. 3.* ft. 5. c. 2. ordained and provided;" for the words, *other than such, &c.* have been construed not to extend to the pains, &c. mentioned in the beginning of the sentence, but to the offences mentioned in the end of it.

Staundf. P. C. 387. 3 Inst. 19. Dyer, 28. 2 Hawk. P. C. 452.

2. That estates in tail are forfeited by force of these words in 26 *H. 8.* c. 13. *of any estate of inheritance*, which must be void, if they do not include estates in tail: (a) also lands given to a man and his wife and the heirs of their two bodies, are as much forfeited by his attainder, as lands given to him and the heirs of his body†.

Staundf. P. C. 187. Co. Lit. 372. b. (a) Dyer, 322. pl. 27. adjudged.

† If *A.* entails his estate in *Scotland* on himself for life, remainder to *B.* his eldest son, and the heirs male of his body, remainder to the heirs male of *A.*'s own body, with subsequent limitations, and the reversion to the heirs and assigns whatsoever of *A.* with prohibitive, irritant and resolute clauses; and *A.* dies, leaving *B.*, and another son, *C.* *B.* is attainted of high treason; the estate is forfeited to the crown during his life, and the continuance of such issue male of his body as would have been inheritable to the said estate *tailzie*, and also for such estate and interest as vests in him by the limitation to the heirs whatsoever of *A.* after the substitutions determined; and after the death of *B.*, and failure of his issue male, *C.* shall succeed, by virtue of the substitution to the heirs male of the body of *A.* Foster, 95.—If the estate is limited to *A.* and the heirs male of his body, without any previous limitation to his son *B.*, and *B.* on his father's death becomes entitled as heir of his body, and is attainted of high treason, the whole entail is forfeited by his attainder, as long as there are heirs male of the body of *A.* Foster, 102.

† If *A.* entails his estate in *Scotland* on himself for life, remainder to *B.* his eldest son, and the heirs male of his body, remainder to the heirs male of *A.*'s own body, with subsequent limitations, and the reversion to the heirs and assigns whatsoever of *A.* with prohibitive, irritant and resolute clauses; and *A.* dies, leaving *B.*, and another son, *C.* *B.* is attainted of high treason; the estate is forfeited to the crown during his life, and the continuance of such issue male of his body as would have been inheritable to the said estate *tailzie*, and also for such estate and interest as vests in him by the limitation to the heirs whatsoever of *A.* after the substitutions determined; and after the death of *B.*, and failure of his issue male, *C.* shall succeed, by virtue of the substitution to the heirs male of the body of *A.* Foster, 95.—If the estate is limited to *A.* and the heirs male of his body, without any previous limitation to his son *B.*, and *B.* on his father's death becomes entitled as heir of his body, and is attainted of high treason, the whole entail is forfeited by his attainder, as long as there are heirs male of the body of *A.* Foster, 102.

3. That neither a *right* to (b) a writ of error to reverse an erroneous common recovery, (c) nor a mere *right of action* to lands in the hands of a stranger as of a discontinuee, or of the heir of the disseisor, are forfeited by either of these statutes; (d) but *rights of entry* are as much forfeited as lands in possession; yet the king shall

(b) 3 Co. 2, 3. agreed in the Marquis of Winchester's case, Leon. 270, 271.

not

Moor, 125. (e) not be adjudged in possession, by virtue of such a right, without an office, and a *seire facias* or seizure on such office; for the words, *the king shall be deemed in possession without office*, &c. shall have this construction, that he shall be in possession without office, in the same manner as he should have been on an office found at common law; but at common law, if a disseisee had been attainted of high treason, the king should not have been in possession without office, and a *seire facias* or seizure thereon.

Hob. 340. 7 Co. 13. 4 Co. 58. a. (d) 3 Co. 2, 3. 20. (e) 3 Co. 11. a. 4 Co. 58. a. Leon. 21. 3 Co. 95. a.

Cro. Car. 427. Stone and New-
man's case,
8^e ed. Plow. 552.

4. If tenant in tail of the gift of the crown makes a feoffment in fee, and then is attainted of high treason, the right of the entail is forfeited; for it could not be discontinued, because the reversion continued always in the crown; and though it be put in abeyance by the feoffment, as to any benefit which the feoffor could have claimed from it; yet since it is not turned to a right of action, but would have still continued in him for the benefit of the heir, if there had been no attainder, it shall likewise continue in him for the benefit of the crown.

Hob. 334. Palm. 351. 2 Roll. Rep. 305.

5. That if one attainted of high treason is seized of a defeasible estate-tail, and hath also a right to an ancient entail, which is discontinued, he forfeits both; for the first is within the express words of 26 H. 8. c. 13. and the other within those of 33 H. 8. c. 20. and it doth not follow, that because naked rights to lands in the hands of a discontinuee, or of the heir of a disseisor, are not within the meaning of the statute, therefore a right in the party himself is not; for the forfeiture of such naked rights might not only be of dangerous consequence in unsettling possessions, but might also be prejudicial to strangers, whom the statute, by an express saving, plainly intends to favour; but a forfeiture of the offender's right to his own lands can prejudice none but himself and his heirs.

(a) In Englefield's case, 7 Co. 12, 13. Poph. 18. And. 293. Moor, 303. 4 Leon. 155. Palm. 433. Roll. Rep. 142.

6. In the construction of the statute of 33 H. 8. c. 20. it is (a) agreed, that a power of revoking the uses of a settlement may be forfeited by force thereof, if the execution of it require nothing but what may be as well performed by any other person, as by the party himself by whom it was reserved; as the tender of a ring, &c. (b) Neither doth the mention of such considerations, and inducements for the reserving such a power in the preamble of it, as are inseparable from the person, alter the case, if nothing of this kind be inserted in the proviso itself, by which it is reserved; but (c) if such proviso require any thing of this kind, it prevents the forfeiture; as if it be worded thus, that if the party should be minded to alter and revoke the uses, and signify his mind in writing under his hand and seal, or (d) if it only require, that the revocation be under his hand and seal, without saying any thing about his changing his mind; or as (e) some say, if it only require the tender of a ring by the party, *ipso adiunct declarante* his intent, &c. *.

Lev. 279. Lang, 44. Roll. Rep. 142. (c) As in the Duke of Norfolk's case, where there was this proviso, that if the duke

duke should be minded to alter and revoke the uses, and signify his mind in writing under his hand and seal, that then, &c. and it was clearly adjudged, that the power of revocation was not forfeitable, because it depended on the duke's signifying his mind in writing under his proper hand and seal, which none but himself could do. 7 Co. 13. cited and agreed. Lev. 279. 2 Keb. 566. 763. 773. 3 Inst. 19. (d) Mod. 16. 38. Lev. 279. Main's case. (e) *Vide* Palm. 429. Latch. 25. 26. 70. 102. Jon. 135. Vent. 129. Mod. 40.—* *A.* who is tenant for life, with power to make leases for three lives, or twenty-one years, makes a lease to trustees for ninety-nine years, if he so long live, for payment of his debts; and appoints them his attorneys, to make leases pursuant to the power; *A.* is outlawed for high treason; the trustees shall not make the leases to the nominees of the crown. Bunb. 92.

7. That neither an (a) annuity granted *pro consilio impendendo*, (a) Plow. 381. (b) nor an office granted for life, and requiring skill and confidence, are forfeitable by these statutes; but such office in fee may be forfeited without the aid of them, because the grantor in giving an estate descendable to all the heirs of the grantee, however qualified, appears not to have been induced to make his grant from the consideration of the peculiar merit of the persons who are to execute the office. (b) Plow. 379. & *vide* tit. Office and Officers.

By an act of parliament made 13 Car. 2, it was enacted, 2 Lev. 169. Browne and Wayne, 2 Jon. 57. 2 Mod. 130. 3 Keb. 459. 651. 712. Vent. 299. Pollex. 181. S. C. that all the manors, messuages, lands, tenements, possessions and reversions, remainders, rights, interests, hereditaments, leases, chattels real, and other things of what nature soever, that Sir John Danvers, or any other to his use, or in trust for him, had the 25th of March 1646, or at any time after, should be forfeited to the king; and it was adjudged, that by force of these words, all interests of what nature soever, an estate-tail was forfeited.

But it is holden, that the statutes of *premunire*, which give a general forfeiture of all the lands and tenements of the offender, extend not to lands in tail. Co. Lit. 130.

It is agreed, that a saving against corruption of blood in a statute concerning *felony* saves the land to the heir, because the escheat to the lord for felony is only *pro defectu tenentis*, occasioned by the corruption of blood: also, the saving of the land to the heir saves the corruption of blood and loss of dower. Hale's P. C. 8. 3 Inst. 47.

But a saving against the corruption of blood in a statute concerning *high treason* does not save the land to the heir, because the land goes to the king by way of *immediate forfeiture*, and not by way of escheat*. Salk. 85. pl. 2. * See farther the statutes 7 Ann. c. 21. and

17 Geo. 2. c. 29., and the observations on those statutes, in Conf. on Law of Forf. for High Treason. By those statutes, after the death of the Pretender's sons, no attainder of high treason is to extend to the disinheriting of any heir, &c.

(D) To what Time the Forfeiture shall have Relation.

THE forfeiture upon an attainder either of *treason* or *felony* shall have relation to the (c) time of the offence, for the avoiding all subsequent alienations of the lands, but to the time of the conviction,* or *fugam fecit* found, &c. only as to *chattels*, unless the party were killed in flying from, or resisting those who had arrested him; in which case it is said, that the forfeiture shall relate to the time of the offence. Plow. 488. b. Co. Lit. 2. b. 8 Co. 170. (c) That if the time proved varies from that laid in the indictment, and the jury find the defendant guilty generally, the forfeiture shall relate to the time laid, till

till the verdict be falsified by the party interested, as it may be in this respect, though not as to the point of the offence. Hale's P. C. 264. 270. 3 Inst. 230.—But if the jury find the defendant guilty on the day on which the fact is proved, whether before or after the day laid in the indictment, in such case the forfeiture shall relate to the day so specially found. Kelynge, 16. Hale's P. C. 264. 2 Inst. 318. 3 Inst. 230.

8 Co. 170. No attainder whatsoever shall have any relation as to the mesne profits of the lands of the person attainted, (a) but only from the time of the attainder.

Plow. 488. (a) Whether in a *præmunire* the forfeiture shall relate to the time of the offence, or only to that of the judgment, *Q. & vide Cro. Car. 17. Jon. 27. & tit. Præmunire.*

Plow. 260. The forfeiture of a person becoming *felo de se* has relation to the time the mortal wound was given, so that all intermediate alienations are avoided.

5 Co. 110.
Hale's P. C.
29.

(E) What is to be done with the Offender's Goods before Conviction.

8 Co. 171. IT hath always been holden that one indicted or appealed of treason or felony may, *bonâ fide*, sell any of his chattels real or personal, for the sustenance of himself and family, until they be actually forfeited.

Skin. 357.
pl. c.
Jones and
Ashurt.

But where a person being in *Newgate* for robbery and burglary, before conviction, made a bill of sale of all his goods to his son; on trover brought by the son against the sheriff's of *London*, it was holden by *Holt*, that the bill was fraudulent, and that though a sale, *bonâ fide*, and for a valuable consideration, had been good, because the party had a property in the goods till conviction, and ought to be reasonably sustained out of them, yet that such a conveyance as this cannot be intended to any other purpose than to prevent a forfeiture and defraud the king; and this he said was a fraud at common law.

3 Inst. 229.
Bridg. 77.
Hale's P. C.
269.

(b) That according to the general tenor of the old books, the goods of one arrested for treason or felony may, by the purview of an ancient statute, which seems to continue still in force, be immediately inventoried and appraised; after which, and on surety found that they shall be forthcoming, they shall be kept by the bailiffs of the party arrested, and for want of such surety by his neighbours, till he be convicted, or found to have fled, &c. whereby they are actually forfeited, *vide 2 Hawk. P. C. c. 49. § 35.* and the authorities there cited.

(c) For precedents of such actions, *vide Lutw. 132. Cro. Eliz. 749.*

And by the 1. R. 3. c. 3. it is enacted, "That no sheriff, under-sheriff, nor escheator, bailiff of franchise, nor any other person, take or seize the goods of any person arrested or imprisoned for suspicion of felony, before that the same person so arrested and imprisoned be convicted or attainted of such felony according to the law; or else the same goods otherwise lawfully forfeited; upon pain to forfeit the double value of the goods so taken to him that is so hurt in that behalf by (c) action of debt, &c."

This

This statute is said to be in affirmance of the common law, and hath been (a) adjudged to extend as well to the seizure of money, as of any other chattel. 8 Co. 171. (a) Raym. 414.

It seems plain from this statute, that goods may be seized as soon as they are forfeited; and it seems the whole township is answerable for them to the king, and may seize them wherever they can be found. Co. Lit. 391. 2 Hawk. P. C. c. 49. § 40. and several ancient authorities there cited.

And at common law it was no plea for such township, that the goods were delivered to the custody of J. S. who embezzled them, &c., but it is enacted by 31 E. 3. c. 3. "That if any man or town be charged in the Exchequer by estreats of the justices of the chattels of fugitives and felons, and will allege in discharge of him another which is chargeable, he shall be heard, and right done to the other." 2 Hawk. P. C. c. 49. § 41.

(F) Where the Wife shall lose her Dower.

BEFORE the statute of 1 E. 6. cap. 12. the wife not only lost her dower at common law, but also her dower *ad osium ecclesie*, or *ex assensu patris*, or by special custom, (except that of Gavelkind,) by the husband's attainder of treason or (b) capital felony, whether committed before or after the marriage. Co. Lit. 31. b. 37. a. 41. a. F. N. B. 150. Perk. § 308. Bro. tit.

Dower, 82. Plow. 261. (b) That the wife of a *felon de se* shall have dower. Plow. 261, 262. Dame Hale's case.—So, if the husband be outlawed in trespass or any civil action, for this works no corruption of blood, or forfeiture of lands. Perk. § 388. Co. Lit. 31. a. —So, if the husband be attainted of heresy, for this is only a spiritual offence. Co. Lit. 31.—So, if the husband or wife be excommunicated. Co. Lit. 31.—So, if either the husband or wife be attainted in a *præmunire*, she shall be endowed; but for this *vide* Co. Lit. 134. and tit. *Præmunire*.

But the wife never forfeited lands given jointly to her husband and her, whether by way of frank-marriage, or otherwise, but only for the year and day, and waste. Co. Lit. 37. 3 Inst. 216.

It is enacted by 1 E. 6. cap. 12. par. 17. "That albeit any person shall be attainted of any treason or felony whatsoever; yet that notwithstanding every woman, that shall fortune to be the wife of the person so attainted, shall be endowable and enabled to demand, have, and enjoy her dower, in like manner and form as though her husband had not been attainted, &c."

But this is repealed as to treason by 5 & 6 E. 6. cap. 11. § 13. (c) This act extends to an attainder of petit treason, as well as to an attainder of high treason. by which it is enacted, "That the wife, whose husband shall be attainted of any treason (c) whatsoever, shall in no wise be received to ask, challenge, demand, or have dowry of any the lands, tenements, or hereditaments of the person so attainted, during the said attainder in force."

Strandf. 195. Dyer, 140. pl. 42. Co. Lit. 37. a. 392. b.—But not to misprision of treason. Co. Lit. 37. a. Moor, 639. Dyer, 97. pl. 49. 13 Co. 19.

If the husband seized of lands in fee makes a feoffment, and then commits treason and is attainted of it, the wife shall not recover dower against the feoffee. Bendl. 56. Dyer, 140. Co. Lit. 111. a.

(a) 3 Leon.
3. (b) Perk.
§ 391.

So, (a) if the husband is attainted of treason, and afterwards pardoned, yet the wife shall not recover dower; but (b) of lands purchased by the husband after the pardon the wife shall be endowed.

2 Inst. 216.
Moor, 639.
pl. 879.

If a husband having levied a fine with proclamations is erroneously attainted of treason, and the five years pass after his death, and then the outlawry is reversed, the fine and nonclaim are no bar till five years are passed after the reversal, because the wife could not sue for her dower while the attainder stood in force, neither could she any way reverse it.

For this
vide tit.
Dower.

After the making of the statute 1 E. 6. c. 12. it seems to have been doubted, whether the wife should not lose her dower in case of any new felony made by act of parliament; and therefore where several offences have been made felony since, care has been taken to provide for the wife's dower.

(G) How far the Blood of the Offender is corrupted.

Co. Lit.
8. 41.
3 Inst. 211.
Staundf.
P. C. 195.

(c) But an
attainder of piracy corrupts not the blood. Co. Lit. 391. — Nor of petit larceny. 3 Inst. 211. Co.
Lit. 41. a. Noy, 170.

IT is clearly agreed, that by an attainder of treason or (c) felony, the blood of the offender is so far stained or corrupted, that the party loses all the nobility or gentility he might have had before, and becomes ignoble.

Co. Lit. 8.
a. 301. b.
392.
Staundf.
P. C. 165.
Bro. Non-
ability, 21.
Cro. 66.

Also, it is clearly agreed, that he can neither inherit as heir to any ancestor, nor have an heir; and the policy of the law herein is to make men more mindful of their allegiance, and to deter them from taking up arms against the crown; for as the natural love men have for their posterity, often restrains them from actions which would prejudice them, either by entailing the infamy of such actions on them, or making them sharers in the punishment which the law has appointed for such offences; so men are less careful of their persons, when their miscarriages will neither involve their children in the guilt or punishment of them.

(d) As in
Cro. Car.
543. Lit.
Rep. 28.
Noy, 159.
Vent. 413.
417.

Therefore it is (d) laid down as a sure rule, that wherever it is necessary for any one, who would make a title to another, to derive the descent through him, the attainder is an effectual bar to such title, (e) unless the lands were entailed, in which case he claims *per formam doni*, and paramount his title.

Lev. 6c. Sid. 200. (e) Lit. § 746. 3 Co. 10. 3 Co. 166. a. — And therefore, if the grandfather be seized in tail, and the father be attainted of treason since the 26th H. 8. c. 13. and die in the life of the grandfather, the son shall inherit the grandfather, for the son is heir *per formam doni* to the tail, which is originally not forfeitable, and by that statute the father forfeits only the lands and rights that he hath in him. Co. Lit. 8. 3 Co. 10. Dowry's case.

Co. Lit. 392.
Dalif. 14.
pl. 3.
Vent. 416.

As if there be grandfather, father and son, and the father be attainted, the son cannot claim as heir to the grandfather of the lands in fee-simple, because he must of necessity derive the
descent

descent through the father, which by reason of the attainder he cannot do.

So, if there be two brothers, and one of them having issue a son be attainted, and either the son or uncle purchase land, and die without issue, the other cannot be his heir, because the blood of the father, through whom the descent must be conveyed, is corrupted. Dyer, 274.
pl. 40. Cro.
Car. 543.
Vent. 413.
416. 425.

But it is also a general rule, that the attainder of a person, who needs not be mentioned in the conveyance of the descent, does no hurt, let the ancestor be never so remote; and that therefore where one may claim as immediate heir to another, without deriving the descent through any other, he shall not be barred by the attainder of any other. Lit. Rep.
28. Noy,
159. 166.
Lev. 60.
Sid. 200;
Vent. 413.

As, if the son of one attainted purchase land, and have a son and die, such son shall inherit, because he derives his descent immediately from him. Vent. 416.

So, if a man have two sons, and be attainted, and one of the sons purchase lands, and die without issue, the other shall be his heir, because he may make his title without mentioning the father; and therefore there is no disability in the one to be represented, or in the other to represent. Co. Lit.
8. a.
4 Leon. 5.
Cro. Jac.
539. Roll.
Abr. 625.
pl. 5.

Cro. Car. 543. Palm. 19. Lev. 59. Vent. 425. 2 Roll. Rep. 93. 2 Sid. 25. 27. Moor, 569. pl. 775. Noy, 158. Lit. Rep. 28.—But my Lord Coke says, that the reason of this case is, because the attainder of the father corrupts only the lineal blood, and not the collateral blood between the brethren, which was vested in them before the attainder; but he saith, that some have holden, that if a man, after he be attainted, have issue two sons, the one cannot be heir to the other, because they could not be heir to their father, for that they never had any inheritable blood in them. Co. Lit. 8. a. — But the ground of this opinion is overthrown by the resolution in the case of Collingwood and Pace, wherein it was adjudged in the Exchequer-chamber by seven judges against three, that the sons of an alien might be heirs one to another, if born in *England*, or naturalized, though it is certain they could not be heirs to their father. Sid. 193. Hard. 224. Vent. 413. Lev. 59. And therefore it seems now settled, that such sons, whether born before or after the attainder of their father, may inherit each other. As to this see tit. *Aliens*.

So, where a person attainted hath issue by a woman seised of lands of inheritance, such issue may inherit the mother, though he never had any inheritable blood from the father. Noy, 159.
167.
Staundf.
P. C. 196.

2 Sid. 248. Cro. Jac. 539. Lit. Rep. 28. Lev. 59. Sid. 201. Vent. 422. Co. Lit. 84. b.

If the father of a person attainted die seised of an estate of inheritance during his life, no younger brother can be heir, but the land shall rather escheat; for the elder brother, though attainted, is still a brother, and no other can be heir to the father while he is alive; but if he die before the father, the younger brother shall be heir, because there is no default in the father to be represented, nor in the younger son to represent the father after the death of his brother. Co. Lit.
a. 13. a.
Noy, 166.
170.
Lev. 60.
Sid. 195.
Vent. 413.

But if the eldest son had left issue and died, such issue could not have inherited, but such lands must have escheated, because the eldest son could not have represented the grandfather, but by the mediation of the father, and as standing in his stead; and that in this case he could not do, because the father can have no representatives, and the younger son could not inherit, because the elder line is still continuing, which excludes the younger. Dyer, 48.

Co. Lit.
163. b.

If a man be seised of lands in fee, and have issue two daughters, and one of them be attainted of felony, and the father die, both daughters being alive, one moiety shall descend to the innocent daughter, and the other moiety shall escheat.

Co. Lit.
163. b.

But if a man make a lease for life, remainder to the right heirs of A. being dead, who hath issue two daughters, whereof one is attainted of felony, it seems the remainder is not good for a moiety, but void for the whole.

Co. Lit.
163. b.

For in the first case the lord by escheat must make a title to divest the estate which was once lawfully vested in the ancestor; which he cannot do, because there is no defect in this case, since the ancestor may be legally represented, and the innocent daughter may legally represent; and therefore there can be no title in the lord to evict that moiety, though he has title to the moiety of the offending daughter, who after her crime can represent no man; but in the second case, the sisters are to make title to the remainder, which they cannot do, because to make title to the remainder, they must bring themselves within the words of the gift; and the innocent daughter cannot take upon her the character of an heir alone, since they both make but one heir to the ancestor; and both cannot join, because one is attainted and incapable of that character.

Co. Lit.
2. b.

Although a person attainted be to many purposes looked upon as dead in law, yet he hath a capacity to purchase land, which the king shall have upon office found, and not the lord of the fee, because his person being forfeited to the king he cannot purchase but for the king.

Co. Lit.
8. a.
391. b.
392. b.
Stam. P. C.
195. 3 Inst.
233. Dalif.
14. pl. 3.
Noy, 170.
Co. Lit.
8. a.
3 Inst. 233.

But if a man attainted be pardoned by act of parliament he may purchase as before, for he is totally restored and inheritable to all persons; but if he be pardoned by charter, he may thenceforth purchase lands, but cannot inherit his former relations; for the king's charter cannot alter the law or take away the right of others, or restore the relation that was lost.

If a man be attainted and after pardoned by charter, the children born before such pardon shall not inherit; but if they fail, the children born after such pardon may inherit him; for the pardon makes him capable of *new relations* as well as of *new purchases*, though all the old legal benefit and relations are lost.

Forgery.

FORGERY at common law is an offence in falsely and fraudulently making or altering any matter of record, or any other authentick matter of a public nature, as a parish register, or any deed or will, and punishable by fine and imprisonment, and such other corporal punishment as the court in discretion shall think proper.

Hawk. P.C.
c. 70. § 1.
4 Bl. Com.
247.

But the mischiefs of this kind increasing, it was found necessary to guard against them by more sanguinary laws. Hence we have several acts of parliament declaring what offences amount to forgery, and which inflict severer punishment than there were at the common law.

Therefore it will be necessary to consider,

- (A) In what Cases the making and altering of a Writing shall be said to be so far false and fraudulent as to amount to Forgery.
- (B) Of what Nature or Kind the Writing must be to constitute the Offence Forgery at Common Law.
- (C) What Offences of this Kind are made Forgery by Statute, and of the Punishment to be inflicted on Persons guilty of Forgery.

- (A) In what Cases the making and altering of a Writing shall be said to be so far false and fraudulent as to amount to Forgery.

THE notion of forgery doth not so much consist in the counterfeiting of a man's hand and seal, which may often be done innocently, but in the endeavouring to give an appearance of truth to a mere deceit and falsity; and either to impose that upon the world as the solemn act of another, which he is no way privy to, or at least to make a man's own act appear to have been done at a time when it was not done, and by force of such a falsity to

Hawk. P.C.
c. 70. § 2.
2 Roll. Abr.
28, 29.
11 Co. 27.
[It was said
in argu-
ment, and
seemingly
adopted by

the court in give it an operation, which in truth and justice it ought not to the case of have.

Tatlock v.

Harris, 3 Term Rep. 176., that it is no answer to the charge of forgery to say that there was no *special intent* to defraud any particular person, because a *general* intent to defraud is sufficient to constitute the crime; for if a person do an act, the *probable* consequence of which is to defraud, it will, in contemplation of law, constitute a fraudulent intent.]

3 Inst. 169.

Pult. 46. b.

27 H. 6. 3.

Hawk. P.C.

c. 70. § 2.

(a) So, if

by his first

conveyance

he had passed only an equitable interest for good consideration, and had afterwards by such a subsequent antiquated conveyance endeavoured to avoid it. Moor, 665.

Hence it is holden to be forgery for a man to make a (a) feoffment of certain lands to J. S. and afterwards make a deed of feoffment of the same lands to J. D., of a date prior to that of the feoffment to J. S., for herein he falsifies the date in order to defraud his own feoffee by making a second conveyance, which at the time he had no power to make.

he had passed only an equitable interest for good consideration, and had afterwards by such a subsequent antiquated conveyance endeavoured to avoid it. Moor, 665.

Noy, 101.

Moor, 759.

760.

3 Inst. 170.

Also, it is forgery for a man, who is ordered to draw a will for a sick person, to insert legacies in it of his own head.

Hawk. P. C. c. 70. § 2. cent. Dyer, 288. b.

3 Mod. 66.

Hawk. P.C.

c. 70. § 2.

3 Inst. 171.

Hawk. P.C.

c. 70. § 2.

So, if one inserts in an indictment the names of those against whom in truth it was not found, this is forgery.

So, where one finding another's name at the bottom of a letter, at a considerable distance from the other writing, causes the letter to be cut off, and a general release to be written above the name, and then takes off the seal and fixes it under the release.

Moor, 619.

Hawk. P.C.

c. 70. § 2.

But in

3 Inst. 169.

my Lord

Coke seems

to think,

that a deed so altered is more properly to be called a false than a forged deed; but by Hawk. this is forgery; for a man's hand and seal are as falsify made use of to testify his assent to an instrument, which after such an alteration is no more his deed than a stranger's. Hawk. P. C. c. 70. § 2. [In all forgeries indeed, the instrument itself must be false: and therefore, if a person give a note entirely as his own, and on his own account, his subscribing it with a fictitious name will not make it a forgery. But if he gives the note in a different character than that which he really bears, as if pretending to be the executor of A. he receives money from B. on account of his supposed testator, and gives a note for it as and in the name of executor of A., this is a forgery, for in this case, the instrument is false in itself. Dunn's case. Leach's Cases, 54.]

Also, the making any fraudulent alteration of the form of a true deed, in a material part of it, is forgery; as the making a lease of the manor of Dale appear to be a lease of the manor of Sale, by changing the letter D. into an S., or by making a bond for five hundred pounds expressed in figures seem to have been made for five thousand, by adding a new cypher.

Pult. 46.

21 H. 6.

4. b.

Hawk. P.C.

c. 70. § 3.

But as the fraud and intention to deceive, by imposing upon the world that as the act of another, which he never consented to, are the chief ingredients which constitute this offence; so it hath been holden, that he who writes a deed in another's name, and seals it in his presence, and by his command, is not guilty of forgery, because the law looks upon this as the other's hand and sealing, being done by his approbation and command.

Moor, 760.

So, if a man writes a will for another without any directions from him, and he for whom it is written becomes *non compos* before it is brought to him, it is not forgery; for it is not the bare writing of an instrument in another's name without his privity,

but the giving it a false appearance of having been executed by him, which makes a man guilty of forgery.

Also, he cannot be punished as guilty of forgery, who raseth the word *libris* out of a bond made to himself, and putteth in *marcis*, because here is no appearance of a fraudulent design to cheat another, and the alteration is prejudicial to none but to him who makes it, whose security for his money is wholly avoided by it; yet it seems to be forgery, if by the circumstances of the case it should any way appear to have been done with an eye of gaining an advantage to the party himself, or of prejudicing a third person: also, it is holden, that such an alteration, even without these circumstances, is a misdemeanour though it be not forgery.

[So, a person who has been known by a name which was not his own, and who afterwards, for the purposes of concealment, assumes his own name, and in that name draws a bill of exchange, is not guilty of forgery, although the bill was drawn for the purposes of fraud.]

It seems, that by a bare nonfeasance a man cannot be said to be guilty of forgery; as if a man in drawing a will omits a legacy which he is directed to insert: yet it hath been holden, that if the omission of a bequest to one cause a material alteration in the limitation of a bequest to another, as where the omission of a devise of an estate for life to one man causeth a devise of the same lands to another to pass a present estate, which otherwise would have passed a remainder only, he who makes such an omission is guilty of forgery.

But it seems to be no way material, whether a forged instrument be made in such a manner, that if it were in truth such as it is counterfeited for, it would be of validity or not; and upon this ground it hath been adjudged, that the forgery of a protection in the name of *A. B.* as being a member of parliament, who in truth, at the time, was not a member, is as much a crime as if he were.

(B) Of what Nature or Kind the Writing must be to constitute the Offence Forgery at Common Law.

IT is clearly agreed, that at common law the counterfeiting of a matter of record is forgery; for, since the law gives the highest credit to all records, it cannot but be of the utmost ill consequence to the publick to have them either forged or falsified.

Also, it is agreed to be forgery to counterfeit any other authentic matter of a publick nature, as (a) a privy seal, or (b) a licence from the Barons of the Exchequer to compound a debt, or (c) a certificate of holy orders, or (d) a protection from a parliament man.

(b) Roll. Abr. 65. pl. 5. 2 Bulf. 137. (c) Lev. 138. (d) Sid. 142.

Moor, 619.
Noy, 99.
Salk. 375.

R. 7.
Aickles,
Leach's
Cases, 345.

Moor, 762.
Noy, 191.

Hawk. P.C.
c. 70. § 7.

Sid. 142.

Roll. Abr.
65. 76.
Yelv. 146.
Cro. Eliz.
178.
3 Mod. 66.
(a) Roll.
Abr. 63.
pl. 33.
Cro. Car.
326.
Jon. 325.
(d) Sid. 142.

(a) Roll. It is also unquestionable, that a man may be in like manner guilty of forgery at common law by forging (a) a deed; and therefore it seems, that one may be equally guilty by forging (b) a will, which cannot be thought to be of less consequence than a deed.

3 Leon. 170.

(b) Moor, 760. Noy, 101. Dyer, 302. and Hawk. P. C. c. 70, § 10., where it is said, that he cannot find this point any where directly holden.—[But see *infra*, and the next head.]

(c) Roll.

Rep. 431.

Sid. 16.

155. 451.

Roll. Abr.

66. pl. 8, 9.

Winch. 40.

90.

3 Leon. 231.

Leon. 101.

Cro. Eliz.

296. 853.

3 Bull. 265.

(d) Cro.

Eliz. 166.

Yelv. 146.

3 Bull. 265.

(e) Hawk.

P. C. c. 70.

§ 11.

(f) Yelv.

146.

There seem to be some strong opinions in the (c) books, that the counterfeiting of any writings of an inferior nature to those above-mentioned, is not forgery at the common law. Also it hath been (d) holden, that the forging of another's hand, and thereby receiving rent due to him from his tenants, is not punishable at all; but by (e) Hawk. it cannot surely be proved by any good authorities, that such base crimes are wholly disregarded by the common law, as not deserving a publick prosecution; for the opinion, that they are punishable by no law, seems by no means to be maintainable, since many of them are most certainly punishable by force of 33 H. 8. cap. 1.; neither can it be a convincing argument, that they are not punishable by common law, (f) because they are of a private nature, as much as other writings concerning other matters; yet no one will say, that the making of a false deed concerning a private matter, is not punishable at common law; but, perhaps, says he, it may be reasonable to make this distinction between the counterfeiting of such writings, the forgery whereof, as in the above cases, is properly punishable as forgery, and the counterfeiting of other writings of an inferior nature; that the former is in itself criminal, whether any third person be actually injured thereby or not; but that the latter is no crime unless some one receive a prejudice from it.

The King

and Ward,

Mich.

12 Geo. 1.

Barnard.

K. B. 10.

2 Ld. Raym.

1401.

But these opinions came fully to be considered in a late noted case, where it was holden, that the counterfeiting of a release of acquittance for a sum of money, though without seal, was forgery; and that it would be the most injurious notion, and even a reflection on the common law, to suppose it so defective as not to provide a remedy against offences of this nature.

(C) What Offences of this Kind are made Forgery by the Statute, and of the Punishment to be inflicted on Persons guilty of Forgery.

BY the 5 Eliz. cap. 14. it is enacted, " That if any person or persons, upon his or their own head and imagination, or by false conspiracy and fraud with others, shall wittingly, subtilly, and falsely forge or make, or subtilly cause, or wittingly assent, to be forged or made, any false deed, charter or writing sealed, court-roll, or the will of any person or persons in writing, to the intent that the estate of freehold or inheritance

" of

“ of any person or persons, of, in, or to any lands, tenements,
 “ or hereditaments, freehold or copyhold, or the right, title, or
 “ interest of any person or persons, of, in, or to the same, or any
 “ of them, shall or may be molested, troubled, defeated, reco-
 “ vered, or charged, or shall pronounce, publish, or shew forth in
 “ evidence, any such false and forged deed, charter, writing,
 “ court-roll, or will as true, knowing the same to be false and
 “ forged, as is aforesaid, to the intent above remembered, (ex-
 “ cept being attorney, lawyer, or counsellor, he shall for his client
 “ plead, shew forth, or give in evidence such false or forged
 “ deed, &c. to the forging whereof he was not party or privy,)
 “ and shall be thereof convicted either upon action or actions
 “ of forgery of false deeds, to be founded upon the said statute,
 “ at the suit of the said party grieved or otherwise, according to
 “ the order and due course of the laws of this realm, &c. he
 “ shall pay unto the party grieved his double costs and damages,
 “ to be found and assessed in that court where such convic-
 “ tion shall be; and also shall be set upon the pillory in some
 “ open market-town, or other open place, and there have both
 “ his ears cut off, also his nostrils slit and seared with a hot
 “ iron, &c. and shall forfeit to the king the whole issues and
 “ profits of his lands and tenements, and suffer perpetual im-
 “ prisonment.”

And § 3. it is enacted, “ That if any person or persons, upon
 “ his or their own head or imagination, or by false conspiracy
 “ or fraud had with any other, shall wittingly, subtilly, and false-
 “ ly forge or make, or wittingly, subtilly, and falsely cause or
 “ assent to be made and forged, any false charter, deed, or writ-
 “ ing, to the intent that any person or persons shall or may have
 “ or claim any estate or interest for term of years, of, in, or
 “ to any manors, lands, tenements, or hereditaments, not being
 “ copyhold, or any annuity in fee-simple, fee-tail, or for term
 “ of life, lives, or years; or shall, as is aforesaid, forge, make,
 “ or cause, or assent to be made or forged, any obligation or
 “ bill obligatory, or any acquittance, release, or other discharge
 “ of any debt, account, action, suit, demand, or other thing
 “ personal, or shall pronounce, publish, or give in evidence, ex-
 “ cept as is before excepted, any such false or forged charter,
 “ deed, writing, obligation, bill obligatory, acquittance, release,
 “ or discharge as true, knowing the same to be false and forged,
 “ and shall be thereof convicted by any of the ways and means
 “ aforesaid, he shall pay unto the party grieved his double costs
 “ and damages, to be found and assessed in such court where the
 “ said conviction shall be had, and shall be also set upon the pil-
 “ lory in some open market town, or other open place, and there
 “ have one of his ears cut off, and also shall suffer imprisonment
 “ for one year, &c.”

And by § 7 & 8. it is further enacted, “ That if any person
 “ or persons, being convicted or condemned of any of the of-
 “ fences aforesaid, by any the ways and means limited, shall,
 “ after

“ after any such his or their conviction or condemnation est-
 “ soons commit or perpetrate any of the said offences in form
 “ aforesaid, that then every such second offence shall be adjudged
 “ felony without benefit of the clergy, saving to all persons other
 “ than the said offenders, and such as claim to their uses, all
 “ rights, &c. which they shall have to any the hereditaments
 “ of any such person so as is aforesaid convicted or attainted at
 “ any time before, &c. saving also the dower of such offender’s
 “ wife, and the right of his heir.”

And by § 10. it is further enacted, “ That all justices of *oyer*
 “ and *terminer*, and justices of assise, shall have power to inquire
 “ of, hear, and determine the offences aforesaid.”

But it is provided, by § 9, 12, & 16. “ That this act, or any
 “ thing therein contained, shall not extend to any ordinary or his
 “ commissary, &c. for putting their seal of office to any will to
 “ be exhibited unto them, not knowing the same to be false or
 “ forged, or for writing the said will, or probate of the same;
 “ nor to any proctor, &c. of any ecclesiastical court, for the
 “ writing, setting forth, or pleading of any proxy made accord-
 “ ing to the ecclesiastical law, for the appearance of any person
 “ being cited to appear in such court; nor to any archdeacon or
 “ official for putting their authentick seal to the said proxy or
 “ proxies; nor to any ecclesiastical judge for admitting the same;
 “ nor to any person who shall plead or shew forth any deed or
 “ writing exemplified under the great seal of *England*, or under
 “ the seal of any other authentick court of this realm; nor to any
 “ person who shall cause any seal of any court to be set to any
 “ such deed, charter, or writing enrolled, not knowing the same
 “ to be false or forged.”

In the construction of this statute the following points have
 been holden :

Dyer, 322.
 pl. 26.
 3 Leon. 108.
 Hawk. P.C.
 c. 70. § 17.

1. That a false customory of a copyhold manor made in parch-
 ment, under the seals of several tenants of the manor, and con-
 taining in it divers false customs, apparently tending to the dishe-
 rison of the lord, and falsely pretending to be its title, to be set
 forth by the consent of all the tenants and allowance of the lord,
 is within the first branch of the forgery mentioned in the statute,
 as being a sealed writing made to the intent to molest the inhe-
 rittance of the lord.

3 Inst. 170.
 Noy, 42.
 Hawk. P.C.
 c. 70. § 18.

2. That the forgery of a lease for years, or of a grant of a
 rent-charge for years, in the name of one who is seised of a free-
 hold or inheritance, is also within the said first branch of the
 statute, because the said branch is penned in general words ex-
 tending to any molestation whatsoever of such estate, without
 mentioning any estate or interest, in the claim whereof such mo-
 lestation shall consist; and from this ground it follows, that these
 words in the second branch of forgery mentioned in the statute,
to the intent that any person shall claim any estate or interest for term of
years, &c. are meant only of such forgeries as relate to such an
 estate or interest *in esse* before.

3. That

3. That the forgery of a will in writing of one possessed of such an estate, mentioning a bequest thereof, is within the said second branch of the statute, as being a false writing, made to the intent that some person may claim an estate for years, notwithstanding the said branch makes no express mention of a will, as the first doth.

Dyer, 302.
pl. 43.
Hawk. P.C.
c. 70. § 19.

4. That the forgery of a lease of lands in *Ireland* is not within either of the branches of the statute.

3 Leon. 170.

5. That the forgery of a deed, containing a gift of mere personal chattels, is also no way within the statute, the words whereof to this purpose are, *If any person shall forge any obligation, or bill obligatory, or any acquittance, release, or other discharge of any debt, account, action, suit, demand, or other thing personal.*

3 Leon. 170.
Hawk. P.C.
c. 70. § 21.

6. That the forgery of a statute merchant, or of a recognizance in the nature of a statute staple, by acknowledging them in the name of another, are within the statute, as being obligations, because they must have the seal of the party, by the express words of the statute, which appoint in what manner such statute or recognizance shall be taken; but that the forgery of the statute staple is no way within the statute, because it needeth not the seal of the party, but only the seal of the staple provided for it.

15 H. 7.
15. a.
2 Roll.
Abr. 466.
Hawk. P.C.
c. 70. § 22.
3 Inst. 171.
contr.

7. That he, who is truly informed by another that a deed is forged, is in danger of the statute, if he afterwards publish the same to be true, for the words of the statute are, *If any one shall publish, &c. such false and forged deed, &c. knowing the same to be false or forged.*

3 Inst. 171.
Hawk. P.C.
c. 70. § 23.

8. That the double damages to be awarded to the party grieved by a forged release of an obligation, &c. shall be governed by the penalty, and not by the true debt appearing in the condition.

3 Inst. 172.
Hawk. P.C.
c. 70. § 24.

9. That one, who hath been convicted of publishing a forged deed, may become guilty of felony by forging another deed afterwards, as well as by publishing any such deed, notwithstanding the second offence be not of the very same nature with the first; for the words of the statute are, *If any person being convicted or condemned of any of the offences aforesaid, &c. shall after any such conviction or condemnation eschews commit any of the said offences.*

3 Inst. 171.
Hawk. P.C.
c. 70. § 25.

10. That notwithstanding it be necessary, in every prosecution upon the statute, strictly to pursue the very words of it; (for which cause it hath been resolved, that an indictment, setting forth the forgery of a writing indented, without adding that it was sealed, is insufficient;) yet there was no necessity that the translation of the words of the statute should be in proper classical *Latin*, so that it were intelligible; and upon this ground it hath been adjudged, that an indictment setting forth, that the defendant *super caput suum proprium* did forge, &c., meaning thereby to express that he did it of his own head, is sufficient.

3 Keb. 356.
367.
3 Inst. 369.
Keb. 849.
2 Keb. 129.
2 Lev. 221.
Vent. 23.
24.
Salk. 376.
Hawk. P.C.
c. 70. § 26.

11. That upon an indictment of trespass, forgery and publication of a deed, a verdict finding the defendant guilty *de transgressionibus & forgeria prædictis, prout superius in indictamento supponitur*,

2 Lev. 111.
221.
3 Keb. 353.
Hawk. P.C.
c. 70. § 27.

ture, is sufficient, because these words *de transgressionem predictam* include the whole: also, perhaps such a verdict may be sufficient for another reason, because the offence is equally within the statute, and the punishment the very same, whether the party be guilty both of the forgery and publication, or of one of them only.

12. That if the conveyance be defective, so as not to pass the thing intended to be conveyed, yet it is within the act; as where to an indictment of forgery the error assigned was of a deed enrolled, and the acknowledgment laid eleven months after the enrolment; and it being objected, that it being of a bargain and sale it could have no force, nor be any way binding to the party without the acknowledgment; the court held, that admitting the acknowledgment essential, so that the enrolment was not good, unless that appeared, (which they seemed to deny,) yet that it was within the statute; and that though there be a flaw in the conveyance forged, which counsel learned may espy and avoid, yet the party may be impeached, molested, and troubled by such deed, which makes it within the statute.

By the 2 Geo. 2. cap. 25. * reciting, that the laws already in force were not effectual for preventing the abominable crimes of forgery, it is enacted, "That if any person shall falsely make, forge, or counterfeit, or cause or procure to be falsely made, forged, or counterfeited, or willingly act or assist in the false making, forging, or counterfeiting, any deed, will, testament, bond, writing obligatory, bill of exchange, promissory note for payment of money, indorsement or assignment of any bill of exchange, or promissory note for payment of money, acquittance or receipt either for money or goods, with intention to defraud any person, knowing the same to be false, forged, or counterfeited, then every such person, being thereof lawfully convicted according to the due course of law, shall be deemed guilty of felony, without benefit of clergy."

Provided, "That no attainder for this offence shall make or work any corruption of blood, loss of dower, or disinheritance of heirs."

And by the 7 Geo. 2. c. 22. reciting the last above-mentioned statute, and that the same doth not extend to the forging of any acceptance of bills of exchange, it is enacted, "That if any person shall falsely make, alter, forge, or counterfeit, or cause or procure to be falsely made, altered, forged, or counterfeited, or willingly act or assist in the false making, altering, forging, or counterfeiting any acceptance of any bill of exchange, or the number or principal sum of any accountable receipt for any note, bill, or other security for payment of money or delivery of goods, with intention to defraud any person whatsoever, or shall utter or publish as true, any false, altered, forged, or counterfeited acceptance of any bill of exchange, or accountable receipt for any note, bill, or other security for payment of money or delivery of goods, with intention to defraud

" any

Feb. 707.
742. 803.
848. The
King v.
King,
and Pasch.
4 Geo. 2.
S. P. deter-
mined be-
tween The
King and
Croke,
2 Stra. 901.
Barnard.
K. B. 168.
441. 461.
(B).

* Made per-
petual by
9 Geo. 2.
c. 18. &
vide 31 G. 2.
c. 22. § 81.

Russell's
case.
Leach's
Cases, 8.

“ any person, knowing the same to be false, altered, forged, or counterfeited; then every such person, being thereof lawfully convicted, according to the due course of law, shall be deemed guilty of felony, and shall suffer death as a felon, without benefit of clergy *.”

[*The following forgeries are also felonies without benefit of clergy, viz.

Of testimonial of justices by soldiers or mariners, 39 Eliz. c. 17. § 3.; of authorities to transfer stock, or personating proprietors, 8 Geo. 1. c. 22., 31 Geo. 2. c. 22. § 80.; of order for payment of annuities, or personating the proprietor, 9 Geo. 1. c. 12. § 4., 9 Geo. 2. c. 34. § 8.; of new stamps, or receipts for money payable on indentures, 8 Ann. c. 9. § 41.; of the hand of the accountant-general, registrar, clerk of the report-office, or any of the cashiers of the bank, 12 Geo. 1. c. 32. § 9.; of East India bonds, id.; of South Sea common seal bonds, receipts, or warrants for dividends, 9 Ann. c. 21. § 57., 6 Geo. 1. c. 4. § 56., Geo. 1. c. 11. § 50., 12 Geo. 1. c. 32. § 9. and other subsequent acts; of Mediterranean passes, 4 Geo. 2. c. 18.; of any entry of acknowledgment of bargainor in bargain and sale in the registry of York, the second offence, 8 Geo. 2. c. 6. § 31.; of stamp for marking gold and silver, 31 Geo. 2. c. 32. § 15.; of policies of Royal Exchange and London Assurances, 6 Geo. 1. c. 18. § 13.; of debentures, 5 Geo. 1. c. 14. § 10.; of the marks on leather, 9 Ann. c. 11. § 44., 5 Geo. 1. c. 2. § 9.; on linen, 10 Ann. c. 19. § 97., 4 Geo. 3. c. 37. § 26.; of the common seal of the bank, or of bank notes, 8 & 9 W. 3. c. 20. § 36., 11 Geo. 1. c. 9. § 6., 15 Geo. 1. c. 13. § 11.; of exchequer bills, 7 & 8 W. 3. c. 31. § 78., 9 W. 3. c. 2. § 3., 5 Ann. c. 13., 3 Geo. 1. c. 8. § 40., 6 Geo. 1. c. 4. § 91., 9 Geo. 1. c. 5. § 19., 11 Geo. 1. c. 17. § 6., &c.; of lottery orders, 12 Ann. c. 2. 5 Geo. 1. c. 3., and subsequent lottery acts; of stamps, 5 W. & M. c. 21. § 11., 9 & 10 W. 3. c. 25. § 59., 9 Ann. c. 23. § 34., 10 Ann. c. 19. § 115, 163., 10 Ann. c. 26. § 72., 5 Geo. 1. c. 2. § 9., 6 Geo. 1. c. 21. § 60., 29 Geo. 2. c. 12. § 21., 29 Geo. 2. c. 13. § 5., 10 Geo. 2. c. 19. § 27., 32 Geo. 2. c. 35. § 17., 2 Geo. 3. c. 36. § 8., 5 Geo. 3. c. 35. § 6., c. 46. § 40., c. 47. § 8., 7 Geo. 3. c. 44. § 5., 16 Geo. 3. c. 34. § 15., 17 Geo. 3. c. 50. § 25., 20 Geo. 3. c. 18., 23 Geo. 3. c. 49. § 20., c. 58. § 11., 24 Geo. 3. c. 54. § 16., 25 Geo. 3. c. 50. § 19., c. 55. § 15., c. 51. § 15., c. 79. § 17., c. 48. § 10.; of seamen's tickets, wills, &c., 9 Geo. 3. c. 30. § 6.; of the hand of receiver of prebends, 32 Geo. 2. c. 14. § 9.; of acceptance of bills of exchange to defraud corporations, 18 Geo. 3. c. 18.; of warrant or order for payment of money or delivery of goods, 7 Geo. 2. c. 22.]

[A man may be guilty of forgery within several of the above statutes, though the person whose name or signature he purports to forge be not in existence. As, if a person alter his own name indorsed on a bill of exchange to the name of a person beginning with the same initial, although there is no known person in existence, answering to the name forged. So, where a person in possession of a promissory note, which had been lost, indorses it in a fictitious name in order to get it discounted. Upon the same principle, a man may be indicted for forging a *last* will and testament, although the supposed testator be alive.

Foist. 116.

If a bill of exchange payable to *A.* or order get into the hands of another person of the same name with the payee, and such person, knowing that he is not the person in whose favour it was drawn, indorse it, he is guilty of forgery.

Bolland's case.
Leach's Cases, 78.
R. v. Tuft, *Licet*
Lent Aff. 1776.
R. v. Coogan, Leach, 356.
Mead v. Young, 4 Term Rep. 28.

A forged draught on a banker is an order for the payment of money within the 7 Geo. 2. c. 11., although no person of the name forged ever kept cash there.

Lockett's case, Leach. 89.

To forge a note in imitation of a bank note, although there be no water-mark, and the word *pounds* be omitted, is a capital offence.

Elliot's case, id. 162.

An entry of the receipt of money or notes made by a cashier of the bank of *England* in the bank book of a creditor, is an accountable receipt for the payment of money within 7 Geo. 2. c. 22., and altering the principal sum by prefixing a figure to increase its numeration, is a capital forgery.

Harrison's case, id. 166.

So,

Jones and
Palmer's
case, Leach,
295.
Id. 108.
266.
Clinch's
case, *id.*
437.
Folt. 120.

So, is a forgery with intent to defraud *the stewards of the feast of the sons of the clergy.*

But a forged order for the delivery of goods, to be within 7 Geo. 2. c. 22. must be positive and compulsory. It must likewise be directed to the person who holds the goods, and it must appear upon the indictment that the person whose name is charged to be forged, had an authority to make such order as the forged order purports to be.

R. v. Jones,
Doug. 300.

Where an indictment stated that the instrument forged "purported to be a bank note," but, in fact, it was very different and distinguishable from that security; the court held that the defect could not be supplied, so as to support the indictment, by any representations of the party at the time he uttered it.]

Formedon.

Co. Lit.
326. a.
327.
Booth, 139.

FORMEDON is a real action which lies for the issue in tail after the death of his ancestor, or for him in remainder or reversion after the estate-tail determined, and is called *formedon*, because the writ comprehends the form of the gift.

The proceedings in this action, as in all other real actions, being dilatory and expensive, it is now seldom brought; but as it is a proper remedy in many cases, and still in use, we shall consider it under the following heads.

(A) Of the several Writs of Formedon : And herein,

1. Of the Formedon in Descender.
2. Of the Formedon in Remainder.
3. Of the Formedon in Reverter.

(B) Of what Things a Formedon will lie.

(C) How the Demandant must set forth his Title.

(D) Of the Tenant's Plea in Abatement or Bar.

(A) Of

(A) Of the several Writs of Formedon : And herein,

1. Of the Formedon in Descender.

Formedon in the descender is an action *ancestral droiturel*, which lies for the issue in tail, upon a violation of that right which descends to him from his ancestor, according to the form of the gift, and is in nature of a writ of right, being the (a) highest writ that an issue in tail can have.

2 Inst. 291.
Plow. 235.
F. N. B.
212. L.
Lit. § 595.
(a) And
therefore

tenant in tail shall not have a writ of right *sur disclaimer*, nor a *quo jure*, nor a *ne injuste vexes*, nor *nuper obiit*, or *rationabili parte*, nor a *mortdancestor*, nor a *sur cui in vita*; for these and the like none but tenant in fee shall have. Co. Lit. 326. b. — But tenant in tail shall have a *quod permittat*, a writ of *customs and services in le debet & solet*, but not in the *debet* only; and in like manner he shall have a *secta ad mortendum in le debet & solet*, but not in the *debet* only; also he may have a writ of entry *in consimili casu*, and an admeasurement, and a *nativo habendo*, *cessavit*, *escheat*, *waste*, and the like. Co. Lit. 326. b.

This writ lay not at common law, but was given by *Westm.* 2. cap. 1. the (b) form of which is set forth in the statute; for at common law all estates-tail were fee-simple, conditional, and the donee, by having issue, might have aliened the estate or forfeited it, in which cases the issue had no remedy; but when by this statute, called the statute *de donis conditionalibus*, the donee was deprived of this power, it was also necessary that the issue should have a remedy against the alienation or discontinuance of his ancestor, and therefore the (c) formedon in descender was given. *Tail.* (b) But though the form of the writ be set down, yet the statute need not be recited, nor any other statute which giveth the form of the writ. 2 Inst. 336. (c) That where the heir could not have an assise of *mortdancestor*, he might, according to his special case, have a formedon in descender at common law, but then he was to recover a fee-simple. Plow. 239. b. *per* Bendlow. Co. Lit. 60. b.

Co. Lit.
21. 326. b.
F. N. B.
212. L.
And. 73.
Plow. 239.
b.
6 Co. 40.
Moor. 155.
Vent. 299.
& vide
tit. Estates,

And therefore since this statute upon (d) every gift in tail of lands or tenements, if the ancestor alien the lands or tenements, or be disseised or deforced thereof and die, he who is heir unto the lands, by force of the gift, shall have his formedon in descender against him who is tenant of the lands or tenements, or (e) pignor of the profits of the same.

F. N. B.
212. L.
(d) That
the demand-
ant may
have one
formedon
upon several
gifts. 8 Co. 86. b.

Cro. Jac. 330. *per* Coke. — But if A. makes a gift of the manor of S. to B. and the heirs of his body, and afterwards by another deed gives sixty acres of land to B. and the heirs of his body, upon the death of B. without issue, A. cannot have one formedon in reverter on these distinct gifts. (e) But the writ against the pignor of the profits is given by the statute of 1 H. 7. c. 1.

So, if tenant in tail hath issue two daughters, and one of them hath issue a son, and dies, and the tenant in tail dieth, and a stranger abates, the surviving daughter and son shall have a formedon in descender.

F. N. B.
213. C.

So, if a man gives lands unto a woman, and unto the heirs which he himself shall beget on the body of the said woman, and they have issue between them two daughters, and one of them hath issue a daughter, and dies, and after the donor and donee die, the aunt and niece shall join in a formedon.

F. N. B.
213. E.

If tenant in tail hath issue two sons, and dies, and the eldest son enters and hath issue and dies, and the issue enters, and dies without

F. N. B.
213. D.

without issue, the youngest son of tenant in tail shall have his formedon in descender.

F. N. B.
214. D.
wide tit.
Coparceners. If tenant in tail hath several daughters, and after his death they enter and make partition, if one of the daughters after discontinues, and dies leaving issue, such issue may have a formedon in descender.

Fitz. N. B.
214. C. So, if two coparceners are tenants in tail by descent from their father or mother, and afterwards they make partition, and one coparcener hath issue and dies, and the other coparcener dies without issue, the issue shall have a formedon in descender for the whole land.

F. N. B.
214. B. So, if the lands in *gavelkind* be entailed, and descend to many brethren as heirs to their father, and they make partition betwixt them of the lands, and afterwards one aliens his part and dies, his heirs shall have a formedon of that which they held in parts.

Perk. § 334. If lands be given to two men, and to the heirs of the body of one of them, and he who hath the inheritance marries, and dies leaving issue, such issue may, after the death of him who hath the freehold, bring a formedon in descender against a stranger who abates, and allege the eplees in his father; for to such an intent the estate-tail was executed in the donee; but, in this case, it seems that the wife of the donee who had the inheritance in him shall not be endowed, because the estate-tail was not executed to all purposes in the husband.

Co. Lit.
297. b. If tenant in tail discontinue in fee, and die, and the discontinuee make a lease for life, and grant the reversion to the issue, he shall not have a formedon against the tenant for life, for by his formedon he must recover against an estate of inheritance, which the tenant hath not in him.

6 Co. 7. b. If in a formedon in descender the demandant is barred by verdict or on demurrer, yet his issue in tail shall have a new formedon on the construction of the statute *Westm. 2.* So, if he be barred of a writ of error by a release of errors by his ancestor, yet he shall have a new writ of error; for he does not claim altogether as heir, but *per formam doni*; and by the statute he shall not be barred by the feint or false pleading of his ancestor, (a) so long as the right of entail remains.

Co. Lit. 393. b.

2. Of the Formedon in Remainder.

Lit. § 597. This writ lies where a gift is made in tail or for life, remainder
F. N. B. in tail or in fee, and the tenant in tail or for life aliens, or is dis-
217. C. seised, and dieth without issue, he in remainder, or his representative, may bring their formedon in remainder.

2 Inst. 336. This writ, as it lies for him in remainder after an estate-tail, is
Booth, 151. grounded upon the equity of the statute *de donis*; for a formedon in remainder did not lie upon an estate-tail at common law, because it was a fee-simple conditional, whereupon no remainder could be limited, because of the danger of a perpetuity, which was always against the policy of our law.

But

But it seems that, by the better opinion, a formedon in remainder lay after an estate for life; for this was an interest well known long before the statute *de donis*; yet others doubt hereof, and think, that in this case it was given by the statute of *Westm.* 2. *cap.* 24. made in the same year, by which it is provided, *Quod quotiescunque de cetero evenerit in cancell' quod in uno casu reperit breve, in consimili casu caderite sub eodem jure & simili remedio indigente, concordent clerici in Canc. in brevi faciend.* on which words it is clearly agreed the writ of entry in *consimili casu* is grounded, which is (a) a proper writ for him in reversion or remainder after an estate for life.

mili casu, in the lifetime of the tenant for life, or his formedon after his death, or writ of entry *ad communem legem*, but enters for the forfeiture, and brings his ejection; but if the alienee of the tenant for life die seised before the entry of him in remainder or reversion, his entry in such case being taken away, this may be a proper remedy. Booth, 151-2.

F. N. B.
217 D.
218. A.
Booth, 151.
(a) that at this day, if the tenant for life aliens, he in remainder seldom or never brings either his writ of entry in *consimili casu*.

If lands be given to *A.* for life, and the reversion be afterwards granted to *B.* in tail, and after the death of *A.* a stranger abate, *B.* shall have a formedon in remainder, and not in the reverter.

F. N. B.
217. C.
Dyer, 125.

If lands be given to the father and son, and to the heirs of their two bodies begotten, remainder over in fee, and the father die leaving only one son, who afterwards dies without issue, and a stranger abate, or the estate had been discontinued, he in remainder may have one formedon, and need not bring several writs.

Dyer,
143-5.

If a remainder be once executed, that is to say, if the remainder-man be once seised of the estate-tail in possession, and the right descend to his heirs, the heir shall not have a formedon in remainder, but in the descender; as if *A.* give lands to *B.* in tail, remainder to *C.* in tail, *B.* die without issue, *C.* enter and alien in fee, and have issue *D.*, *D.* shall not have a formedon in remainder, because *C.* his father was seised, and the right descended to him, but he shall have the general writ of formedon in descender.

F. N. B.
219. A.
8 Co. 89.
Booth, 152.

3. Of the Formedon in Reverter.

This writ lies where the donee in tail or his issue die without issue, and a stranger abates, or they who were seised by force of the entail discontinue the same; in either of these cases, the donor or his heirs may have a formedon in reverter.

Lit. § 596.
F. N. B.
219. E.
Vide Dyer,
199. pl. 55.
where he in

reversion must bring his formedon, and cannot have a *scire facias* to execute a fine.

This writ lay at common law; for though at common law the estate-tail was a fee-simple conditional, so that by having issue, the donee by alienation, &c. might have barred the possibility of the donor's right of reverter, yet the having of children was in the nature of a condition precedent; and therefore if the donee never had a child, the donor might bring his formedon in reverter, and recover against any alienation or disposition of the donee.

2 Inst. 336.
Plow. 235.

(B) Of what Things a Formedon will lie.

Co. Lit. 20. **I**T seems that all such inheritances, as may be entailed, may be recovered in a formedon, and that therefore it lies not only of lands, but also of rents, (a) commons, estovers, or other (b) profits arising from lands.

vide tit.
Estates-tail,
letter (A).
(a) But it is
said, that if

one grants common of pasture to a man and the heirs of his body, and the donee dies, and the heir is deforced of the common, he shall not have a formedon in defender of the common, but a *quod permittat*, in the nature of a formedon, and shall count upon the gift and special matter. F. N. B. 212. B. (b) As if a man grants the moiety of the profits arising out of his mill unto another man, and the heirs of his body, and the donee dieth, and his heir is deforced of the profits, the heir shall have a formedon in the defender for those profits. F. N. B. 212. B.—So, if one grant to a man, and the heirs of his body, pasture for twenty oxen, or for an hundred sheep, &c., and the donee die, and his son, who is his heir, be deforced thereof, he shall have a formedon in the defender. F. N. B. 212. B.

Roll. Abr.
§ 37.
Plow. 2.

But no formedon will lie for things merely personal, which only charge the person, and neither issue out of land nor relate to it, and therefore cannot be demanded as a tenement in a *præcipe*; as if A. grants to B. and the heirs of his body, to be master of his hawks, or keeper of his hounds, with a fee or salary annexed to it, the issue of B. cannot have a formedon thereof.

Co. Lit. 60.
vide tit.
Copyhold.

If there be a custom in a manor, that copyholds may be entailed, which co-operating with the statute *de donis* is allowed to be good, the issue in tail may have a formedon of such lands.

(C) How the Demandant must set forth his Title.

Reg. 243.
§ Co. 87.
Dyer, 216.
pl. 56.

F. N. B.
212. F.
Booth, 143.
Hedl. 78.

(c) Where
in formedon
in descender,
the demand-
ant made
himself heir

THE demandant in a formedon in the descender must make himself heir to him who was last seised by force of the entail, but he (c) need not mention an ancestor who happened to be inheritable, but was never actually seised by force of the entail; as if there be grandfather, father, and son, and the father die in the life-time of the grandfather, the son may bring his formedon without alleging any right in the father. So, if the donee in tail has two sons, and the eldest dies in his life-time, the second may, after the death of his father, bring his formedon without taking notice of the eldest son.

unto every one that had been inheritable to the entail, though by the regiller he should make himself heir only unto them that were seised by the force of the entail; yet the writ was holden good, cited from the Year-book 11 H. 6. 20. Hob. 51, 52. But he must not fail to make himself heir to all that were seised. Hob. 52.

Mod. 219.
Barrow and
Haggett,
2 Mod. 54.
S. C.

So, where in a formedon in descender, the demandant set forth, that the right descended unto him as brother and heir to the donee, without alleging that the donee died without issue, it was holden good; for he could not be heir to his brother unless the brother had died without issue.

Dyer, 216.
pl. 56.
Booth, 155.
Dyer, 14.

In formedon in reverter, the demandant need not in his writ or count allege, that all the issue inheritable are dead; but it is sufficient for him to say, that the donee is dead without issue; and that

that after his death it ought to revert to him, for he is (a) a stranger to the pedigree, and therefore not obliged to make it out. none of the ancestors of the donor, that were seised of the reversion descended, are to be omitted in the pedigree. Booth, 155.

pl. 75. 19.
pl. 90.
(a) But in
this writ,

So, in a formedon in remainder, the demandant need not allege, that all the parties are dead, for he is equally a stranger, as in the precedent case; and it is sufficient for him to shew, that he who last inherited by force of the entail is dead without issue. Booth, 155.
3 Lev. 218.
Leon. 286.
Brownl. 155.

So, in a formedon in remainder upon an estate-tail limited to P. and K. the remainder to F. in fee, & *qui post mortem P. and K. to T. son and heir of F.* ought to remain; the writ was adjudged good without laying expressly the death of F. though it was urged that the form of the Register was so, because the laying of T. to be heir of F. doth import as much. Hob. 51.

But in a formedon in remainder, it is not sufficient for the demandant to allege, that the issue in tail is dead without issue, without saying that the tenant in tail is also dead without issue, for he in remainder can have no title unless the estate-tail be spent; and it is not implied that because the issue is dead without issue, that therefore the tenant in tail is, for he may have other sons besides his eldest. 5 Mod. 17.
per Holt,
C. J.

Also, if there be tenant in tail who hath three sons, and the second levy a fine in the life-time of his father, and the lands descend to the eldest, in whose life-time the second son dies, although the youngest son may, on the death of the eldest, bring his formedon in descender, and lay down the entail, and then bring it to his eldest brother that was last seised; and make himself immediate heir unto him without mention of the second brother; yet if the second son survive the elder, the tenant in the formedon may plead the fine of the middle brother, and that he or his issue did survive, &c. and this will be a good bar. Hob. 333.

In a formedon in descender by husband and wife, in right of the wife, the descent must be made in the writ to the wife alone, for the descent followeth the blood, and to that the husband is a stranger. Hob. 1.
Brownl.
154. S. C.

In a formedon in remainder, the demandant ought to shew the deed of gift, if *oyer* be required thereof; but he need not mention it in his count, but the tenant is to demand *oyer* thereof. F. N. B.
219. C.
Booth, 153.

(D) Of the Tenant's Plea in Abatement or Bar.

THERE are several pleas both in bar and abatement, which the tenant may plead to this action; such as (b) non-tenure, which is a plea in abatement, and by which the tenant shews that he is not tenant of the freehold, or of some part thereof, at the time of the writ brought, or at any time since; which is called pleading non-tenure generally. Booth, 23.
(b) This
plea is
founded on
that rule
laid down
by Bracton,
l. 5. c. 27.

Amittere non potest quod non habet, & ita cadit breve.

Booth, 29. Special non-tenure is where the tenant shews what interest and estate he hath in the land demanded, as that he is tenant for years, in ward, by statute merchant, elegit, or the like; and therefore the plea of special non-tenure must always shew who is tenant.

Brownl. 153. In a formedon in descender against three, who plead non-tenure, and issue thereupon joined, it was found specially that two of them were lessees for life, the remainder to the third person; and whether the three were tenants, as the writ supposed, was the question; and it seems by the book, that they were, for they should have pleaded several tenancy, and then the demandant might maintain his writ..

Booth, 29. At common law, non-tenure of parcel of an entire thing, as a manor, &c. abated the whole writ; but now by the 25 E. 3. cap. 16. it is enacted, "That by the exception of non-tenure of " parcel, no writ shall be abated, but only for that parcel where- " of the non-tenure was alleged."

Mod. 181. If the tenant pleads non-tenure of the whole, he need not shew who is tenant; but in a plea of non-tenure of parcel he must shew who is tenant, and this even before the statute; for the common law would not suffer a writ good in part, to be wholly destroyed, except the tenant shewed the demandant how he might have a better.

3 Lev. 55. The tenant cannot, after a general imparlance, plead non-tenure of part, though he may plead non-tenure of the whole.

3 Lev. 330. In a Formedon in reverter it hath been adjudged, that if the tenant pleads non-tenure generally, the demandant may maintain his writ that he is tenant, though he can recover no damages; and that *Littleton* and *Coke* were not to be intended of simple plea of non-tenure, but of non-tenure with a disclaimer, as the pleadings were usually in *Littleton's* time; for upon the simple plea of non-tenure, supposing the tenant hath no freehold, but a reversion in fee, the demandant shall not be restored to the fee, for nothing is disowned by the simple plea of non-tenure but only the freehold; which may be true, and yet he may have the reversion in fee; but when the tenant disclaims, or pleads non-tenure and disclaims, the demandant shall be restored to the whole, because he hath disclaimed the whole.

2 Inst. 297. A feoffment and lineal warranty, with assents, by descent; may Booth, 163. be pleaded in bar to a formedon in the descender. So, a collateral writ tit. warranty, without assents, before the statute 4 & 5 Ann. c. 16. §. 21. might be pleaded in bar to such a formedon.

Booth, 164. So, a common recovery may be pleaded in bar to a formedon vide tit. in remainder or reverter, either with double or single voucher; Fires and Recoveries. with single, if the tenant to the writ were seised of the estate-tail at the time of the recovery; with double voucher, if he were not seised.

Booth, 165. In a formedon the tenant may plead in bar an exchange between the ancestor of the demandant and him under whom the tenant claims, and that the demandant entered into the lands given

given in exchange, and takes the profits; and an alienee may plead this plea, though he be a stranger, for he is privy in estate.

Non dedit, i. e. no such entail, is a good plea in bar of all formedons, and it may be pleaded by the vouchee.

Co. Ent.
32. b.
Booth, 163.
Booth, 164.

To a formedon in remainder may be pleaded in bar an estate-tail, made by another long before the donor in the count had any thing, and that the tenants are heirs to the first entail.

A remitter may be pleaded in bar, as thus; that the donee was seised in fee, and being an infant made a feoffment to the donor, who gave the land to the infant in tail, by which he was remitted, whose estate the tenant hath.

Booth, 164.

If in a formedon in remainder the tenant pleads infancy, and that the remainder descended to him, and prays his age; and the demandant pleads that the remainder did not descend to him, and thereupon issue is joined, and found for the demandant, a final judgment shall be given notwithstanding the infancy of the tenant.

Lev. 163.
Amcot v.
Sid. 113.
252. S. C.
But for this
vide tit.

Infancy and Age.

The tenant may plead, that the demandant, at the day of the purchase of the writ, was (a) seised of the lands for which the formedon was brought; but in such plea he must shew of what estate.

Winch. 23.
Dyer, 137. b.
pl. 26.
(a) That if
the demand-
ant enters

into any part of the land after the writ purchased, this falsifies his writ; and therefore the writ shall abate for the whole. Lutw. 29. — That if the tenant pleads entry into part pending the writ, he ought to say that he entered and expelled the other. Winch. 23.

It is holden as a rule, that nothing can be pleaded in abatement to this action after a view, but what arises upon the view.

3 Lev. 219.

Fraud.

Co. Lit. 3. b. **F**RAUD (a) covin, collusion, and deceit, are often used as
 (a) My Lord synonymous words, and in whatever shape or form they ap-
 Coke defines covin to be pear, are always deemed odious in the eye of the law.
 a secret assent, determined in the hearts of two or more, to the defrauding and prejudice of another. Co.
 Lit. 357.

But for the better understanding hereof we shall consider,

- (A) What Acts are condemned in the Common Law Courts as fraudulent, though not within the express Provision of any Act of Parliament.
 - (B) What Acts are deemed fraudulent in the Courts of Equity.
 - (C) Of fraudulent Conveyances to defeat Creditors and Purchasers within the 13 & 27 *Eliz.*
 - (D) In what Court Fraud is cognisable.
 - (E) Where a Wrong-doer is farther punishable than by making void the fraudulent Act.
-

- (A) What Acts are condemned in the Common Law Courts as fraudulent, though not within the express Provision of any Act of Parliament.

Co. Lit. **H**ERE it may be laid down as a general rule, that without the
 3. b. Dyer, express provision of any (b) act of parliament, all deceitful
 295. Hawk. practices in defrauding or endeavouring to defraud another of his
 P. C. c. 71. known right, by means of some artful device, contrary to the
 (b) As to plain rules of common honesty, are condemned by the common
 the most re- law, and punishable according to the heinousness of the offence.
 markable statutes
 against fraud and imposition, vide the statute of *Merton*, or 20 H. 3. c. 5. against the lord's enfeoffing his
 son and heir apparent to defeat the king of his wardship; and the statute 4 H. 7. c. 17. to the same
 purpose, the statute of *Gloucester*, or 6 E. 1. c. 11. for securing the interest of termors against recoveries
 by fraud; but more particularly the 21 H. 8. c. 15. which enables termors to falsify recoveries against
 their lessors. *Westm.* 2. or 13 E. 1. c. 4. for securing the wife's dower against a fraudulent recovery
 suffered by the husband. 9 R. 2. c. 3. 13 R. 2. c. 12. 32 H. 8. c. 38. for securing the interest of
 reversioners

reversioners against recoveries suffered by fraud by particular tenants, such as tenant for life, dower, curtesy, and after possibility of issue extinct. 5 E. 3. c. 6. and 2 R. 2. c. 3. for securing creditors against such as take sanctuary. 1 R. 2. c. 9. against fraudulent feoffments to persons unknown. 3 H. 7. c. 2. which makes deeds of gift of goods or chattels, in trust for the maker, void. 33 H. 8. c. 1. & 30 Geo. 2. c. 24. against obtaining money or goods by false tokens. The 13 Eliz. c. 5. 27 Eliz. c. 4. which are inserted under this head. 29 Car. 2. c. 3. emphatically called the statute of frauds. 3 & 4 W. 3. c. 14. against fraudulent devises. 4 & 5 W. 3. c. 16. against fraudulent mortgages; and 10 Ann. c. 23. against fraudulent conveyances to multiply votes at elections of knights of the shire; and the statutes against frauds by persons becoming bankrupts, for which *vide tit. Bankrupt.*

Such as (a) causing an illiterate person to execute a deed to his prejudice, by reading it over to him in words different from those in which it was written. Sid. 312. [And this though it be read to him

by a stranger to the party to whom the deed is made. 2 Co. 9.] (a) So, if one persuades a woman to execute writings to another as her trustee, upon an intended marriage, which in truth contained no such thing, but only a warrant of attorney to confess a judgment, &c. Sid. 431. — So, if he suppresses a will. Noy 103. — Or levies a fine in another's name. Noy 99. Moor 630. Cro. Eliz. 531. Mod. 46. 2 Jon. 64. — If he sues out execution upon a judgment obtained by another person. Noy 99. — Or if he acknowledges an action in the name of another, without his privity and against his will. Noy 99. — In which cases the record may be vacated, and also the wrong-doer punished by information or indictment, and obliged to answer in damages, to the party injured, by an action on the case. Salk. 379. pl. 25. Hawk. P. C. 187-8. 2 Ld. Raym. 1013. 6 Mod. 42. 61. 104. 301. 311. 7 Mod. 40. Salk. 286. pl. 20.

Also it is a rule, that a wrongful (b) manner of executing a thing shall avoid a matter that might have been executed lawfully. Co. Lit. 35. (b) Where a person by adding a seal to a note, which was sufficient without a seal, lost his security. 2 Vern. 162,

As if a man that has a right of action to certain lands, by covin causes another to oust the tenant of the land to the intent to recover it from him; and he recovers accordingly against him by action tried, yet he shall not be remitted to his ancient right, but is in of the estate of him who was the ouster. 41 Aff. 28. 44 Aff. 29. Roll. Abr. 420. 549. Co. Lit. 357. Poph. 64. 100.

So, if one man disseises another of land, to which a woman hath title of dower by covin, and with consent of the woman, to the intent to endow her, and he endows her in the (c) country accordingly, yet this is of no effect against the disseisee, but he may oust him because of the covin. 44 Aff. 29. Roll. Abr. 549. (c) The same law, though the endowment

was upon a recovery against him in a writ of dower, because of the covin. 44 Aff. 29. Rol. Abr. 549. — And although the assignment was indifferently made by the sheriff of an equal third part, yet shall the disseisee avoid it. Co. Lit. 357. b. 3 Co. 78. 5 Co. 31. a. 6 Co. 58. a. 8 Co. 132. b.

If goods are sold in a market-overt, by covin, between two, on purpose to bar him that has a right, this shall not bar him thereof. 2 Inst. 713. Cro. Eliz. 86.

As to frauds in contracts and dealings, the common law subjects the wrong-doer in several instances, to an action on the case; as if a person having the possession of goods sells them to another, (d) affirming them to be his own, when in truth they are another's, an action on the case lies. Roll. Abr. 90. Cro. Jac. 474. But for this *vide tit. Actions on the Case,*

letter (E). (d) That the having the goods in his possession is a warranty in law, that they belong to him. Salk. 210. pl. 2. Ld. Raym. 593.

But if A. possessed of a term for years, offers to sell it to B. and says, that a stranger would have given him twenty pounds for this term, by which means B. buys it, though in truth A. was never

S. P. And never offered twenty pounds, no action on the case lies, though that in these cases it was the plaintiff's folly to believe him. *B.* is hereby deceived in the value.

Salk. 211. But if on a treaty for the purchase of a house, the defendant pl. 3. affirms the rent to be thirty pounds *per ann.* whereas in truth it is Risney and but twenty pounds, and thereby the plaintiff is induced to give so Seiby,* much more than the house is worth, an action on the case lies; Lev. 102. for the value of the rent is matter that lies in the private know- Sid. 146. ledge of the landlord and tenant, and if they affirm the rent to Keb. 510. be more than it is, the purchaser is cheated, and ought to have a 518. 522. remedy for it. S. P. ad- judged.

11 H. 6. 18. If a vintner sells (*a*) wine, which he warrants to be found and F. N. B. 96. not corrupted, or if a person sells any (*b*) commodity which he Dyer, 75. warrants to be good, if it proves otherwise, an action on the case *in margine.* lies against him. (*a*) That if the servant

of a taverner sells wine to another which is corrupted, an action upon the case lies against the master though he did not command the servant to sell it to any particular person. 9 H. 6. 53. Rol. Abr. 95. But if a servant sells an unbound horse, or other merchandize, in a fair, no action lies against the master, unless he commanded him to sell to a particular person. 9 H. 6. 53. Rol. Abr. 95. Poph. 143. Bridgm. 128. — But it seems, that in these cases no action lies against the servant. Rol. Abr. 95. — So, if an attorney, in an action of debt, knows of and was a witness to a release of the debt, made before the act on brought for it, yet no action lies against the attorney, for he acted only as a servant, and in the way of his calling. Mod. 209. [See *Barker v. Braham*, 2 Bl. Rep. 369.] (*b*) So, an action on the case lies against a goldsmith for mingling dross with his plate. Cro. Jac. 471. 2 Rol. Rep. 28. — So, against a jeweller for selling counterfeit jewels. 2 Rol. Rep. 5. 26, 27. Poph. 123. Cro. Jac. 469. S. C. — So, for selling silk of such a nature, whereas it was of a different kind. Salk. 289. pl. 27. — So, on a promise to deliver ten pots of good and merchandizable pot ashes, and delivering pot ashes mixed with dirt. Vent. 365.

Sid. 298. If *A.* is employed by *B.* to sail from *England* to the *Indies*, and Huffly and *A.* covenants that he or his servants will not thence import any Pacy, callicoos, &c. and *A.* retains *C.* as his servant in this voyage, and 2 Keb. 88. acquaints him with the covenants; and notwithstanding *C.* falsely S. C. and fraudulently brings thence certain callicoos, &c. *A.* shall have an action against *C.*, for though no action lies by a master for a bare breach of his command, yet if a servant does any thing S. C. ad- falsely and fraudulently to the damage of his master, an action judged, though ob- will lie. jected it was not laid to be done *ex intentione* to damnify the plaintiff; for let *C.* intend *quicquid velit*, *A.* was damnified thereby. Rol. Abr. 105. Like point.

Rol. Abr. If *A.* is excommunicated, and the letters of excommunication 100. Har- are brought to the parson of the parish to be read and published 113's case, in the church against *A.*, and the parson having malice to *B.* inserts Cro. Eliz. his name instead of the name of *A.* and pronounces him excom- 838. S. C. municated, an action on the case lies.

Rol. Abr. If a man chafes the cattle of another into the lands of *J. S.* 100, 101. whereby he is subject to the action of *J. S.* an (*c*) action on the Cro. Car. case lies against him. 320. S. C.

(*c*) So, if one person affirms that another's sheep are strays, by which they are seized upon by the bailiff of the manor, an action on the case lies. Allen 3. Rol. Abr. 101.

Carth. 3, 4. If *A.* hath judgment against *B.*, and *J. S.* with an intent to Staith and defeat him of the benefit of it, persuades *B.* to acknowledge a judgment to a stranger, to whom in truth he owed nothing, and adjudged in thereupon *L. R.* and

thereupon his goods are taken in execution, &c. *A.* may bring an action on the case against *J. S.* on this fraud and combination.

affirmed in the House of Lords. Roll. Abr. 549.

If land be aliened pending a writ of debt, by covin, to avoid the extent thereof for the debt; yet when the covin appears upon the return of the *elegit* by the sheriff, the land so aliened shall be extended.

If a man makes a feoffment to the use of his son, an infant, and not in consideration of marriage, &c. and ten days afterwards commits treason, of which he is attainted, this land shall be forfeited; for the feoffment was fraudulent against the king.

2 Roll. Abr. 34.

But if the feoffment had been made in pursuance of an agreement entered into before, by which it was agreed, in consideration of his wife's settling her lands in such manner, that he would also settle his lands on his son; this, it seems, is not fraudulent, but good against the king.

2 Roll. Abr. 34.

A. being in *Newgate* for a robbery makes a bill of sale of all his goods, to the intent to make a provision for his son, and is afterwards convicted and executed; and in an action of trover brought by the son against the sheriff of *London*, it was holden by *Holt*, Ch. Just. that the bill of sale was fraudulent; for though a sale *bonâ fide*, and for valuable consideration, had been good, because the party had a property in the goods till conviction, and ought to be reasonably sustained out of them, yet this (a) conveyance is fraudulent at common law, for it cannot be intended to any other purpose than to prevent a forfeiture, and defraud the king.

Skin. 357. pl. 4. Jones and Ashart. (a) That if a man alien his lands fraudulently, with an intent to prevent a forfeiture, and afterwards com-

mits felony, the land shall be forfeited. Rol. Abr. 34.

A man takes a wife, and afterwards marries another, his first wife living, and by deed gives part of his goods to his pretended second wife; it seems this is a fraudulent gift within 13 *Eliz. c. 5.* and by the common law too, in respect of creditors, because made without any valuable consideration; for the second pretended marriage is so far from coming under the notion of a consideration, that it is a crime punishable by law.

2 Leon. 223.

A man has a judgment for a just debt against *A.* and takes out a *fieri facias*, and gets the sheriff to seize the goods, but would not let him proceed further, but suffered the goods to remain in the custody of *A.* the debtor: *B.* who has also a judgment against *A.* for a just debt, takes out a *fieri facias*; and the question was, whether he could seize upon the same goods; and it was holden *per Cur.* that he might, for the former was a fraudulent execution, and the sheriff might very well return *nulla bona* upon it.

7 Mod. 37. Rice and Seijeant.

If there is judgment in debt against *J. S.* and he suffers himself to be (b) outlawed for felony with an intent to defraud his creditors, and afterwards he purchases his pardon and hath restitution, the creditor may well take out execution for this apparent fraud.

Dyer, 245. b. in margin. (b) Where a prisoner in the Fleet, at the suit

of divers creditors, procured himself to be accused of felony, and to be removed to the King's Bench, with an intent to plead guilty, and after the allowance of clergy, to get quit; the king being informed of this practice, by his privy seal directed the justices not to proceed on his arraignment, without farther directions from him. Dyer 247.

A man

39 H. 6. 50.
b. Roll.
Abr. 549.
Cro. Car.
128.

A man came by *habeas corpus* out of London, and had no cause to have the privilege of the Common Pleas, but by his covin: it was ordered, that he should be in execution till he had paid the debt recovered against him after the writ brought, and that after he should be remanded to answer the plaintiffs there.

2 Inst. 108.
H.P.C. 63.
Kelynge,
43.
Sid. 254.
Raym. 267.

Hence it appears, that the making use of the process of the law is not only a fraud, but an aggravation of the offence; as if a person intending to steal a horse takes out a replevin, and thereby has the horse delivered to him by the sheriff; or if one intending to rifle goods, gets possession from the sheriff, by virtue of a judgment obtained, without any the least colour of title, upon false affidavits, &c.

H.P.C. 48.
Hawk. P.C.
c. 31. § 24.

If *A.* on a quarrel with *B.* tells him, that he will not strike him, but that he will give *B.* a pot of ale to strike him, and thereupon *B.* strikes, and *A.* kills him, he is guilty of murder, for he shall not elude the justice of the law by such a pretence to cover his malice.

Hawk. P.C.
c. 31. § 25.

So, if *B.* challenge *A.* and *A.* refuse to meet him; but, in order to evade the law, tells *B.* that he shall go the next day to such a town about his business, and accordingly *B.* meets him the next day on the road to the same town, and assaults him, whereupon they fight, and *A.* kills *B.*, he seems guilty of murder, unless it appear by the whole circumstances, that he gave *B.* such information accidentally, and not with a design to give him an opportunity of fighting.

Kelynge,
24. 81.
Show. 50,
51. This
at common
law was
not clearly
felony, for
3 & 4 W. & M. c. 9. was passed to make it so.

If a person takes a lodging in a house, under the colour thereof to have the opportunity of rifling it, and to elude the justice of the law, by endeavouring to keep out of the letter of it, by gaining a possession of the goods with the consent of the owner, he seems to be as guilty of felony as any other felon, in as much as his whole intention was to defraud the law.

(B) What Acts are deemed fraudulent in the Courts of Equity.

4 Inst. 84.
See of the
jurisdiction
of the court
of Chancery,
tit.
Courts.

IT is clearly agreed, that all covins, frauds, and deceits, for which there is no remedy by the ordinary course of law, are properly cognizable in equity; and it is admitted, that matters of fraud were one of the chief branches to which the jurisdiction of Chancery was originally confined.

{ Where a court of equity absolutely sets aside a deed for fraud, and the estate in question passed by that deed only, it will not direct a reconveyance. *Secus*, where the estate has been conveyed to a third person as an instrument not privy to the fraud; or if the deed is set aside upon paying so much money, for there, till payment, the estate remains. *Bates v. Graves.* 2 Vez. jun. 294. In *Chesterfield v. Janssen*, 2 Vez. 155. Lord Hardwicke enumerates four species of fraud: 1st, Fraud arising from facts and circumstances of imposition, which is the plainest case: 2^{dly}, Fraud may be apparent from the intrinsic value and subject of the bargain itself, such as no man in his senses, and not under delusion, would make on the one hand, and as no honest or fair man would accept on the other; which are inequitable and unconscionable bargains, and of such even the common law has taken notice: a third is that which may be presumed from the circumstances and condition of the parties contracting; and this goes farther than the rule of law, which is, that fraud must be proved, not presumed: but it is wisely established in a

court

court of equity, to prevent taking any surreptitious advantage of the weakness or necessity of another, which knowingly to do, is equally against conscience, as to take advantage of his ignorance: a fourth kind of fraud may be collected or enforced, in the consideration of a court of equity, from the nature and circumstances of the transaction, as being an imposition and deceit on other persons not parties to the fraudulent agreement.]

But as every case on this head depends so much upon its own circumstances, it will be difficult to range them in any other order than by inserting the most remarkable cases where the parties have been relieved against fraud and imposition.

As where *A.* being tenant in tail, remainder to his brother *B.* in tail, *A.* not knowing of the entail, makes a settlement on his wife for life for her jointure, without levying a fine, or suffering a recovery, which *B.* who knew of the entail engrosses, but does not mention any thing of the entail, because, as he confessed in his answer, if he had spoken any thing of it, his brother, by a recovery, might have cut off the remainder, and barred him; although after the death of *A.*, *B.* recovered in ejectment against the widow by force of the entail; yet she was relieved in Chancery, and a perpetual injunction granted for this fraud in *B.* in concealing the entail; for if it had been disclosed, the settlement might have been made good by a recovery.

Preced.
Chan. 35.
Raw v.
Potts,
2 Vern. 239.
S. C. and
affirmed in
the House
of Lords.

So, where a mother being absolute owner of a term, the same being limited to her in tail, is present at a treaty for her son's marriage, and hears her son declare, that the term was to come to him at his mother's death, and is a witness to the deed, whereby the reversion of the term is settled on the issue of this marriage after the mother's death, she was compelled in equity to make good the settlement.

2 Vern. 150.
Hundfen
and Cheney.

If *A.* by a marriage-settlement be tenant for life of certain mills, remainder to his first son in tail, and the son, who knows of the settlement, encourages a person to take a lease for thirty years of those mills, and to lay out considerable sums of money in new building and improving them, in order to reap the advantage thereof after his father's death; this is such a fraud and practice as ought to be discountenanced in equity, and therefore it was decreed in this case, that the lessee should enjoy for the residue of the term that remained unexpired after the father's death.

Abr. Eq.
357. Han-
ning and
Feiters.

So, where a younger brother, having an annuity of 100 *l.* *per annum* charged on lands by his father's will, agrees with *J. S.* to sell it to him, which *J. S.* is encouraged to purchase by the elder brother, who told him, that though he had heard that there was a settlement which had entailed those lands out of which it issued, that yet he had constantly paid this annuity, as also 3000 *l.* charged by the same will to his sisters; and the elder brother afterwards got the settlement into his hands, and endeavoured thereby to avoid payment of this annuity; it was decreed in favour of the purchaser, that the annuity should still be paid purely on the encouragement given by the elder brother.

Vern. 136.
Hobbs and
Norton.

So, where lands in mortgage running through three descents, and the person entitled to redeem, not knowing how much was due

Preced.
Chan. 131.
Barret and
Wells.

due for the interest, is informed by the heir of the mortgagee, that it was considerably less than really it was; whereupon he settles it upon his marriage, as subject only to so much; it was decreed, that those who derive under this settlement should redeem accordingly, without being obliged to pay the sum concealed, for the fraud.

Broderick
v. Brode-
rick, Vin.
Abr. tit.
Circumven-
tion, p. 3.
1 P. Wms.
239.

In this case it was decreed, that the defendant do account for the rents and profits of the freehold leases to the plaintiff, the plaintiff to have all just allowances for debts and legacies paid by him, and to account for 150 guineas to the defendant, with interest, &c. As to the purchase

[*Francis Broderick*, being seised of a considerable estate in fee, made his will, and devised it to *Thomas Broderick*, the defendant; *Francis* himself executed the will, but it was not attested in his presence by three witnesses. *Francis* died, and the defendant *Thomas*, finding that the will was void, for 100 guineas paid by him to the plaintiff *George Broderick*, who was *Francis's* heir at law, procured from the plaintiff a release, which recited that *Francis*, by his last will duly executed, had devised his estate to the defendant *Thomas*; and the defendant *Thomas* thinking himself not safe with the release only, for 50 guineas more prevailed with the plaintiff to convey the lands by lease and release to one *Day*, who was trustee to the defendant *Thomas*, to whom *Day* afterwards conveyed. Afterwards, the defendant *Thomas*, upon a valuable consideration, conveyed part to one *Parker*, who had not any other notice of the invalidity of the will, save that he heard it mentioned in common discourse. The plaintiff brought his bill against *Thomas Broderick*, *Day*, and *Parker*, to have the release, lease and release, delivered up as fraudulently obtained; and it not appearing that he knew at the time of his making the release, &c. that the will was bad, Lord *Harcourt* decreed that they should be delivered up; and it not appearing that *Parker* was privy to the fraud, though he had heard of the invalidity of the will as above, it was decreed that he, upon receiving his purchase-money with interest, should convey to the plaintiff, and should account for the rents and profits which he had received, and be allowed what he had laid out in repairs or otherwise.

bona fide of part of the freehold lands, he shall reconvey to the plaintiff, upon payment of the purchase money with interest at 5*l.* per cent., because he had notice of the invalidity of the devise by common report, though not actual notice from the plaintiff or defendant; and though he was not a fraudulent purchaser, yet he was a rash one, and ought to have inquired into the validity of the will, or gotten the heir at law to join in the conveyance to him. *Ex relatione alterius*. Vin. Abr. *ubi sup.*

Jevers v.
Jevers, 4 Br.
P. C. 199.
2 Eq. Caf.
Abr. 54.
pl. 13.
See too
Scrope v.
Osley,
4 Br. P. C.
237. S. P.

The father had, on his marriage, articleed to settle his whole estate upon that marriage; but neglecting so to do, when the eldest son attained his full age, he, without giving the son notice of the articles, and by threats and promises, prevailed with him to join in making a settlement on the younger children, and thereby to give the father a power of making a jointure upon another wife: the father afterwards gave a bond to make such jointure, and married. This bond was set aside as against the heirs, and the first articles were established, and the wife was put to seek satisfaction of her bond out of the personal estate.

Mead v.
Webb,
4 Br. P. C.
497.

Where on a treaty for a lease, it appeared that the agents of the lessor had in his presence represented the quantity of land proposed to be demised to be much more than it actually was; and that

that the lessor, knowing that this was a misrepresentation, had assented to it, because he did not think it prudent to disclose the truth; the contract was set aside as fraudulent.

An estate was settled after marriage upon trust, *inter al.* to raise portions for the daughters of the marriage upon failure of issue male, to whom the estate was limited in tail: one of the daughters gives a general release to her brother, but neither party at the time of such release being given had any knowledge of the settlement. The release, therefore, though general, was holden not to extend to the settlement, and the trusts of it were decreed to be performed.]

Ramsden
v. Hylton,
2 Vez. 304.

If *A.* has a prior incumbrance on an estate, and is a witness to a subsequent mortgage, but does not disclose his own incumbrance; this is such a fraud in him, for which his incumbrance shall be postponed (*a*).

2 Vern. 151.
Clare and
the Earl of
Bedford,
cited to have
been de-

creed. [(*a*) In the case of *Mocatta v. Murgatroyd*, 1 P. Wms. 364., Lord Cowper is reported to have decreed that the first mortgagee shall in such case be postponed, though there be no actual proof of his knowing the contents of the deed he attested. But Mr. Cox, the editor of that book, has not been able to find this decree in the registrar's book. And Lord Thurlow said, in the case of *Becket v. Cordley*, that he thought this case of *Mocatta v. Murgatroyd* went too far in imputing notice to the first mortgagee from the mere circumstance of his being a witness to the second mortgage, since it is in common practice for persons to attest the execution of deeds without being made acquainted with their contents.]

So, where a counsel having a statute from *A.* advises *B.* to lend *A.* 1000*l.* on a mortgage, and draws the mortgage, with a covenant against all incumbrances, and conceals his own statute; it was holden, that the statute should be postponed to the mortgage.

2 Vern. 370.
Draper v.
Borlace.

So, if *A.* being about to lend money to *B.* on a mortgage, sends *C.* to inquire of *D.* who had a prior mortgage, whether he had any incumbrance on *B.*'s estate, if it be proved that *C.* went to him accordingly, and that *D.* denied that he had any, *D.*'s mortgage shall be postponed.

2 Vern. 554.
Ibbotson v.
Rhodes.

So, if *A.* having a mortgage on a leasehold estate, lends the mortgage deed to the mortgagor, with an intention to borrow more money; this is such a fraud in the mortgagee, for which his mortgage shall be postponed to the subsequent incumbrance.

2 Vern. 726.
Peter and
Ruffel, Abr.
Eq. 321.
S. C.

The plaintiff's wife, before her intermarriage with the plaintiff, being possessed of a term for years, as executrix to her first husband, which was liable, as assets, to the payment of his debts, in order thereto, and to raise money for that purpose, the plaintiffs after their marriage entered into an agreement with the defendant for sale of the house in question, for the residue of the term, for 450*l.* whereof 210*l.* was to be applied in discharge of a mortgage thereon to one *J. S.*, and the remaining 240*l.* was to be paid to the plaintiffs; accordingly the plaintiffs executed an assignment of the house to the defendant, with a receipt indorsed thereon for the whole purchase-money, but the defendant did not then pay the purchase-money, but gave a note for the payment of 210*l.*, part thereof, to *J. S.* the mortgagee, and of the remaining 240*l.* to the plaintiffs; and for the non-payment thereof the plain-

Abr. Eq.
357. Beat-
niff and
Smith.

tiffs

tiffs brought their bill to have a specifick performance and payment of the money accordingly; the defendant, by his answer, admitted the whole case to be as above set forth; but insisted, that he ought not to be bound thereby, for that the plaintiffs could not make him a good title, they having by articles before marriage agreed to settle this house for the benefit of themselves and their issue, of which he had no notice at the time of his purchase; and for a discovery of these articles, and to have up his note on a re-assignment of the house, the defendant brought his cross-bill. The plaintiffs by their answer admitted there were such articles, but insisted, that the house lying in *Middlesex*, those articles were never registered in the *Middlesex* office, and therefore void as against the plaintiff; but on a hearing at the *Rolls*, the Master of the *Rolls* decreed the original bill to stand dismissed with costs; and on the cross-bill decreed the note given for the purchase-money to be delivered up on a re-assignment of the house, and the plaintiff in that cause likewise to have his costs, by reason of the plaintiff's fraud in concealing the articles; which decree was affirmed by my Lord Chancellor.

Abr. Eq.
358. Blades
and Blades.

So, in a case between two purchasers of lands in *Yorkshire*, where the second purchaser having notice of the first purchase, but that it was not registered, went on and purchased the same estate, and got his purchase registered; it was decreed, that having notice of the first purchase, though it was not registered, bound him, and that his getting his own purchase first registered was a fraud, the design of those acts being only to give the parties notice, who might otherwise without such registry be in danger of being imposed upon by a prior purchase or mortgage, which they are in no danger of when they have notice thereof in any manner, though not by the registry.

Preced.
Chan. 3.
Devenish
and Baines.

If a copyholder, by his will, intending to give the greatest part of his estate to his godson, and the other part to his wife, is persuaded by the wife to nominate her to the whole, on a promise that she would give the godson the part designed for him; it will be decreed against the wife on the point of fraud, though there was no *memorandum* thereof in writing pursuant to the statute of frauds and perjuries.

Abr. Eq. 20.
Halfpenny
and Mallet,
2 Vern. 373.
S. C.

So, where the defendant, on a treaty of marriage for his daughter with the plaintiff, signed a writing comprising the terms of the agreement, and afterwards designing to elude the force thereof, and get loose from his agreement, ordered his daughter to put on a good humour, and get the plaintiff to deliver up that writing, and then marry him, which she accordingly did, and the defendant stood by, at a corner of a street, to see them go by to be married; the plaintiff was relieved on the point of fraud.

Sellack v.
Harris,
5 Vin. Abr.
tit. *Contracts*,
&c. (H),
P. 31.

[A father purchased lands to him and his heirs, and when he was on his death-bed sent for his eldest son, and told him that these lands were bought with his second son's money, whereupon the eldest son promised that his brother should enjoy them accordingly. The father dies. The Lord Keeper *Wright* and the

Master

Master of the Rolls held, that the eldest son was entitled to these lands, because by the statute of frauds, there ought to have been a declaration of the use or trust in writing. But Lord *Cowper* was of another opinion, because of the fraud here manifest, in that the eldest son promised the father on his death-bed, that the other should enjoy the lands, so that he took this to be a case out of the statute.

So, where a parol building-lease was made of ground, and when the lessor was dying, he declared, he thought he ought to make a lease in writing; but the heir told him, he should not discompose himself, for that he would supply it; whereby, and by other fraudulent means, the lessee was hindered from seeing the lessor, and having the lease executed accordingly; the Lords held this to be out of the statute, and made it good to the lessee.

Leister v. Foxcroft, cited in *Gilb. Eq. Rep.* 11.

So, if a man has made his will, and his son executor, and when he is dying, says, that he has a mind to have his wife executrix, and the son says, "don't trouble yourself to alter it, for I will let her have the surplus, and act as executor;" a court of equity will decree accordingly.]

Gilb. Eq. Rep. ibid.

There are likewise several other instances, where a parol agreement intended to be reduced into writing, but prevented by fraud, has been decreed in equity, notwithstanding the statute of frauds and perjuries; as where, upon a marriage-treaty, instructions were given by the husband to draw a settlement, which he privately countermanded, and afterwards drew in the woman by persuasions and assurances of such settlement to marry him; it was decreed that he should make good the settlement.

Abr. Eq. 19. & vide tit. Agreements, letter (C).

So, where a parol agreement was concerning the lending of money on a mortgage, and the conveyance proposed was an absolute deed from the mortgagor, and a deed of defeasance from the mortgagee, and after the mortgagee had gotten the deed of conveyance, he refused to execute the defeasance; it was decreed against him on the point of fraud.

Abr. Eq. 20.

[So, where a father prevailed with his daughter and her husband to join with him in suffering a recovery for a particular purpose, and afterwards made use of it for another purpose, Lord *Hardwicke* relieved against it upon the ground of fraud. In this case the deed to lead the uses was general to the father and his heirs.]

Young v. Peachy, 2 *Atk.* 254.

If a son and heir apparent persuades his father not to make a will which he intended to have made, and which was to contain provisions for his younger children, promising to do for them himself; this is such a fraud, for which equity will decree the heir to give them such provisions himself.

Preced. Chan. 4. Chamberlain's case, cited to have been decreed.

So, where tenant in tail is prevented by the issue in tail from suffering a recovery in order to provide for younger children, by his promising to do for them himself, equity will compel him to do it after his father's death.

Preced. Chan. 5.

If a mother having a right to dower, to encourage a marriage of her son to *A. B.* releases her dower, and the release is shewn to

2 *Vern.* 133.

(a) That a release shall be avoided in equity whenever there is *suppressio veri* or *suggestio falsi*. Vern. 19, 20, 31, 32.

Vern. 219.
Reeve and
Reeve.

If a man charges lands in *D.* with a portion for a daughter by a first venter, and then marries, and settles part of those lands for the jointure of a second wife, who has no notice of the charge, and *A.* believing that the portion would take place of the jointure, by will gives other lands in lieu thereof, and the wife combines with her son, who is heir to *A.* to defeat his settlement and provision on the daughter, by adhering to her jointure, and insisting, that the provision on the daughter was voluntary and fraudulent as to her; and that therefore she was not bound to accept of the devise; the daughter will be relieved in equity.

2 Chan. Rep.
81. Howard
and Hooker.
(b) So, where
the intended
wife, the
day before
her marriage,

A widow makes a (b) deed of settlement of her estate, and marries a second husband, who was not privy to such settlement; and it appearing to the court, that it was in confidence of her having such estate, that the husband married her, the court set aside the deed as fraudulent.

entered privately into a recognizance to her brother; it was decreed to be delivered up. 2 Chan. Rep. 79.—But where a conveyance or settlement shall be said to be fraudulent, and in derogation of the rights of marriage, *vide* 2 Vern. 17. and tit. *Marriage and Divorce*, D. 3.

Vern. 408.
Hunt and
Mathews.

But where a widow, before her marriage with a second husband, assigned over the greatest part of her estate to trustees, in trust for children by her former husband; though it was insisted, that this was without the privity of the husband, and done with a design to cheat him, yet the court thought that a widow may thus provide for her children before she puts herself under the power of a husband; and it being proved that 8000*l.* was thus settled, and that the husband had suppressed the deed, he was decreed to pay the whole money, without directing any account.

2 Vern. 71.
Child and
Danbridge.

A. failing in his trade compounded with his creditors at so much in the pound, to be paid at the time therein mentioned; and he having failed in payment at the precise time, some of the creditors refused to stand to the agreement, which being under hand and seal, he brought his bill to compel a performance thereof; but it appearing in the cause that *A.*, to draw in the rest of the creditors, had made an under-hand agreement with some of them, who were seemingly to accept of the composition, to pay them their whole debts, which was a fraud and deceit upon the rest of the creditors, the court would not decree the agreement, nor relieve the plaintiff, but dismissed the bill.

2 Vern. 602.
Small and
Brackley.

So, where *A.* being entrusted by *B.* to receive interest on tallies, receives the principal and fails, and afterwards compounds with his creditors, but *B.* would not come in, without having a greater composition, which *A.* agrees to give, and *A.* brought his bill to be relieved against this under-hand agreement; the court refused to give him any relief, he having been guilty of a breach of trust, and also a party to the fraud.

Middleton
v. Lord On-
slow, 1 P.

[Where, on the consent of the wife and her trustees, and in order to a composition with the husband's creditors, the court of Chancery

Chancery ordered part of the wife's-fortune to be paid to the creditors consenting to accept such composition, and to discharge him of the debts; and some of the creditors, upon executing the deed of composition, took private securities, post-dated, for part of their debts, besides their share with the other creditors; such securities were set aside, as a fraud on the wife, the trustees, and the court.

Wms. 768.
See too
Spurrett v.
Spiller,
1 Atk. 105.
S. P.

So, too, at law; where all the creditors of an insolvent consented to accept a composition upon an assignment of his effects by a deed of trust to which they were all parties, and one of them, before he executed, obtained from the insolvent a promissory note for the residue of his demand, by refusing to execute till such note was made; the note was adjudged void, as a fraud on the rest of the creditors, and therefore incapable of being ratified or revived by a subsequent promise.

Cockshott
v. Bennett,
2 Term Rep.
763.

Upon the same principle, where *A.* agreed to give *B.* a certain sum for goods in advancement of *C.*, it was holden, that a secret agreement between *B.* and *C.* that the latter should pay a further sum, was void as a fraud upon *A.*, and that *B.* could not recover such further sum against *A.*]

Jackson v.
Duchaire,
3 Term Rep.
551.

If a security be obtained from a person by fraud and practice, upon a pretence of a demand that is fictitious, it will be relieved against in equity.

2 Vern. 123.
Where a bill
of exchange
was obtained

by a gross fraud, and it was relieved against with costs to be ascertained by the party's own oath. — Where a policy of insurance for insuring a life was gained by fraud, and set aside with costs both at law and in equity. 2 Vern. 206. — Where a weak man was prevailed upon by two of his relations, to give a bond to one of them, to settle his estate to the use of himself in tail male, remainder to his two brothers successively in tail male, and he afterwards marrying, was relieved against the bond. 2 Vern. 189. [Where advantage has been taken of the weakness of parties, and conveyances therefore set aside, see *White v. Small*, 2 Ch. Ca. 103. *Clarkson v. Hanway*, 2 P. Wms. 203. *Bennet v. Vade*, 2 Atk. 324. *Evans v. Blood*, 4 Br. P. C. 557. *Bridgeman v. Green*, 2 Vez. 627. *Filmer v. Gott*, 7 Br. P. C. 70.]

As where *A.* having by the means of an attorney prevailed on *E.* a woman, to levy a fine of some houses, and to execute a deed leading the uses thereof to *A.* and his heirs; it was proved that she, at the time of levying the fine, declared she must make use of some friend's name in trust; and afterwards by will declared she had levied such fine only in trust, and the better to enable her to dispose of the estate, and thereby devised it to *J. S.* and his heirs, subject to the payment of her debts; although *A.* proved a great familiarity and friendship between them, and that she had declared he should have her estate; yet it was decreed, not only that the estate should be liable to the creditors debts, but that *A.* should convey the estate to the devisee and his heirs.

2 Vern. 307.

So, where *A.* being to procure 1000*l.* for *B.*, borrows it, and pays *B.* only 300*l.* and takes other 300*l.* himself, and the remaining 400*l.* in goods, which prove worth little or nothing; and for securing the whole, both gave a recognizance; yet that being sued against *B.* he brought his bill, and had a perpetual injunction against the recognizance on payment of 300*l.* only and interest, by reason of some circumstances of fraud; it appearing to be a contrivance between *A.* and the lender, to charge *B.* with the whole.

Preced.
Chan. 80.
Smith and
Loader,
2 Vern. 346.
S. C.

Vern. 206.
vide Preced.
Chan. 76.
where, on
the circum-
stances of a
fraud, the
court of
Chancery
refused to

carry the agreement of a feme covert into execution.——Where a purchase at a great under-value, obtained from a person who some time after became a lunatick, was set aside for fraud. 2 Vern. 678.

2 Vern. 632.
Green v.
Wood. [See
the case of
Savage v.
Taylor,
Cal. temp.
Talb. 234.]

Where an agreement for a purchase was obtained from a woman of ninety years of age, and several suspicious circumstances appeared, the court would neither decree it to be carried into execution against the heir at law, nor to be delivered on a cross-bill for that purpose, but left the parties to their remedy at law.

Osmond v.
Fitzroy, and
contra.
3 P. Wms.
129. In
giving judg-
ment in this
case, Sir J.
Jekyll said,
“Where a
man gives a
bond, if
there be no
fraud or
breach of
trust in the
obtaining of
it, equity
will not set

[The Duke and Duchess of *Cleveland*, being about to send Lord *Southampton*, their eldest son, to travel, employed one *Osmond* as a servant to attend upon the young lord, then an infant of about seventeen, and (as by the answer of *Osmond* it was admitted) to prevent his being imposed upon. Afterwards, on the Lord *Southampton*'s returning from abroad, *Osmond* was continued in his service, and, when his lordship was about twenty-seven years of age, prevailed on him to enter into a bond for the payment of 1000*l.* to him the said *Osmond*. The bond was prepared by *Osmond*, and kept secret from the duke and duchess. There were also some proofs of the weak capacity of the young lord, and that at that time he was unable to raise money to pay off the bond. Under all these circumstances the court thought the bond fraudulently obtained, and relieved against it

aside the bond only for the weakness of the obligor, if he be *compos mentis*; neither will this court measure the size of people's understandings or incapacities, there being no such thing as an equitable incapacity, where there is a legal capacity.” But in *Griffin v. Deveuille*, Lord Thurlow observed, that in almost every case upon this subject, a principal ingredient was a degree of weakness short of legal incapacity; and that in this very case of *Osmond v. Fitzroy*, no relief probably would have been given, if the court had not considered Lord *Southampton* as more liable to imposition, than the generality of mankind. Cox's note 3 P. Wms. 130.

Bosanquet v.
Dashwood,
Ca. temp.
Talb. 38.

A court of equity will relieve against an unequal contract entered into by a person in embarrassed circumstances, for to avail oneself of the distresses of another, carries somewhat of fraud in it.

Proof v. Hines, *id.* 111. *Heathcote v. Paignon*, 2 Br. Ch. Rep. 167. See 3 Wooddef. 457.

Duke Ham-
ilton v.
Mohun,
1 P. Wms.
118. *Hyl-
ton v. Hyl-
ton*, 2 Vez.
547. *Grif-
fin v. De
Veuille*,
3 Wooddef.
App. 16.

It will relieve, too, where there is a manifest inequality between parties arising from the relation in which they stand to each other. Such is the relation of guardian and ward; and therefore a court of equity will not allow any gift or release to a guardian from his ward on his coming of age, or give validity to any contract the terms of which are not perfectly fair and equal, made by persons in that situation, or between whom a similar confidence hath existed; such also is the relation of parent and child (*a*), attorney and client (*b*), and steward or agent and his principal (*c*).

(*a*) *Gliffin v. Okeden*, 2 Atk. 258. and 3 Br. P. C. 560. *Cocking v. Pratt*, 1 Vez. 400. *Hawes v. Wyatt*,

Wyatt, 3 Br. Ch. Rep. 156. (b) Proof v. Hines, Ca. temp. Talb. 111. Walmsley v. Booth, 2 Atk. 25. Oldham v. Hand, 2 Vez. 259. Welles v. Middleton, printed cases in the House of Lords 1785. Newman v. Payne, 2 Vez. jun. 199. and 4 Br. Ch. Rep. 350. (c) Cray v. Mansfield, 1 Vez. 381. Gartside v. Ifherwood, 1 Br. Ch. Rep. 558. Fox v. Mackreth, 2 Br. Ch. Rep. 400. Crow v. Ballard, 4 Br. Ch. Rep. 117.

For the same reason a court of equity will relieve against bargains with heirs apparent, or persons in remainder, for their expectations: so likewise, with sailors for their prize-money (a).
 Id. 27. Wiseman v. Beake, Id. 121. Cole v. Gibbons, 3 P. Wms. 290. Earl of Chesterfield v. Janfen, 1 Atk. 342. 351. and 2 Vez. 144. 155. Barnardiston v. Lingood, 2 Atk. 133. Gwynne v. Heaton, 1 Br. Ch. Rep. 1. (a) Baldwin v. Rochford, 1 Wils. 229. Taylor v. Rochford, 2 Vez. 281. Howe v. Weldon, Id. 516. Berney v. Pitt, 2 Vern. 14. Knott v. Hill,

Upon principles of publick policy, a court of equity treats as fraudulent all agreements for the purchase of publick offices, even though such offices should not be within the statute of 5 & 6 Edw. 6. Agreements of this kind are indeed considered in the same light in a court of law.]
 Chastel, 1 Br. Ch. Rep. 124. Morris v. McCulloch, Ambl. 452. Garforth v. Fearon, 1 H. Bl. 327. Parsons v. Freeman, Id. 322. Law v. Law, Ca. temp. Talb. 140. and 3 P. Wms. 391. Hannington v. Du

(C) Of fraudulent Conveyances to defeat Creditors and Purchasers within the 13 Eliz. c. 5. & 27 Eliz. c. 4.

IT seems by the common law, if a man had right and title to a thing, or a just debt owing to him, he might avoid any fraudulent conveyance made to deceive him of that right or debt; as if a man had a right to goods, and he that had them, sold them by covin in a market-overt, to alter the property of them; or if one passed away goods to deceive a creditor, these acts might have been set aside; but if the gift were precedent to the right or debt, there was no way in such case to set aside the conveyance.
 known and understood, are so strong against fraud in every shape, that the common law would have attained every end proposed by the statutes of 13 El. c. 5. and 27 El. c. 4. Per Lord Mansfield, Cowp. 434.] 3 Co. 83. Moor, 638. Dyer, 295. Co. Lit. 290. a. b. [The principles and rules of the common law, as now universally

But now by the 13 Eliz. cap. 5. "for the avoiding and abolishing of feigned, covenous and fraudulent feoffments, gifts, grants, alienations, conveyances, bonds, suits, judgments, and executions, as well of lands and tenements as of goods and chattels, now of late more commonly practised than heretofore; which feoffments, gifts, grants, alienations, conveyances, bonds, suits, judgments, and executions, have been and are devised and contrived of malice, fraud, covin, collusion, or guile, to the end, purpose, and intent to delay, hinder, or defraud creditors and others of their just and lawful actions, suits, debts, accounts, damages, penalties, forfeitures, heriots, mortuaries, and reliefs, not only to the let or hindrance of the due course or execution of law and justice, but also to the overthrow of all true and plain dealing, bargaining and chevi-fance;"

It is therefore enacted, “ That all and every feoffment, gift, grant, alienation, bargain, and conveyance of lands, tenements, hereditaments, goods, and chattels, or of any of them, or of any lease, rent, common, or other profit or charge out of the same lands, tenements, hereditaments, goods, and chattels, or any of them, by writing or otherwise, and all and every bond, suit, judgment, and execution at any time had, or hereafter to be had or made to or for any intent or purpose before declared and expressed, shall be from henceforth deemed and taken (only as against that person or persons, his or their heirs, successors, executors, administrators, and assigns, and every of them, whose actions, suits, debts, accounts, damages, penalties, forfeitures, heriots, mortuaries, and reliefs, by such guileful, covenantous, or fraudulent devices and practices, as is aforesaid, are, shall, or might be in anywise disturbed, hindered, delayed, or defrauded) to be clearly and utterly void, frustrate, and of none effect; any pretence, colour, fained consideration, expressing of use, or any other matter or thing to the contrary notwithstanding.

“ Provided that this act, or any thing therein contained, shall not extend to any estate or interest in lands, tenements, hereditaments, leases, rents, commons, profits, goods, or chattels, had, made, conveyed, or assured, or hereafter to be had, made, conveyed, or assured, which estate or interest is or shall be upon good consideration, and *bona fide*, lawfully conveyed or assured to any person or persons, or bodies politick or corporate, not having at the time of such conveyance, or assurance to them made, any manner of notice or knowledge of such coin, fraud, or collusion, as is aforesaid.”

* This stat.
is made per-
petual by 39
Eliz. c. 18.

And by the 27 *Eliz. cap. 4.* * “ for avoiding fraudulent, fained, and covenantous conveyances, gifts, grants, charges, uses, and estates, and for the maintenance of upright and just dealing in the purchasing of lands, tenements, and hereditaments, it is enacted, That all and every conveyance, grant, charge, lease, estate, incumbrance, and limitation of use or uses, of, in, or out of any lands, tenements, or other hereditaments whatsoever had or made, or at any time hereafter to be made, for the intent and purpose to defraud and deceive such person or persons, bodies politick or corporate, as have purchased, or shall afterwards purchase in fee-simple, fee-tail, for life, lives, or years, the same lands, tenements and hereditaments, or any part or parcel thereof so formerly conveyed, granted, leased, charged, incumbered, or limited in use, or to defraud and deceive such as have, or shall purchase any rent, profit, or commodity, in or out of the same, or any part thereof, shall be deemed and taken only as against that person and persons, bodies politick and corporate, his and their heirs, successors, executors, administrators, and assigns, and against all and every other person and persons lawfully having or claiming, by, from, or under them, or any of them, which have purchased, or shall

“ shall hereafter so purchase for money, or other good consideration, the same lands, tenements, or hereditaments, or any part or parcel thereof, or any rent, profit, or commodity, in or out of the same, to be utterly void, frustrate, and of none effect; any pretence, colour, fained consideration, or expressing of any use or uses to the contrary notwithstanding.

“ Provided that this act, or any thing therein contained, shall not extend or be construed to impeach, defeat, make void, or frustrate any conveyance, assignment of lease, assurance, grant, charge, lease, estate, interest, or limitation of use or uses of, in, to, or out of any lands, tenements, or hereditaments heretofore at any time had or made, or hereafter to be had or made upon or for good consideration; and *bonâ fide*, to any person or persons, bodies politick or corporate; any thing before mentioned to the contrary hereof notwithstanding.”

And by § 5. of the said statute it is further enacted, “ That if any person or persons shall make any conveyance, gift, grant, demise, charge, limitation of use or uses, or assurance of, in, or out of any lands, tenements, or hereditaments, with any clause, provision, article, or condition of revocation, determination, or alteration, at his or their will or pleasure, of such conveyance, assurance, grants, limitations of uses, or estates of, in, or out of the said lands, tenements, or hereditaments, or of, in, or out of any part or parcel of them contained or mentioned in any writing, deed, or indenture of such assurance, conveyance, grant, or gift, and after such conveyance, grant, gift, demise, charge, limitation of uses, or assurance so made or had, shall or do bargain, sell, demise, grant, convey, or charge the same lands, tenements, or hereditaments, or any part or parcel thereof, to any person or persons, bodies politick or corporate, for money or other good consideration paid or given, (the said first conveyance, assurance, gift, grant, demise, charge, or limitation, not by him or them revoked, made void, or altered, according to the power and authority reserved or expressed unto him or them, in and by the said secret conveyance, assurance, gift, or grant,) that then the said former conveyance, assurance, gift, demise, and grant, as touching the said lands, tenements, and hereditaments so after bargained, sold, conveyed, demised, or charged against the said bargainees, vendees, lessees, grantees, and every of them, their heirs, successors, executors, and assigns, and against all and every person and persons which have, shall, or may lawfully claim any thing by, from, or under them, or any of them, shall be deemed, taken, and adjudged to be void, frustrate, and of none effect, by virtue and force of this present act.

“ Provided, That no lawful mortgage made, or to be made, *bonâ fide*, and without fraud or covin, upon good consideration, shall be impeached or impaired by force of this act, but shall stand in the like force and effect as the same should have done if the act had never been had or made.”

Cowp. 434.

[Although the statute of 13 *Eliz. c. 5.* subjects the parties to the frauds which it provides against, to certain penalties, and therefore, it should seem, ought to be construed strictly, yet Lord *Mansfield* observed, that the statutes of 13 & 27 *El.* cannot receive too liberal a construction, or be too much extended in suppression of fraud.]

In the construction of these statutes the following opinions have been holden :

Cro. Eliz.
243.
Leonard and
Bacon.

That where in a *formedon* the tenant pleaded non-tenure upon which they were at issue; and it was found, that before the writ purchased, the tenant enfeoffed divers persons, with an intent to defraud him who had cause of action to the lands, and that notwithstanding the feoffor took the profits; on this verdict it was adjudged for the demandant, *viz.* "that by the 13 *Eliz. c. 5.* the "feoffment was void against him."

3 Co. 80.
Twine's
case, Moor,
638. 2 Bulst.
226. S. C.
[See too
Worsley v.
De Mattos,
1 Furr.
467.]

A. being indebted to *B.* in 400 *l.* and to *C.* in 200 *l.* *C.* brings debt against him, and pending the writ, *A.* being possessed of goods and chattels to the value of 300 *l.* makes a secret conveyance of them all, without exception, to *B.* in satisfaction of his debt, but notwithstanding keeps in possession of them, and sells some of them, and others of them, being sheep, he sets his mark on; it was resolved to be a fraudulent gift and sale within the 13 *Eliz. c. 5.*, for though such a sale hath one of the qualifications required by the statute, being made to a creditor for his just debt, and consequently on a valuable consideration; yet it wants the other; for the owner's continuing in possession is a fixed and undoubted character of a fraudulent conveyance, because the possession is the only *indicium* of the property of a chattel, and therefore this sale is not made *bonâ fide*; and as this is a leading resolution, being agreeable to the rule of commerce settled by the statute, so it is highly conformable to the most exact reason and equity; for if such collusion and practice were allowed between a debtor and his creditor, as it would prove injurious to other creditors of the same debtor, in depriving them of all means of satisfying themselves by the stated methods of justice; so it must in its consequence have a very ill influence on commerce, by preventing loans of money, and other confidences of that nature, which are so necessary for the support of it, since no man would lend or trust another with money or goods upon such an apparent hazard of losing them.

3 Co. 81.
Mocr, 639.

So, where *A.* being indebted to five several persons in the sums of 20 *l.* each, and having goods to the value of 20 *l.* makes a gift of them to one of the five, in satisfaction of his debt; but upon this secret trust between them, that the grantee, in compassion to his circumstances, should deal favourably with him in permitting him, or some other for him, to use and possess the said goods, paying this creditor as he was able and could afford it, the said debt of 20 *l.* it was resolved to be a fraudulent conveyance and deed of sale.

2 Roll.
Abr. 779.
Palm. 214.
3 Co. 81.

So, if *A.* makes a bill of sale of all his goods in consideration of blood and natural affection to his son, or one of his relations,

it

it is a void conveyance in respect to creditors, for the considerations of blood, &c. which are made the motives of this gift, are esteemed in their nature inferior to valuable considerations, which are necessarily required in such sales by 13 *Eliz. c. 5.*; and this seems to be a construction suitable to the strictest rules of equity; for if considerations of blood or natural affection were allowed to be of equal dignity with, or to come under the notion of, valuable considerations required by this statute, it would be in the power of any debtor, by such conveyances of his personal estate to his kindred, to build a family upon a conduct to his creditors, which carries in it all the strains of injustice and collusive dealing; moreover, there is a strong presumption, that such sales to relations are constantly attended with a secret trust and personal confidence of reconveying part of the goods to the vendor for his subsistence; so that they are entirely inconsistent with the scheme laid down by the statute, and therefore void and illegal.

[So, where an executor advanced sums of money to his daughters, who were legatees under the will of which he was executor; to two of them on marriage, to the others as a voluntary gift; and afterwards died insolvent, having received assets; Lord *Northington* held the voluntary gifts to be fraudulent, though there was no evidence in the cause, and the daughters in their answers denied that the money advanced was on account, or in part of their legacies, or that it was to their knowledge or belief part of the personal estate of the testator, his Lordship observing, that it is the motive of the giver, not the knowledge of the acceptor, that is to weigh.]

Partridge
v. Gopp,
Ambl. 596.

But if a person, before he contracts any debts, makes a voluntary settlement on his son *bonâ fide*, it seems that this is not within the statute (a), for it never could be the intent of the act to set aside all voluntary settlements; but if the gift be made on any trust either expressed or implied, between donor and donee, it is within the statute; for all acts for the suppressing of fraud are to be liberally expounded.

Mod. 119.
[1 Ventr.
194. 1 Sid.
349. 2 Roll.
Rep. 306.
(a) "If there
be, saith
Lord Hard-
wicke, a vol-
untary con-

veyance of real estate or chattel interest by one not indebted at the time, though he afterwards becomes indebted, if that voluntary conveyance was for a child, and no particular evidence or badge of fraud to deceive or defraud subsequent creditors, that will be good; but if any mark of fraud, collusion, or intent to deceive subsequent creditors appear, that will make it void." *Townsend v. Wyndham*, 2 *Vez.* 11. *Russell v. Hammond*, 1 *Atk.* 15. *Stileman v. Ashdown*, 2 *Atk.* 493. However, in the case of *Jones v. Marsh*, *Ca. temp. Talb.* 64., Lord Talbot declined giving any opinion how far a family settlement, without any consideration, would be fraudulent against subsequent creditors though the party was not indebted at the time; and in *Hungerford v. Earle*, 2 *Vern.* 261, *Hutchins*, Lord Commissioner, held such settlement to be void. It is observed however, that Lord Talbot was not, by the circumstances of the case before him, called upon to give his opinion; and that the opinion of *Hutchins* was evidently influenced by the provisions of the settlement not having been pursued. *Fonbl. Eq. Tr.* 263. note.

And therefore if the jury find that the owner continued in possession of his goods after his bill of sale of them, this is an undoubted badge of a fraudulent conveyance, because the possession is the only *indicium* of the property of a chattel, which is a thing unfixed and transitory; so there are other marks and characters of fraud, as a general conveyance of them all without any exception, for it is hardly to be presumed, that a man will strip

3 Co. 81.
Moore, 638.

himself entirely of all his personal property, not excepting his bedding and wearing apparel, unless there were some secret correspondence and good understanding settled between him and the vendee, for a private occupancy of all or some part of the goods for his support; also a secret manner of transacting such bill of sale, and unusual clauses in it, as that it is made honestly, truly, and *bonâ fide*, are marks of fraud and collusion, for such an artful and forced dress and appearance give a suspicion and jealousy of some defect varnished over with it.

Cadogan v.
Kennet,
Cowp. 432.

[*A.* being indebted, by settlement before marriage, in consideration of the marriage, and of 10,000 *l.* the wife's fortune, which was supposed to be more than the amount of his debts at that time, conveys all his real estate and household goods (his real estate alone not being thought an adequate settlement) in trust for himself for life, remainder to his wife for life, remainder to his first and other sons in strict settlement: the wife being a ward of Chancery, the settlement was approved of by a Master, and the goods enumerated in a schedule. *A.*, after the marriage, continued in possession of the goods; after which a creditor, *at the time of the settlement*, having obtained judgment, took them in execution, whereupon the trustees commenced an action against him. It was holden, that the settlement was good against creditors; that possession was no circumstance of fraud in this case, for that it was part of the trust that the goods should continue in the house. But if the settlor had let the house and furniture, reserving one rent for the house, and another for the furniture, or if the rent could be apportioned, the creditors would be entitled to the share of such rent reserved, or to such apportionment of it in respect of the goods. And there having been a sale of part in this case, it was agreed, that the value should be vested in the funds on the trusts of the settlement, and the interest during *A.*'s life paid to the defendant. The rest of the goods were ordered to be delivered to the plaintiffs.

Cowp. 434.

Where there had been a decree in the court of Chancery and a sequestration; and a person, with knowledge of the decree, bought the house and goods belonging to the defendant, and gave a full price for them; yet the court said, that the purchase being with a manifest view to defeat the creditor, was fraudulent; and therefore, notwithstanding a valuable consideration, void. So, if a man knows of a judgment and execution, and with a view to defeat it purchases the debtor's goods, it is void; because the purpose is iniquitous. For if a transaction be not *bonâ fide*, the circumstance of its being done for a *valuable consideration* will not alone take it out of the statute.]

8 Co. 60.
Moor, 615.

If a gift be made to deceive one creditor, it is void against all creditors; but wherever a conveyance is construed fraudulent, it it must be with respect to real creditors and purchasers for valuable consideration.

And. 233.
Moor, 602.
[See *acc.*

Therefore if a man makes a fraudulent lease, and then another *bonâ fide*, without rent or fine, the second lessee shall not avoid the

the first lease; for no purchaser shall avoid a former fraudulent conveyance, but a purchaser for valuable consideration. *Doe v. Routledge*, 3 Co. 83. a., Cro. El. 444. Cowp. 785.]

But though a purchaser for valuable consideration within the 27 *Eliz. c. 4.* hath notice of a fraudulent conveyance before he purchases, yet after the purchase he shall avoid it; for the statute expressly avoids such conveyances, so that whether the purchaser hath notice of them, or not, is not material. 5 Co. 60. Gooche's case, *Moor*, 615.

[So, where one, *after marriage*, made a settlement of an estate upon himself for life, remainder to his wife for life, remainder to their issue in tail; and three years afterwards mortgaged the estate to *B.* who was apprized of the settlement; it was holden, that the settlement was void as against the mortgagee within the statute of 27 *Eliz. c. 4.*; and the settlement being made void by the statute, notice could make no difference.] *Chapman v. Emery*, Cowp. 278.

If *A.* brings an action against *B.* for lying with his wife, after which *B.* assigns his estate to trustees in trust to pay the several debts mentioned in a schedule, and such other debts as he should mention within ten days, and *A.* recovers 5000*l.* damage, and brings his bill to set aside this deed as fraudulent, and made to defeat him of his recovery; in this case *A.* can have no other relief but to come in upon the surplus, after the debts mentioned in the schedule, or appointed within ten days pursuant to it, are satisfied; the deed being fraudulent neither in law nor equity, *A.* being no creditor at the time of executing it; and it was conscientious in him to prefer his real creditors to one, whose debt, when recovered, was founded only *in maleficio*. Preced. Chan. 105. Lewkner and Freeman, 1 Eq. Caf. Abr. 149. pl. 5. S. C.

A. by bill of sale made over his goods to a trustee for *B.*, who lived with him as his wife, and was so reputed, and he also purchased a lease of the house wherein he dwelt, in the name of a trustee, and declared the trust thereof to himself for life, then in trust for *B.* during the residue of the term; this bill of sale was holden fraudulent as to creditors, but as to the declaration of the trust of the term, the court held it good, and not liable to *A.*'s debts, the term being never in him, and being so settled at the time it was purchased; and *A.* might have given the money to *B.*, who might have purchased it for herself, and in her own name. 2 Vern. 490. Fletcher and Lady Lidley.

Fraudulent conveyances and gifts are only void against purchasers and creditors, and shall bind the parties themselves, and their representatives. Cro. Jac. 270. vide 2 And. 172. [Franklin

v. Thornebury, 1 Vern. 132. *Villers v. Beaumont*, *Id.* 100. *Bale v. Newton*, *Id.* 464. *Clavering*, 2 Vern. 473. *Boughton v. Boughton*, 1. Atk. 325. *etc.* and if there be two or more voluntary conveyances, the first shall prevail unless the latter be for payment of debts. 1 Ch. Rep. 99.]

And therefore where *A.* made a fraudulent sale of his goods to *B.* and delivered possession of some of them in his life-time, and the rest came to the hands of his administrator, it was holden in an action brought by *B.* for those goods, that the administrator could not plead the statute of 13 *Eliz. c. 5.* nor maintain the possession of the goods even to satisfy creditors. *Yelv.* 196. *Hawes and Loader*, Cro. Jac. 270. S. C.

But

13 H. 4. But if a man makes a deed of gift of his goods in his life-
 4. b. Roll. time by covin, to oust his creditors of their debts; yet after his
 Abr. 549. death the vendee shall be (a) charged for them.
 (a) As an executor of his own wrong. Yelv. 197. Cro. Jac. 271. [See too *Edwards v. Harben*, 2 Term Rep. 587. and *supra*, 21.]

Cro. Eliz. Where by special verdict it was found, that *A.* being possessed
 810. of divers goods to the value of 250*l.* by covin to defraud his
 Bethel and creditors, made a gift of his goods to his daughter, upon con-
 Stanhope, dition, that upon payment of 20*s.* it should be void, and died;
 2 And. 172. and that *J. S.* intermeddled with the goods; after which the
 S. C. daughter took possession of them by force of the gift, and then
 administration was granted to *J. S.* of all the goods, &c. of *A.*; in an action against him as executor, it was holden, that the gift was apparently fraudulent within the 13 *Eliz. c. 5.*, and that by his intermeddling, before administration granted to him, he became an executor *de son tort*, and liable as such; and that the law continued the possession in him from the time of intermeddling to the time of granting administration.

Trin. 1706. If *A.* makes a bill of sale to *B.* a creditor, and afterwards to *C.*
 Baker and another creditor, and delivers possession at the time of the
 Lloyd, *per* sale to neither, and after *C.* gets possession of the effects, and *B.*
 Holt, C. J. takes them out of his possession, *C.* cannot maintain trespass, be-
 cause the first bill of sale is fraudulent against creditors, and so is the second; yet they both bind *A.*, and *B.*'s is the elder title, and the naked possession of *C.* ought not to prevail against the title of *B.* that is prior, where both are equally creditors, and possession at the time of the bill of sale is delivered over to neither.

Moor, 615. If a gift be made to deceive one creditor, it is void against
 (b) Where a (b) all the creditors of the party, within the statute.
 feoffment

was made to deceive creditors, though by the event the king was cheated of his ward, yet being only to the intent and purpose to deceive creditors, it ought not to be extended farther. 10 Co. 57. — So, where there was a redemption to *A.*, to the intent the wife of the tenant should not be endowed during the life of *A.*, it was holden that it could not be extended to any other intent or purpose. Dyer 351. — Where one held of divers lords by heriot custom, and to the intent to deceive one, made a gift of all his beasts heriotable. 2 Leon. 8, 9. Dyer 351.

Cro. Jac. A man binds himself in a bond to pay money, and then in a
 131, 132. statute to make such a conveyance, &c. a fraudulent conveyance is made contrary to the defeasance of the statute; though the conveyance be void against the first debtor, yet it is a breach of the condition of the statute, and the donee shall be satisfied before the creditor by bond.

5 Co. 60. It is not necessary that he who contracted the debt should make the fraudulent conveyance; for if a man binds himself and his heirs in a bond, and lands descend to his heir, who makes a fraudulent conveyance of those lands, the creditor shall avoid it.

2 Co. 54. If a person, intending to deceive a purchaser, conveys by deed
 11 Co. 74. enrolled his lands to the king, and afterwards, for valuable consideration, conveys to *J. S.*, the purchaser shall avoid this conveyance to the king by the 27 *Eliz. cap. 4.*; for although the statute does not by express words extend to the king, yet being a general law, and made for suppressing fraud, it shall include him.

So,

So, if *A.* being tenant in tail, remainder to *B.* in tail or fee, and *B.* under an apprehension that *A.* designs to suffer a recovery, and destroy his remainder, by deed enrolled conveys his remainder to the king; yet if *A.* for valuable consideration afterwards by recovery conveys the estate to *J. S.* and dies without issue, the purchaser shall avoid the conveyance to the king as fraudulent within the 27 *Eliz. cap. 4.*

11 Co. 74.
a. b.

In trespass against a bailiff of a manor for distraining goods, he justified by virtue of his authority, and that by his precept he was commanded to distrain the goods of *J. S.* which goods came to the plaintiff's hands by colour of a fraudulent gift of them to the plaintiff; and on issue, whether the sale was made *bonâ fide*, it was found for the defendant, and adjudged for him, although it was objected, that he being no creditor could not take advantage of the statute, which being a penal law ought to be construed strictly.

Latch. 222.
Sir Ambrose
Turvil v.
Tipper.

If a father makes a fraudulent lease of his lands, with an intent to deceive a purchaser, and dies before he makes any conveyance of the lands, and afterwards his son and heir, knowing or not knowing of this lease, conveys to *J. S.* for valuable consideration, *J. S.* shall avoid this lease within the 27 *Eliz. c. 4.*

6 Co. 72. b.
Et vide
1 Vern.
45, 6.

A. has a lease of certain lands for sixty years, if he live so long, and forges a lease for ninety years absolutely, and by indenture reciting this forged lease bargains and sells it for valuable consideration, together with all his interest in the land, to *B.*; in this case *B.* is not a purchaser within 27 *Eliz. cap. 4.*; for though there were general words in the sale to pass the true interest, yet it is plain that it was never contracted for, or originally included in the bargain; so that the bargain being made of an imaginary interest, the bargainee can never come under the character of a real purchaser, to defeat the purchaser of the true lease of sixty years, which *A.* was really possessed of.

Co. Lit.
3. b.
Sir Richard
Grobham's
case.

A deed, though it be fraudulent in its creation, yet by matter *ex post facto* may become good; as, if one makes a fraudulent feoffment, and the feoffee makes a feoffment to another for valuable consideration, and afterwards the first feoffor also, for valuable consideration, makes a second feoffment, the feoffee of the feoffee shall hold against the second feoffment of the first feoffor.

Sid. 134.

A. agreed with the *East India Company* to go as president to *Bengal*, and entered into a bond of 2000 *l.* penalty for performance of articles; but before he set out he made a settlement of his estate, and among other things he declared the trust of a term of 1000 years to be for the raising of 5000 *l.* as a portion for his daughter, who afterwards married *J. S.* a gentleman of 700 *l.* *per ann.* who before the marriage was advised by counsel, that the portion was sufficiently secured; and who afterwards on her death had, on her request, expended 400 *l.* on her funeral, but never made any settlement on her; and *A.* having embezzled the goods and stock of the Company to a considerable value, the question was, whether this settlement was voluntary and fraudulent

Preced.
Chan. 377.
East India
Company v.
Clavel,
Gilb. Eq.
Rep. 37.
2 Eq. Ca.
Abr. 52.
pl. 6.
See Pre.
Ch. 305.
2 Eq. Ca.
Abr. 481.
pl. 13.

lent as to them; and it was holden to be a prudent and honest provision, without any colour of fraud; and though in its creation it was voluntary, yet being the motive and inducement to the marriage, it made it valuable.

Moor, 605.
3 Co. 82. b.
(a) A man and his wife seized in fee of lands, in right of the wife, in consideration of the marriage of their son, and 500*l.* paid for a portion, levy a fine to the use of the father and his wife for their lives, then to their son and his heirs, proviso, that it should be lawful for the father to revoke, with consent of four persons, the relations of the son's wife; the father dies, the mother, without consent, sells the lands for valuable consideration to other persons; and it was holden, that the vendee should not avoid the settlement, the power of revocation being out of the power of them to effect, the consent of such being necessary, over whom the father and mother could not be presumed to have any power; otherwise if the consent were lodged with those persons, that may be supposed to be at the disposal of the persons to whom the power is reserved.
2 Jon. 94, 5.

This branch of the statute does not extend to creditors, and therefore if the conveyance was not made to deceive them, it seems they cannot avoid it.

Moor, 638. If goods continue in the possession of the vendor, after a bill of sale of them, though there is a clause in the bill, that the vendor shall account annually with the vendee for them, yet it is a fraud; since if such colouring were admitted, it would be the easiest thing in the world to avoid the provisions and caution of the act.

2 Bulf. 226.
Stone v.
Grubham. Where there is an absolute conveyance or gift of a lease for years, and the person who makes it continues in possession after such sale, the gift is fraudulent, because attended with that distinguishing character of a fraud; but if the conveyance or sale be conditional, as that upon payment of so much money the lease shall go to the vendee, then, continuance in possession after the gift does not make it fraudulent, because the vendee is not to have the lease in possession till he performs the condition.

Cro. Jac.
455. If one makes a lease for years with a proviso to be void upon payment of 10*s.* this lease will be void against purchasers; but if it be a mortgage for a considerable sum of money, though it be in the power of the mortgagor, yet it is not void.

Ruffell v.
Hammond,
1 Atk. 13. [Where a father settled an estate upon his son, but took back an annuity to the value of it, Lord *Hardwicke* held that this was tantamount to a continuance in possession, and that the settlement was void as against creditors.

Shaw v.
Standish,
2 Vern. 326. *A.* entered into articles of partnership in fifths with three others for 21 years in digging for mines in *A.*'s lands, *A.* to have two-fifths, and in consideration of his ownership of the land, to have a tenth out of the share of the other partners. In pursuance of these articles, they searched for mines, and in about two years,

and after having expended about 120*l.* they discovered a valuable mine, which they worked for three months, when *A.* died: upon *A.*'s death, his widow set up a voluntary settlement made after marriage. But the court inclined to think that the partners were as purchasers, and that the voluntary settlement was void as to them.

In the above case it was said to have been adjudged at law, that a lessee at a rack-rent and who paid no fine, was a purchaser within the statute, and should avoid a voluntary conveyance.]

If a man makes a voluntary settlement, reserving to himself a power to mortgage and charge the estate with what sums he pleases, this amounts in effect to a power of revocation, and therefore fraudulent as to creditors by judgment. 2 Vern. 516.

It seems to be clearly agreed, that if a person makes a settlement on his wife, or child, after marriage, in consideration of love and affection, and not pursuant to any articles, or any agreement in consideration of the marriage, or marriage-portion, that such settlement being voluntary is fraudulent against purchasers within the 27 *Eliz. cap. 4.*

But though the settlement be made after marriage, yet if it were in pursuance of marriage articles, to make a provision on the wife and the issue of the marriage, it is not fraudulent; and in this case the wife and children become purchasers themselves, and shall avoid a prior voluntary conveyance, and shall in (*a*) equity have the same favour in not being obliged to discover papers, writings, &c.

As, where a (*b*) person promised a woman, before marriage, to make her a jointure of 1000*l.* a year; and after marriage, for securing the payment thereof, made a lease to commence after his death for 100 years, with a proviso, that on making the settlement the lease should be void; this lease was holden good against a purchaser.

The conveyance in this case did not make it fraudulent, when, upon revealing of it, it appears to be good. (b) That before the statute of frauds and perjuries, a verbal agreement before marriage was sufficient to prevent its being said to be fraudulent. Vent. 194.

Where *A.* made a lease for years, to the use of such person as should marry his daughter, provided he was then living and approved of the match; it was holden that if *A.* had sold the lands before the marriage, that the lease would be fraudulent against a purchaser; but if before the sale the daughter marries, the father cannot defeat it, because it was the cause of the marriage, and drew on the stranger to engage in it, and is of the same effect as if it had been a special agreement with this particular person; and it was holden not to be necessary that the father approved of the match at the time, but that, if he approved of it seven years afterwards, it was sufficient.

So, where *A.* surrendered the reversion in fee of copyhold lands to his son, to lessen the fine he must have paid in case it had come to him by descent; and after, on the son's treaty of marriage, the father tells the wife's friends, that this copyhold was so settled on the

6 Co. 73.
Cro. Jac.
158. 455.
Hard. 395.

Cro. Jac.
158. 455.
Lev. 150.
Hard. 395.
(a) *Vide*
1 Chan. Ca.
99. Vern.
440. 479.
2 Vern. 701.

Cro. Jac.
454. Dame
Griffin v.
Stanhope,
adjudged;
and that the
wife's concealing the

Sid. 133.
Prodgers
and Lang-
ham.
Keb. 486.
S. C.

Preced.
Chan. 275.
Kirk v.
Clerk.

the son, in consideration of which, and of some leasehold lands settled by the father, a marriage was had, and 2000*l.* portion paid; though in the settlement no mention was made of the copyhold, yet it was holden that the surrender thereof, in the manner aforesaid, was not voluntary or fraudulent against a purchaser, because it was the principal inducement that prevailed on the friends of the son's wife to consent to the marriage, and to give her such a fortune, and that it ought to be considered as if it had been surrendered at the time of the marriage.

Andrew
Newport's
case, Skin.
423., and
3 Lev. 387.
S. C., by
the name of
Smartle v.
Williams.

[So, where, on an ejectment brought by the assignee of a mortgage, it was objected, that it did not appear, that any money was paid upon the original mortgage, and therefore it was fraudulent; and being fraudulent in the creation, though the present assignee paid a valuable consideration, yet this would not purge the fraud, and make it good against the defendant, who was a purchaser *bonâ fide*, and for a valuable consideration; *Holt, C.ⁱ J.* answered, that the first mortgage was good between the parties; and being so, when the first mortgagee assigned for a valuable consideration, this was all one, as if the first mortgage had been upon a valuable consideration: for the assignee stands in his place, and therefore is within the second proviso of the statute of 27 *El. c. 4.*]

Vern. 285,
6.

(a) Where a
father made
a settlement,
on the mar-
riage of his

daughter, to himself for life, remainder to the daughter, and afterwards sold the land to another, whether the former conveyance shall be avoided during his life, within the 27 *Eliz. c. 4.* 2 *Roll. Rep.* 306. *Q.*

— Where a settlement, in consideration of a marriage portion, was made on the husband and wife, and the issue of that marriage, remainder to the heirs of the body of the husband; it was holden, that the consideration should extend to the issue of the husband on the second venter. *Lev.* 150, 237. *Hard.* 395. *Chan. Ca.* 104.

Preced.
Chan. 520.
Brunsdon
and Strat-
ton.

But where the intended husband was under age, and so incapable of making a settlement, and the wife's father gave a bond for the payment of 1500*l.* on his making a suitable jointure-settlement on her, without taking any notice whatsoever of the issue, and the marriage took effect; and the husband some years after, on the payment of the 1500*l.* made a settlement of 147*l.* *per ann.* on himself for life, remainder to his wife for life, for her jointure, with remainder to their first and other sons, in the usual form; it was holden, that this settlement was neither voluntary nor fraudulent, being but adequate to the wife's fortune; and that the words of the bond were capable of such a construction, for that a jointure-settlement must be intended a settlement in the common form to the issue, and a jointure for the wife.

Wheeler v.
Caryll,
Ambl. 121.

[So, where a woman, entitled to 6000*l.* secured by her mother's marriage-settlement, subject to the contingency of being lessened by the birth of another daughter, married clandestinely without any settlement; and after the marriage her father secured the 6000*l.* upon his estate, upon which her husband made a settlement upon her; such settlement was adjudged to be good against the husband's creditors.

So,

So, where the husband, some time after marriage, in consideration of an additional portion of 100*l.* paid by the wife's mother, settled an estate of 100*l.* per ann. upon himself for life, remainder to his first and other sons, &c., and his mother, having an interest in the estate, joined with him in the conveyance; and thirteen years after, he mortgaged his estate with the usual covenants; and upon his death the mortgagee brought his bill against the son to foreclose; Lord *Talbot* said, that it would be very hard to call this a fraudulent settlement; since it was in consideration of a marriage had, and of an additional provision of 100*l.* paid by the wife's relations, which cannot be said to be voluntary against a creditor who lent his money thirteen years after.

Jones v. Marsh, Ca. temp. Talb. 64.

If a woman is entitled to a trust term, which the husband cannot lay hold of and possess, nor get at without the assistance of a court of equity; if the trustees will not raise the portion, and the husband goes into equity for aid; the court will decree an adequate settlement to be made on the wife, and will support it as a good settlement for a valuable consideration. So, if after marriage, the wife being entitled to such a portion, which the husband cannot touch without the aid of the court, and which the trustees will not pay without the husband's making a settlement; if the husband does agree to it, and do that which the court would decree, it is a good settlement against creditors.

Ambl. 121.
The like law if the particular assignee of the husband for a valuable consideration, apply to equity.
Jewson v. Moulson, 2 Atk. 432.

John Hamerton being seised in fee of an estate, and having a mother who had an annuity of 50*l.* per ann. issuing out of the whole, and also two brothers, *Thomas* and *Vavasor*; and being about to be married; his mother, previously to the marriage, consented to part with her security upon the whole estate for her annuity, and to take, instead thereof, a security for the same upon part of the estate; and accordingly she and *John* (the intended husband) join in a fine to deliver the whole estate from the annuity, and in consideration of the marriage, and of a portion of 1300*l.*, and of the grant and release of the annuity, *John* conveys to trustees that they should pay 50*l.* per ann. to the mother out of part of the estate for her life, then as to the whole, to the use of *John* for life, remainder to trustees to preserve contingent remainders, remainder to the first and every other son in tail-male, remainders to *Thomas Hamerton* and *Vavasor Hamerton*, severally, one after the other in tail-male in strict settlement, remainder to the daughter and daughters of the marriage of *John Hamerton* and his intended wife, remainder to *John Hamerton* in fee. There was no issue of the marriage; afterwards *John Hamerton* mortgaged the estate to *Monckton*, and acknowledged a fine to him *sur concessit*, then *Monckton* purchased of *John Hamerton* in fee for a valuable consideration, and took a fine from him *sur consauance de droit come ceo, &c.*; *John Hamerton* died without issue, but *Thomas Hamerton* left a son, who brought an ejectment to recover the estate. It was holden that this was a good settlement against purchasers, the consideration given by the mother making her a purchaser for her younger sons.

Roe v. Mitton, 2 Will. 356.

Doe v.
Routledge,
Cowp. 705.

William Watson in 1763, surrendered a copyhold estate, to which he was entitled in fee, to the use of himself for life, remainder to the defendant *Routledge*, (who was his nephew by a sister,) his heirs and assigns, and was admitted thereupon. This surrender was voluntary, and without any consideration, other than natural love and affection. In the year 1767, *Routledge* paid his addressee to a woman, whom he afterwards married, and shewed a copy of the surrender to her father, but whether this had any influence in procuring the marriage did not appear. Afterwards, in 1773, *William Watson* surrendered the same estate to the use of *Hugh Watson*, a nephew by a younger brother, his heirs and assigns; and by a deed of the same date, executed by *William Watson*, reciting that *Hugh Watson*, upon the proposal and at the request of *William Watson*, had agreed with *William Watson* for the absolute purchase of the said estate for the sum of 200*l.*, and also the surrender in pursuance thereof, *William Watson* acknowledges the receipt of the 200*l.* from *Hugh Watson*, and enters into the usual covenants: there was a receipt indorsed on the deed for the 200*l.*, and it was in proof that it was paid. *Hugh Watson* was accordingly admitted upon the surrender, and entered into possession. It was in evidence that before, and at the time of the surrender to him, he knew of the surrender to *Routledge*: that the estate at the time of the surrender to *Hugh Watson* was worth between 50*l.* and 60*l.* per ann. and the inheritance worth between 1800*l.* and 2000*l.* It did not appear that *William Watson* was indebted at the time of making the first surrender, or at the time of his death. It was holden, that the first settlement, though voluntary, was good within the 27 *El.*, for that there is no part of the act which affects voluntary settlements *eo nomine*, unless they are fraudulent: and that the deed of 1773 was not such a deed as ought to set the first settlement aside, supposing the first to be affected by the act, inasmuch as the consideration money was by no means adequate to the value of the estate, and the whole transaction was merely colourable.]

5 Co. 60.
Hob. 72.
S. C. and
S. P. cited
and agreed;
but if the
issue be
taken di-
rectly en-
feoffed, or

It has been holden, that *fraud* may be *given in evidence* to defeat a fraudulent and covinous conveyance, and that the party who offers it need not plead it, for the acts to prevent fraud are to be construed liberally in suppression of the mischief; besides, it were an hardship to force the party to plead a thing that is managed with so much subtlety that he cannot attain a competent knowledge of it to plead it in due time.

not enfeoffed, the feoffment must be avoided by pleading the fraud specially.—*8 wide 10 Co. 56-7, Cro. Car. 550*, that covin is not to be presumed; and that if in a special verdict the jury find such circumstances in the case, as might very well have induced them to find fraud, yet if they do not expressly find it, it shall never be presumed. See 2 *Vez. 155. sup.*

(D) In what Court Fraud is cognizable.

IT is clearly agreed, that the court of Chancery had always an original jurisdiction in relieving against frauds, and that at this day it is the only (a) court where matters of fraud are properly cognizable.

2 Vern.
261-2. *Vide*
of the ju-
risdiction of
the court of
Chancery,

tit. Courts. [(a) But every kind of fraud is equally cognizable, and equally adverted to in a court of law; and some frauds are only cognizable there; as fraud in obtaining a devise of lands, which is always sent out of the equity courts to be there determined. 3 Bl. Comm. 431. And Lord Mansfield in the case of *Bright v. Eynon*, 1 Burr. 398. says, that courts of equity and courts of law have a concurrent jurisdiction to suppress and relieve against fraud. But the interposition of the former is often necessary for the better investigating of truth, and to give more complete redress. And Lord Loughborough C. in the case of *Bates v. Graves*, 2 Vez. jun. 295, "When the court of Chancery has declared a deed to be set aside for fraud and imposition, I must suppose that it would be equally set aside at law upon pleading to it." For courts of law relieve by making void the instrument obtained by fraud. Wood's Inst. 296.]

But it hath been doubted, whether a court of equity could give relief on the statutes which make conveyances and dispositions fraudulent against purchasers and creditors, being introductive of new laws; but, it is now settled, that such relief may be proper in equity, and that directing an issue to be tried at law is only discretionary in the court.

Preced.
Chan. 146
2 Vern. 261.
436.

A. recovers a judgment against the defendant's father, and the plaintiff (the sheriff's bailiff) levied 24*l.* of goods in possession of the defendant's father; the defendant brought trover against the plaintiff, pretending the goods to be his, because the landlord had seized them for rent, and sold them to him; but on evidence the sale was proved fraudulent, and that the father was in possession all along, and paid taxes for the farm and goods, &c. and therefore the judge gave directions to the jury to find for the defendant at law; but because he had not proved a copy of the judgment, as it was holden he ought, for that only reason the jury found against him; and he brought his bill for relief; and a demurrer to it on the arguing was over-ruled; then by answer he insisted upon his property under the bill of sale and recovery at law, where the matter is properly triable, and relied on that without examining any witnesses; but the plaintiff fully proved his case as before, and that the judge altered his directions only for want of proof of the judgment, and disproved the defendant's answer in some particulars; and a perpetual injunction was granted against the judgment, and the defendant to pay costs; for though it were examinable at law, so it was in equity too; and the plaintiff having set out the whole matter, and proved it to be true, if it were untrue the defendant might have disproved it.

Preced.
Chan. 233.
Kent and
Bridgeman.

But it hath been holden, that a will relating to the personal estate cannot be set (b) aside in a court of equity for fraud and imposition, let the fraud be ever so great or so strongly proved; and that this is a matter properly cognizable in the spiritual court.

2 Vern. 8, 9.
(b) But tho'
a will gained
by fraud, and
proved in
the spiritual
court, can-

not be controverted in equity; yet if the party, claiming under such will, comes for any aid in equity, he shall not have it. 2 Vern. 76.

2 Vern. 700.
Preced.
Chan. 123.

It was once holden, that a will relating to the real estate, as well as a deed, may be set aside in equity, for fraud and circumvention; as, if a man agrees to give the testator 2000*l.* in bank bills, upon condition he devise his estate to him, and on the delivery of such bills he makes his will, and devises his estate to him, and the bills prove to be forged and counterfeit.

Eq. Ca.
Abr. 406.
[Kerrick v.
Bransby,

But it hath been lately resolved in the House of Lords, that a will of a real estate could not be set aside in a court of equity for fraud or imposition, but must first be tried at law on *deviseavit vel non*, being matter proper for a jury to inquire into.

3 Br. P. C.
358., and
Webb v. Cleverden, 2 Atk. 424.

Bennet v. Vade, *Id.* 324. Anon. 3 Atk. 17. Bates v. Graves, 2 Vez. jun. 287.]

(E) Where a Wrong-doer is further punishable than by making void the fraudulent Act.

Cro. Jac.
497. 2 Roll.
Abr. 78.
2 Roll.
Rep. 107.
Keb. 849.
6 Mod. 42.
Sid. 312.
431. Noy,
99. 103.
Moor, 630.

IT is clear from many instances, that gross frauds are punishable by way of indictment or information; such as playing with false dice, causing an illiterate person to execute a deed to his prejudice, levying a fine in another's name, &c.; and that for these and such like offences the party may be punished not only with fine and imprisonment, but also with such further infamous punishment as the judges in their discretion shall think proper.

Cro. Eliz. 531. Mod. 46. 2 Jon. 64. Ld. Raym. 865. Hawk. P. C. c. 71.

6 Mod. 105.
Salk. 379.
pl. 25. 286.
pl. 20.
5 Mod. 18.
S. C.

But it hath been holden, that the deceitful receiving of money from one man for another's use, upon a false pretence of having a message and order to that purpose, is not punishable by any criminal prosecution, because it is accompanied with no manner of artful contrivance, but wholly depends on a bare naked lie; and it is said to be needless to provide severe laws for such mischiefs, against which common prudence and caution may be sufficient security.

(a) It is said, that the offender cannot be fined in a prosecution upon this statute, because it is expressly ordained that some corporal punishment shall be inflicted, and no other is mentioned. 3 Inst. 123. But in Cro. Car. 564. there is a precedent, by which it appears, that one convicted on such a prosecution hath been adjudged not

But by the 33 *H. 8. cap. 1.* it is enacted, "That if any person or persons shall falsely and deceitfully obtain, or get into his or their hands or possession any money, goods, chattels, jewels, or other things of any other person or persons, by colour and means of any privy false token, or counterfeit letter, made in another man's name, to a special friend or acquaintance, for the obtaining of money, &c. from such person, and shall be thereof convicted by witness taken before the lord chancellor, or before the justices of assize, or before the justices of the peace of any county, city, borough, town, or franchise, in their general sessions, or by action in any of the king's courts of record; every such offender shall suffer such punishment by imprisonment, setting upon the pillory, or otherwise, by any (a) corporal pain, except pains of death, as shall be appointed by those before whom he shall be so convicted."

not

not only to stand in the pillory, but also to pay a fine of 500*l.* and to be bound with sureties to his good behaviour.

And it is further enacted by the said statute, "That as well the justices of assize for the time being, as also two justices of peace in the same county, whereof the one to be of the *quorum*, may call and convene by process or otherwise, to the said assizes or general sessions, any person being suspected of any of the offences aforesaid, and commit or bail him till the next assizes or general sessions, &c."

And by the 27 Eliz. c. 4. § 3., the same *mutatis mutandis* is enacted as to fraudulent conveyances to deceive purchasers.

[It is also enacted by 30 Geo. 2. c. 24. "That all persons who knowingly and designedly by false pretences shall obtain from any person money, goods, wares, or merchandizes, with intent to cheat and defraud any person or persons of the same, shall on conviction be put in the pillory, or publicly whipped, or fined and imprisoned, or transported, for the term of seven years, as the court shall in discretion think fit."

Upon this statute no *certiorari* lies.

R. v. Smith, Cowp. 24.

In an indictment upon this and the preceding statute, the false pretences and false tokens made use of by the defendant must be set forth: if they are not, it is error for which a judgment against the defendant will be reversed.]

R. v. Mason, 2 Term Rep. 581.
R. v. Munoz, 2 Str. 1127.

By the 13 Eliz. cap. 5. § 3. it is enacted, "That all and every the parties to such feigned covenant or fraudulent feoffment, gift, grant, alienation, bargain, conveyance, bonds, suits, judgments, executions, mentioned in the statute, and being privy and knowing of the same, or any of them, who shall wittingly and willingly put in ure, avow, maintain, justify, or defend the same, or any of them, as true, simple, and done, had, or made *bonâ fide* and upon good consideration, or shall alien or assign any the lands, tenements, goods, leases, or other things mentioned in the statute, to him or them conveyed, or any part thereof, shall incur the penalty and forfeiture of one year's value of the said lands, tenements, and hereditaments, leases, rents, commons, or other profits of or out of the same, and the whole value of the goods and chattels, and also so much money, as are or shall be contained in such covenant and feigned bond; the one moiety whereof to be to the queen's majesty, her heirs and successors, and the other moiety to the party or parties aggrieved by such feigned and fraudulent feoffment, gift, grant, alienation, bargain, conveyance, bonds, suits, judgments, executions, leases, rents, commons, profits, charges, and other things aforesaid, to be recovered in any of the queen's courts of record, by action of debt, bill, plaint, or information, wherein no essoin, protection, or wager of law shall be admitted for the defendant or defendants, and also being thereof lawfully convicted, shall suffer imprisonment for one half year, without bail or mainprize."

Information brought in *London* on the aforesaid act for justifying *apud L.* of a fraudulent gift of goods made by *A.* to the defendant

Dyer, 351.
Pl. 23.
2 Leon. 8.

Cro. Eliz.
645.

fendant to defraud the plaintiff of his debt, the defendant saith, that *M.* gave these goods to him at *C. bonâ fide*, and that he justified the gift there, and traverses the justifying it at *L.* and ruled to be no plea; for 31 *Eliz. cap. 5.* restrains common informers to bring their actions only in the proper county where the offence was done; yet that does not extend to a party grieved, but that he may inform in what county he pleases, for he is not a common informer.

Game.

2 Bl. Com.
410.

BEFORE we take notice of the statutes made for the preservation of the game, it may be necessary to observe how the common law stood herein; and this depends upon the difference made between tame and wild animals.

(a) That
hens and
chickens are
tame; so,
partridges,
like other
domestick
fowl, are
tame by na-
ture. Off.
of Exec. 83.

The tame animals, such as (a) horses, cows, sheep, &c. are such creatures, as by reason of their sluggishness and unaptness for motion do not fly the dominion of mankind, but generally keep within the same purlieus and pastures, and may be easily pursued and overtaken if by accident they should escape; and therefore the owner hath the same kind of property in them as he hath in all other inanimate chattels, and for the violation thereof may bring an action of trespass.

Roll. Abr. 5. 18 H. 3. 2. So, several sorts of dogs are tame, as the mastiff, hound, which comprehends greyhound, &c., spaniel, and tumbler; and for these a person may maintain an action of trespass, without alleging that they were tame. Cro. Eliz. 125. Ireland and Higgins, Sand. 84. cited and agreed. — So, a person may justify in assault and battery in defence of his dog that is tame, Rast. Ent. 611. — So, a replevin lieth of a ferret, Cro. Eliz. 126.

7 Co. 16.
3 Lev. 227.
— The
owner of
deer in an
inclosure
may defend
them by
force, &c.
3 W. & M.
c. 10. § 5.
and vide the
statutes
5 Geo. 1.
c. 15. c. 28.
10 Geo. 2. c. 32.
5 Co. 104.
Cro. Eliz.
547.

The wild animals, such as deers, hares, foxes, &c. are understood to be those, which by reason of their swiftness or fierceness fly the dominion of man, and in these no person can have a property, unless they be tamed or reclaimed by him; and as property is the power that a man hath over any other thing for his own use, and the ability that he has to apply it to the sustentation of, his being, when the power ceases his property is lost; and by consequence an animal of this kind, which after any seizure escapes into the wild common of nature, and asserts its own liberty by its swiftness, is no more mine than any creature in the *Indies*, because I have it no longer in my power or disposal.

Hence it appears, that by the common law every man had an equal right to such creatures as were not naturally under the power

power of man, and that the mere caption or seizure created a property in them.

By immediate manucaption, or taking them and killing them, they belong to such person in the same manner as any other chattels, and cannot be violated from him, since the first seizure and caption was sufficient to vest the property of them in him.

By taking and taming them, they belong to the owner, as do all the other tame animals so long as they continue in this condition, that is, as long as they can be considered to have the mind of returning to their masters; for while they appear to be in this state they are plainly the owner's, and ought not to be violated; but when they forsake the houses and habitations of men, and betake themselves to the woods, they are then the property of any man.

Another way of gaining property in them is by inclosure, and then the beasts must be understood to be mine, as the profits of the soil itself are, and they can no more be taken and carried off than any other profits of the land; and therefore if deer be inclosed in a park or paddock, conies in a field or warren, they become so my own, that no man ought to kill or take them away. And since in this case it is the inclosure only that retains them (for take away the inclosure and they are in their natural liberty); therefore, the party is said to have right as he hath to any other profits there inclosed, and a distinct and independent right in every animal.

The king, as an acknowledgment of his dominion over the seas and great rivers, by his prerogative has a property in some animals under the denomination of royal creatures, as *sturgeons*, *whales*, and *swans*, all which are the natives of seas and rivers.

On these reasons and distinctions of the common law, we may now see how the law stands with regard to persons qualified to kill the game, within the statutes made for the preservation thereof.

First it is clear, that if a man pursue deer, hares, or conies out of his land, or the lands of another, into (a) mine, and there takes them, they are the hunter's and not mine, because I never had any original property by inclosing them.

(a) But it is said, that if a man flies his hawk at a pheasant on his own ground, and the hawk pursues the pheasant into another's warren, the owner of the hawk cannot justify entering the warren and taking the pheasant. 38 E. 3. 10. b. 12 H. 8. 10. 2 Roll. Abr. 567. Poph. 162. S. C. cited.

If a man hunts conies*, and kills them in my ground, I may seize them, because they are indeed my property by the inclosure; but if he hunts them out of my ground, they are in the condition of natural liberty, and then I cannot take them away from the hunter, for then the property is in no man; but (b) damages I may have against the hunter for his entering and breaking my inclosure.

Carth. 382. Salk. 212. pl. 2. Ld. Raym. 149. 5 Mod. 307.—* But where plaintiff shall recover full costs for trespasses in hunting, i. e. after notice, see 4 & 5 W. & M. c. 23. § 10. As to taking conies in a warren, see 22 & 23 Car. 2. c. 25. § 4. And as to taking conies in the night on the borders of warrens, *id.* § 5, and taking conies out of warrens in the night, 5 G. 3. c. 14. § 6.

12 H. 8. 9. But where a man hunts conies in my warren, or deer in my park, and the warrener pursues them, he may retake them; for the park or warren is set apart by the publick for the preservation of the game; for all things occupied, in which no man hath a civil right, are under the regulation of the publick; now in parks and warrens, officers are established by authority to have an eye over the game, and to keep it within the boundaries; so that the property is not altered by driving it out of the inclosures, unless it be also out of the pursuit of the officers; for, as long as he that is thus trusted doth pursue it, it is not in its natural liberty, but is still belonging to the warren.

Also, the common law warrants the hunting of ravenous beasts of prey on another's ground, such as foxes, wolves, badgers, &c. so that the party in pursuing those through the grounds of another is subject to no action whatsoever; but it hath been (a) resolved, that the hunting and killing such noxious animals must be done in the ordinary and usual manner; and that therefore the digging for a badger is unlawful, and the party subject to an action of trespass.

(a) Cro. Jac. 321. Gench and Myyns, 2 Bulf. 60. S. C.

Cro. Jac. 44. A warrener or keeper of a park may justify the killing of dogs
3 Lev. 28. and cats, as well as other vermin, which he finds disturbing the
cont. Roll. game in those places.
Abr. 567. *

* By 16 Geo. 3. c. 30. § 9., rangers or keepers of forests, chases, parkes, &c. may in and upon the same seize dogs, brought for coursing deer, in the same manner as game-keepers of manors are empowered by law. *Vide* the statute. The power given to game keepers is by 22 & 23 Car. 2. c. 25. See also 5 Ann. c. 14. § 4. and 3 Geo. 1. c. 11.

5 Co. 104. A man cannot have an action of trespass on the case, for another man's conies breaking into his ground, because they are no
Cro. Eliz. longer the other's than while they are inclosed; so that no violation arises to the property of one man by the beasts of another,
547. but the conies being in their natural liberty may be lawfully killed
Moor, 420, by the owner of the soil.
421. 423.
Roll. Abr.
90. 405.
2 Lev. 291.

An action of trespass may be brought for taking a man's deer in a park or chase, or conies in his warren, for the law takes notice that they are inclosed, because these are the proper inclosures for that purpose; and consequently, those beasts are not in their natural liberty, and therefore the property is in the plaintiff.

17. cont.
Et vide Cro. Car. 553. That trespass lies for breaking his close, and fishing in *separali piscaria sua*, and for taking *pisces suas*, &c. for being alleged to be in *separali piscaria sua*, he may say they were *pisces suos*.

Mich. In an action of trespass *quare clausum fregit*, & *damas ipsius querentis cepit* & *assortavit*, they shall be intended to be inclosed after a verdict; because when a verdict hath found that they are the deer of the plaintiff, that verdict must be intended to be true; therefore the deer must be intended so to be inclosed, as to be under the plaintiff's power; otherwise he could not have property according to the verdict.

3 Lev. 227. But if in trespass *quare duas damas ipsius querentis in quodam clauso querentis vocat. le park, cepit* & *assortavit*, the defendant demurs
Mallock and Eastly, adjudged.

murs generally; this hath been ruled to be ill, because the court will not intend them to be tamed or inclosed; and in beasts, that are in their natural liberty, the plaintiff hath no property; for being only a place called a park, it cannot be understood to be a park.

Any person, upon his own frank-tenement, may erect a dove-house; nor can he for such building be indicted in the leet; this was a matter often controverted, because the pigeons and doves * were to be accounted as tame animals, in as much as they had *animum revertendi*; and then whoever did erect such houses, were answerable for the damage; and because they were not liable to every man's action, to avoid multiplicity of suits, it was formerly holden, that they were indictable in the leet; but the contrary opinion prevailed, because it was allowed the lord of the manor might erect, or permit by his licence any person to erect a dove-house; but no person could raise himself, or authorise another to create a nuisance: besides, these animals are rather to be accounted *feræ naturæ*; and by consequence, the only remedy any person had for the damage sustained by the birds feeding on his ground, was to kill them and take them to himself, which was the proper relief according to the common law, in as much as the birds were accounted no man's property.

paid to the prosecutor on conviction before one justice, or commitment to hard labour from three to one month. See also *infra*.

2 Roll.
Abr. 138.
Poph. 141.
Cro. Jac.
382. Goldb.
259.
Cro. Eliz.
548. Roll.
Rep. 136.
200. 2 Roll.
Rep. 3. 30.
5 Co. 104.
* As to wilfully shooting at or destroying any house-doves, or pigeons, see 2 Geo. 3. c. 29. on penalty of 20s. to be

Thus it appears by the common law, that a property in those living creatures, which by reason of their swiftness or fierceness were not naturally under the power of man, was gained by the mere caption or seizure of them, and that all men had an equal right to hunt and kill them; but as by this toleration persons of quality and distinction were deprived of their recreations and amusements, and idle and indigent people, by their loss of time and pains in such pursuits, were mightily injured, it was thought necessary to make laws for preserving the game from the latter.

The statutes to this purpose are very numerous, such as the 11 H. 7. cap. 17. against taking pheasants or partridges in another's ground; the 23 Eliz. cap. 10. against taking or killing pheasants or partridges in the night, and against hawking in standing or eared corn; the 14 & 15 H. 8. c. 10. against tracing and killing hares in the snow; also those of the 1 Jac. 1. cap. 27. 3 Jac. 1. cap. 13. 7 Jac. 1. cap. 11 and 13. 22 & 23 Car. 2. cap. 25. 4 & 5 W. & M. cap. 25. for preserving the game, and inflicting penalties on persons destroying thereof.

Those for preserving the young fry of fish, prohibiting the taking them at unreasonable times of the year, &c. such as the 13 E. 1. cap. 47. 13 R. 2. cap. 19. 17 R. 2. cap. 9. 2 H. 6. cap. 15. (a) 1 Eliz. cap. 17. 5 Eliz. cap. 21. 22 & 23 Car. 2. cap. 25. par. 7. against fish in the ponds, pools, rivers, &c. of the owners; the 30 Car. 2. cap. 9. 4 & 5 W. 3. cap. 23. par. 5 and 6. 4 & 5 Ann. cap. 21. 1 Geo. 1. cap. 18. 22 Geo. 2. cap. 49. 23 Geo. 2. cap. 26.

(a) Made perpetual by 3 Car. c. 4.

(a) Made perpetual by 31 Geo. 2. c. 42. § 2.

(b) This last statute is repealed by 6 & 7 W. 3. c. 13. For the construction of these statutes *vide* Jon. 170.

Saund. 263. Show. 339.

[A diploma granted by any Scotch university conferring the degree of doctor of physick, does not give a qualification under this act. And though the son of an esquire, or of any other person of higher degree, is qualified by this act under it.]

Made perpetual by 9 Ann. c. 25. By 28 Geo. 2. c. 12. persons selling, or exposing to sale, any game are liable to the penalties in this act, or higher, &c. offering game to sell. And by § 2. of the same act, game found in the house or possession of a poulterer,

Those against deer-stealers, such as the 19 H. 7. cap. 7. 7 Jac. 1. cap. 13. 13 Car. 2. cap. 10. 3 & 4 W. & M. cap. 10. 5 Geo. 1. cap. 15. and cap. 28. and 9 Geo. 1. cap. 22. (a) called the Black-Act, by which it is made felony for persons offensively armed, and having their faces blacked, or otherwise disguised, to appear in any forest, park, &c. or in any warren, &c. and hunt, wound or kill any deer, &c. or steal fish out of any river or pond, &c.

The 33 H. 8. cap. 6. and 2 & 3 E. 6. cap. 14. (b) which enact, That none shall shoot, or keep in his house a cross-bow, hand-gun, &c. unless he hath lands to the value of 100*l.* *per ann.* in pain to forfeit 10*l.* for every offence; and that any person may carry the offender before the next justice of peace, who, upon due examination and proof, hath power to commit him till he pay the penalty, &c.

Vent. 33. 39. Sid. 419. 2 Keb. 521. Raym. 378. 3 Mod. 280. 4 Mod. 49, 147.

But the principal statutes relating to this matter are the 22 & 23 Car. 2. cap. 25. by which it is declared, "That all and every person and persons not having lands and tenements, or some other estate of inheritance, in his own or his wife's right, of the clear yearly value of 100*l.* *per ann.* or for term of life; or having lease or leases of 99 years, or for any longer term, of the clear yearly value of 150*l.* other than the son and heir apparent of an esquire, or other person of higher degree; and the owners and keepers of forests, parks, chases, or warrens, are hereby declared to be persons, by the laws of this realm, not allowed to have or keep for themselves, or any other person or persons, any guns, bows, greyhounds, setting-dogs, ferrets, cony-dogs, lurchers, hayes, nets, lowbels, hare-pipes, gins, snarers, or other engines aforesaid, but shall be, and are hereby prohibited to have, keep, or use the same.

to kill game; yet the esquire himself, or other person of higher degree, derives no qualification under it. Jones v. Smart, 1 Term Rep. 44.]

By the 5 Anne, cap. 14. it is enacted, "That if any higher, chapman, carrier, inn-keeper, victualler, or alehouse-keeper, shall have in his or their custody or possession, any hare, pheasant, partridge, moor, heath game or grouse, or shall buy, sell, or offer to sell any hare, pheasant, partridge, moor, heath game or grouse, every such higher, &c. (unless such game, in the hands of such carrier, be sent up by a person or persons qualified to kill the game,) shall upon every such offence be carried before some justice of the peace for the county, riding, city, or town corporate, or liberties, where the said offence is committed; and if upon view, or upon the oath of one or more credible witnesses, shall be convicted of the same, shall forfeit for every hare, pheasant, partridge, moor, heath game or grouse, the sum of 5*l.* one half to the informer, and the other half to the poor of the parish where the offence was committed; the same to be levied by distress and sale of the offender's goods, by warrant under the hand and seal of the justice

“ justice or justices of the peace, before whom such offender or offenders shall be convicted, rendering the overplus, (if any be,) the charge of distraining being first deducted; and for want of distrels, the offender or offenders to be committed to the house of correction for the first offence for the space of three months, without bail or mainprise; and for every such other offence for the space of four months, provided that such conviction be made within three months after such offence committed; and that [*no*] * *certiorari* shall be allowed to remove any conviction made, or other proceedings of or concerning any matter or thing in this act, into any of the courts at *Westminster*, upon any pretence whatsoever, unless the party or parties, against whom such conviction shall be made, shall, before the allowance of such *certiorari*, become bound to the person or persons prosecuting the same, in the sum of fifty pounds, with such sufficient securities, as the justice or justices of the peace, before whom such offender shall be convicted, shall think fit, with condition to pay unto the prosecutors, within fourteen days after such conviction [*confirmed*] or *procedendo* granted, their full costs and charges, to be ascertained upon their oaths; and that in default thereof, it shall be lawful for the said justice or justices, or other, to proceed for the due execution of such conviction, in such manner as if no such *certiorari* had been awarded.

falefman, fishmonger, cook, or pastry-cook, deemed exposing thereof to sale. Forfeitures and penalties to be recovered and applied as directed by the above act of 5 Ann. c. 14. [* The word *no* is inserted instead of the words *if any*, which are in the act, since that word seemeth necessary to make up the sense; and the word *confirmed* is added for the like

reason. And indeed there have been too many inadvertencies in the drawing up of this act; for there is false grammar in no fewer than six places, besides other mistakes. 2 Burn's Just. tit. *Game*, 253.]

“ And for the better discovery of such higler, chapman (a), carrier, innkeeper, alehouse-keeper, and victualler, as shall offer to buy or sell any hare, pheasant, partridge, moor, heath game or grouse, it is enacted, That any person that shall destroy, sell, or buy any hare, pheasant, partridge, moor, heath game or grouse, and shall within three months make discovery of any higler, chapman, carrier, inn-keeper, alehouse-keeper, or victualler, that hath bought or sold, or offered to buy or sell, or had in his possession, any hare, pheasant, partridge, moor, heath game or grouse, so as any one shall be convicted of such offence in manner as aforesaid, such discoverer to be discharged of the pains and penalties hereby enacted for killing or selling such game as aforesaid, shall receive the same benefit or advantage as any other informer shall be entitled to, by virtue of this act, for such discovery and information.”

And it is further enacted, “ That if any person or persons, not qualified by the laws of this realm so to do, shall keep or use any greyhounds, setting-dogs, hayes, lurchers, tunnels, or any other engine to kill or destroy the game, and shall be thereof convicted upon the oath of one or two credible witnesses, by the justice or justices of the peace where such offence is committed as aforesaid, the person or persons so convicted shall forfeit the sum of five pounds; one half to be paid to “ the

[(a) A poulterer is not a chapman within the meaning of this statute. *Kearle v. Boulter*, Say. Rep. 191.]

(a) *Vide* the 9 Ann. c. 25. by which it is enacted, that no lord or lady of a manor shall make or appoint above one person to be a game-keeper within any one manor, whose name shall be entered with the clerk of the peace, &c. and by

3 Geo. 1. c. 11. it is enacted, that no lord or lady of any manor shall make or constitute any person to be a game-keeper, with power and authority to take and kill hare, pheasant, partridge, or any other game whatsoever, unless such person be qualified by the laws of this realm so to do, or unless such

person be truly and properly a servant to the said lord or lady, or such person be immediately employed and appointed to take and kill the game for the sole use and benefit of the said lord or lady, &c. — [By 25 Geo. 3. c. 50. every person who shall kill game shall deliver to the clerk of the peace his name and place of abode, and take out annually a certificate thereof charged with a stamp duty of 2*l.* 2*s.*; and by 31 Geo. 3. c. 21. with a farther duty of 1*l.* 1*s.*: and all deputations of game-keepers shall be registered, and the game-keepers shall annually take out a certificate thereof charged with a duty of 10*s.* 6*d.* which is doubled by the above statute of 31 Geo. 3. c. 21. Every person killing game without a certificate incurs a penalty of 20*l.*; and any person in pursuit of game, who shall refuse to produce his certificate or to disclose his name and place of abode, or who shall give a false account of himself, incurs a penalty of 50*l.* The certificate will not authorize unqualified persons to kill game; nor can a certificate taken out by a game-keeper under a deputation be given in evidence for killing game out of the manor in respect of which it is granted.] — * A lord of a manor may appoint a game-keeper, with power to kill game, though he is neither a person qualified, nor a menial servant of the lord; and such game-keeper hath a right to carry a gun any where, though out of the manor; and though he kills game, or sports out of the manor, his gun cannot be taken from him; but if he kills game out of the manor he is liable to the penalty. Mich. 9 G. 3. 2 Wils. 387. — [Though it is a rule of law not to permit a question respecting the boundaries of a manor to be discussed in an action on the game-laws; *Calcraft v. Gibbs*, 4 Term Rep. 681. and *Hawkins v. Bailey*; and *Blunt v. Grimes*, there cited; yet it is no defence to such an action that the defendant acted as game-keeper under a deputation from a person claiming to be lord of the manor, if there appear to be no ground for the claim. *Calcraft v. Gibbs*, *ubi supra*. and 5 Term Rep. 19.]

the informer, and the other half to the poor of the parish where the same was committed, the same to be levied by distress and sale of the offender's goods, by warrant under the hand and seal of such justice or justices, before whom such person or persons shall be convicted as aforesaid, and for want of such distress, the offender or offenders shall be sent to the house of correction for the space of three months for the first offence, and for every such other offence four months; and that it shall and may be lawful to and for any of her majesty's justices of the peace in their respective counties, ridings, cities, towns corporate, or liberty, and the lords and ladies of his, her, their, or any of their respective manors, within the said manors, to take away any such hare, pheasant, partridge, moor, heath game or grouse, or any other game, from any such higler, chapman, inn-keeper, victualler, or carrier, or any other person or persons not qualified by the laws to keep the same, to their own proper use, without being accountable to any person or persons for the same; and that it shall and may be lawful for any lord or lady of his or her respective lordship or manor, by writing under his or her hand and seal, to empower his or her game-keeper or (a) game-keepers upon his or her own lordship or manor as aforesaid, to kill hare, pheasant, partridge, or any other game whatsoever; but if the said game-keeper shall, under colour or pretence of the said power and authority to kill or take the same for the use of such lord or lady, afterwards sell or dispose thereof, to any person or persons whatsoever, without the consent or knowledge of the lord or lady of such manor or manors that hath given such power or authority in manner as aforesaid, and shall be thereof convicted, upon the complaint of such lord or lady of any manor, and upon the oath of one or more credible witnesses, before any one or more of her majesty's justices of the peace as aforesaid, upon such conviction, such game-keeper shall be committed to the house of correction for the space of three months, there to be kept to hard labour."

By the 9 *Ann. cap. 25. § 2.* it is enacted, "That if any hare, pheasant, partridge, moor, heath game or grouse shall be found in the shop, house, or possession of any person or persons whatsoever not qualified, in his own right, to kill game, or being entitled thereto under some person so qualified, the same shall be adjudged, deemed, and taken to be an exposing thereof to sale within the true intent and meaning of the above statute 5 *Ann. cap. 14.*"

[(a) In an action there-fore upon this statute for exposing a hare to sale, it is sufficient to allege, that the defendant had

a hare in his possession. Jones v. Bishop, Say. Rep. 64.]

And it is further enacted by the said statute, § 3. "That if any person or persons whatsoever shall take, kill, or destroy any hare, pheasant, partridge, moor, heath game or grouse, in the night-time, the person or persons so offending shall likewise for every such offence incur such forfeitures, pains, and penalties, as by the said statute of 5 *Ann.* is declared and enacted, to be recovered by such means as by the said statute is prescribed."

For the punishing of persons who unlawfully hunt or take any red or fallow deer in forests or chases, or who beat or

wound keepers or other officers in forests, chases, or parks; and for more effectually securing the breed of wild fowl, see 10 *Geo. 2. c. 32. § 9, 10.* N.B. Sect. 9. is made perpetual by 31 *Geo. 2. c. 42. § 5.* For the preservation of the game in *Scotland*, see 24 *Geo. 2. c. 34.* For preventing the burning or destroying of goss, furze or fern in forests or chases, see 28 *Geo. 2. c. 19. § 3.*

Also by the said statute 9 *Ann. cap. 25. § 4.* reciting, "That whereas very great numbers of wild fowl of several kinds are destroyed by the pernicious practice of driving and taking them with hayes, tunnels, and other nets, in the fens, lakes, and broad waters, where fowl resort in the moulting time; and that at the season of the year when the fowl are sick and moulting their feathers, and the flesh unfavoury and unwholesome, to the prejudice of those who buy them, and to the great damage and decay of the breed of wild fowl; it is therefore enacted, That if any person or persons whatsoever, between the first day of *July* and the first day of *September*, as they shall yearly happen, shall by hayes, tunnels, or other nets, drive and take any wild duck, teal, widgeon, or any other fowl, commonly reputed water fowl, in any of the fens, lakes, broad waters, or other places of resort for wild fowl in the moulting season, such person or persons who shall so offend, and thereof shall be convicted before any one or more of her majesty's justices of the peace for the county where such offence shall be committed, by the oath of one or more credible witnesses, shall, for every wild duck, teal, or other water fowl so taken as aforesaid, forfeit and pay the sum of five shillings; one moiety thereof to be paid to the informer, and the other moiety to the poor of the parish where such offence shall be committed; the same to be levied by distress and sale of the offender's goods, by warrant under the hand and seal of the justice and justices of the peace before whom the offender shall be convicted, rendering the overplus, if any be, above the penalty and charge of the distress, and for want of distress the offender shall be com-

mitted

“mitted to the house of correction for any time not exceeding
 “one month, nor less than fourteen days, there to be whipped
 “and kept to hard labour; and the justice or justices of the
 “peace, before whom such person or persons so offending shall
 “be convicted, shall order such hayes, nets, or tunnels, that
 “were used in driving and taking the said wild fowl as aforesaid,
 “to be seized and immediately destroyed in the presence of such
 “justice or justices.”

See 28 G. 2.
 c. 4. and 30
 G. 2. c. 6.
 § 47. to the
 same pur-
 port.

By the 6 *Geo. 2. cap. 3.* “for the better preservation of the game
 in or near such place where any officers or soldiers shall at any
 time be quartered, it is enacted, That no officer or soldier
 shall, without leave of the lord of the manor, under his hand
 and seal, first had and obtained, take, kill, or destroy any hare,
 coney, pheasant, partridge, pigeon, or any other sort of fowls,
 poultry, or fish, or his majesty’s game within the kingdom of
Great Britain; and upon complaint thereof shall be, upon oath
 of one or more credible witness or witnesses, convicted before any
 justice of the peace, who is and are hereby impowered and autho-
 rised to hear and determine the same, (that is to say) every such
 officer so offending shall, for every such offence, forfeit the sum
 of five pounds, to be distributed among the poor of the place
 where such offence shall be committed; and every officer com-
 manding in chief upon the place, for every such offence com-
 mitted by any soldier under his command, shall forfeit the sum
 of twenty shillings, to be paid and distributed in manner afore-
 said; and if upon such conviction made by the justices of the
 peace, and demand thereof also made by the constable or over-
 seers of the poor, such officer shall refuse or neglect, and not
 within two days pay the said respective penalties, such officer
 so refusing or neglecting shall forfeit, and is hereby declared to
 have forfeited his commission, and his commission is hereby
 declared to be null and void.”

By 26 G. 2.
 c. 11., suits
 for the reco-
 very of pec-
 uniary pe-
 nalties for
 offences
 committed
 after 25
March
 1753,
 against the
 game-laws,
 may be
 brought be-
 fore the end
 of the se-
 cond term
 after the of-
 fence com-
 mitted.—

By the 8 *Geo. 1.* “for rendering more effectual the laws now in
 being for the better preservation of the game, it is enacted,
 That wheresoever any person shall, for any offence to be here-
 after committed against any law now in being, for the better
 preservation of the game, be liable or subject to pay any pecu-
 niary penalty or sum of money, upon conviction before any
 justice or justices of the peace, it shall and may be lawful for
 any other person whatsoever, either to proceed to recover the
 said penalty by information and conviction before a justice or
 justices of the peace, in such manner as is in such law con-
 tained, or to sue for the same by action of debt, or on the case,
 bill, plaint or information, in any of his majesty’s courts of
 record, wherein no essoin, protection, wager of law, or more
 than one imparlance shall be allowed, and wherein the plaintiff,
 if he recovers, shall likewise have his double costs.

Any person may sue within six months after offence, for the whole penalty, (though the same be given
 to the poor,) to his own use, and have double costs. Stat. 2 *Geo. 3. c. 19.*

“ Provided,

“ Provided, That all suits and actions to be brought by force
 “ of this act, shall be brought before the end of the next term after
 “ the offence committed, and that no offender against any of the
 “ laws now in being, for the better preservation of the game, shall
 “ be prosecuted for the same offence, both by the way prescribed
 “ by this law, and by the way prescribed by any of the said for-
 “ mer laws; and, that in case of any second prosecution, the
 “ person so doubly prosecuted may plead in his defence the
 “ former prosecution pending, or the conviction or judgment
 “ thereupon had.”

[The 26 G. 2.
 c. 2. extends
 the time to
 the end of
 the second
 term.]

* By 2 Geo. 3. c. 19. None shall take, kill, or have any partridge, from *February 12 to September 1*, or pheasant, from *February 1 to October 1*, (except taken in lawful time, and kept in a mew,) or any black game from *January 1 to August 20*, or grouse, from *December 1 to July 25*, on pain of *5*l.* per bird*.

All penalties on the game laws, sued for in *Westminster-Hall*, shall go to the informer, and no part to the poor of the parish.

By 13 Geo. 3. cap. 55. None shall kill or have black game from *December 10 to August 20*, or grouse, from *December 10 to August 12*, on pain from *20*l.* to 10*l.** for first, and from *30*l.* to 20*l.** for subsequent offence, by suit, or before a justice.

By 28 Geo. 2. cap. 12. Every person, qualified or not, who offers to sale game, is liable to the penalties on higlers, &c., offering to sale, by 5 Ann. c. 14. And game found in possession of a poulterer, &c. is deemed exposing to sale.

By 13 Geo. 3. cap. 80. Persons killing hare, pheasant, &c., or using gun, dog, engine, &c. to kill or take, between *seven at night and six in the morning*, from *October 12 to February 12*; and between *nine at night and four in the morning*, from *February 12 to October 12*, convicted before one justice, forfeit for the first offence from *20*l.* to 10*l.** and for the second from *30*l.* to 20*l.** and costs, or, for want of distress, shall be committed for three months; and for offence after second conviction shall be committed till the quarter session, or give surety to appear to indictment, and if convicted forfeit *50*l.** and costs, or, for want of distress, committed from *twelve to six months*, and publicly whipped. Half the forfeiture to the informer, and half to the poor.

Killing, or using an engine on *Sunday*, or *Christmas-day*, liable to the like penalty. The justice where the offence is committed may grant a warrant to be indorsed by a justice in another county where the offender lives, and the offender thereby be brought before the first justice, or distress be made. An appeal is given, but no *certiorari*.

By 10 Geo. 3. c. 18. A person stealing any dog, or receiving it, knowing it to be stolen, convicted before *two justices*, forfeits from *30*l.* to 20*l.** or imprisonment from *twelve to six months*; and for the second offence from *50*l.* to 30*l.** or from *eighteen to twelve months* imprisonment, and whipping. An appeal is final, and there is not any *certiorari*.

[It hath been determined, that in an information on the acts of
 22 & 23 Car. 2. c. 25. and 5 Ann. c. 14. not only the negative
 qualifications

Rex v.
 Mancot,
 1 Str. 66.

R. v. Hill, 2 Ld. Raym. 1415. qualifications must be set out; but (a) that the time when the offence was committed must also be stated.

R. v. Jarvis, 1 Burr. 148. Bluet v. Needs, Com. Rep. 522. R. v. Wheatman, Dougl. 331. (a) R. v. Pullen, 1 Salk. 369. R. v. Chandler, *id.* 378. R. v. Simpson, 10 Mod. 248. In an action however, it is enough to state that the defendant was not duly qualified. Bluet v. Needs, Com. Rep. 522.

Anon. cited in 2 Ld. Raym. 1387. In a conviction for deer-stealing, the county where the offence was committed was mentioned only in the information, and not in the evidence of the witnesses; and therefore that not appearing to be proved, the conviction was quashed.

R. v. Wyart, 2 Ld. Raym. 1478. A conviction on the 5 Ann. set out the vill, but not the parish wherein the offence was committed: upon motion to quash it for this defect, a part of the penalty being given to the poor of the parish; the court said, if there was a parish of the same name with the vill, they would intend it to be co-extensive with it; if the vill was extraparochial, then the informer was entitled to the whole penalty.

R. v. Stone, 2 Ld. Raym. 1545. A conviction for deer-killing will be quashed, if made upon the evidence of the informer.

R. v. Filer, 1 Str. 497. R. v. Gardner, 2 Str. 1084. Wingfield v. Stratford, 1 Willf. 315. R. v. Thompson, 2 Term Rep. 18. A conviction for keeping (only) a lurcher is good, for the bare keeping of it is evidence of the purpose for which it is kept. But it is not so in the case of a gun, for the keeping of a gun is an ambiguous act: in order therefore to bring the party keeping it within the statute, it must be shewn that it was kept for the purpose of killing game. However a conviction that the defendant *kept and used a gun to kill and destroy the game*, hath been solemnly adjudged to be sufficient.

Reason v. Lisle, Com. Rep. 575. In an action on the 5 Ann. c. 14. for keeping and using a dog to kill the game, it must be shewn what sort of dog it was; that it may appear whether it were one of the dogs mentioned in the statute; for this being a penal law shall not be extended by equity; in an action therefore for using a *hound*, the judgment was reversed, the word hound not being to be met with in the statute.

Marriot v. Shaw, Com. Rep. 274. It hath been adjudged that a conviction *super præmissis* for three penalties of 5*l.* each for killing three hares, where it appears that all was done in the same day, is bad, for the statute does not give 5*l.* for every hare, it being all but one offence.

Cripps v. Durden, Cowp. 646., declared, that "killing a single hare was an offence; but that killing ten more in the same day would not multiply the offence, or the penalty imposed by the statute for killing one." See a similar decision on this point in the case of Reg. v. Matthews, 10 Mod. 26., and see 3 Term Rep. 510.

Rex v. Bleasdale, 4 Term Rep. 809. Two or more persons cannot be convicted in separate penalties under 5 Ann. for using a grey-hound to destroy game, for it is only one offence.

2 Bl. Com. 418. It is not to be forgotten that none of the above statutes *qualify* any one, except in the instance of a game-keeper, to kill game: the circumstance of having 100*l.* per ann. and the rest, are not properly qualifications, but exemptions, and the persons, so exempted from the penalties of the game statutes, are not only liable to actions of trespass by the owners of the land, but also if they kill

game within the limits of any royal franchise, they are liable to the actions of such who may have the right of chase or free warren therein.]

Gaming.

(A) How far restrained by the Common Law.

(B) How far restrained by Statute.

(A) How far restrained by the Common Law.

IT seems that by the common law, the playing at cards, dice, &c. when practised innocently and as a recreation, the better to fit a person for business, is not at all unlawful, nor punishable as any offence whatsoever. 2 Vent. 175. 5 Mod. 13. Salk. 100. pl. 10. See the preamble to the statute 16 Car. 2. c. 7.

Also it is agreed, that a person who wins money at gaming may maintain a special *indebitatus assumpsit* for it; for the contract is not (a) unlawful in itself, and the winner's venturing his money is a sufficient consideration to entitle him to the action. 3 Lev. 118. 6 Mod. 128. 2 Ld. Raym. 1034. 3 Salk. 14. pl. 1. 175. Vent. 175.

pl. 1. Holt, 329. pl. 4. 12 Mod. 81. 2 Show. 82. pl. 69. Carth. 336. 5 Mod. 13. [With respect to wagers, in general they may be considered as legal, if they are not an incitement to a breach of the peace, or to immorality; or if they do not affect the feelings or interest of a third person, or expose him to ridicule; or if they are not against sound policy. Da Costa v. Jones, Cowp. 729. Atherford v. Beard, 2 Term Rep. 610. Goode v. Elliott, 3 Term Rep. 697. "This species of contract," Lord Mansfield, in the case here cited, says, "has in fact gone to an extent that is much to be complained of. And whether it would not have been better policy to have treated all wagers originally as gaming contracts, it is now too late to discuss." This better policy prevails in Scotland, and hath lately been sanctioned by a decision of the House of Lords of this country. Bruce v. Ross, 14th April 1788. Printed Cases of the Lords.] (a) And therefore the defendant to an action for money won at play, where the contract is for a sum allowed of by the statutes, must put in special bail. Salk. 100. pl. 10. [But see Younge v. Moore, 2 Will. 67. contr.]

But it seems to be the better opinion, that a general *indebitatus assumpsit* will not lie for money won at play, for the contract is executory, (b) and but a wager, which is but a collateral promise; and this action will lie in no case but where debt will lie (c), which must be on a contract executed, such as labour done, or some other meritorious cause. Ld. Raym. 69. 89. 6 Mod. 128. Lutw. 180. 5 Mod. 13. and Carth. 338. S. P. where it is

said, that the chief reason of this opinion was, because the court would not countenance gaming, by giving such an easy remedy for money won at play, & vide 3 Lev. 118. and Vent. 175., where it seems to have been holden, that such action will lie. (b) But if the money be staked down the instant that the game

game is determined, the property is vested in the winner, and it is as much a violation of his right to withhold it from him as it would be if he had come to it by any other means. 5 Mod. 13. [(c) This position is unfounded. 3 Burr. 1008.]

5 Mod. 13. But an *indebitatus assumpsit* lies against him who (a) holds the per Holt, wager, because it is a promise in law to deliver it if won. C. J.

(a) If upon a wager the money is deposited in the hands of a third person, and the determination left to two, and one of them refuses to determine the matter, no action lies on such a wager till the adjudication, and the party may justify the detainer; but if it happened that the wager became impossible to be determined, as if the judges died, or the time were past, then the wager dissolves, and each party shall have his money again.

That a common player of hazard, of false dice, and using false dice, may be indicted for it And although gaming in the manner, as has been said, may be lawful, yet if a person be guilty of cheating, as by playing with false cards, dice, &c., he may be indicted for it at common law, and fined and imprisoned according to the circumstances of the case and heinousness of the offence.

at common law, and set in the pillory. 2 Rol. Abr. 78. — So, an information against a person for using the game of cock-fighting, may be at common law. 3 Keb. 463. 510.

Hawk. P.C. c. 75. § 6. Also, all common gaming-houses are nuisances in the eye of the law, not only because they are great temptations to idleness, but also because they are apt to draw together great numbers of disorderly persons, which cannot but be very inconvenient to the neighbourhood.

Vern. 439. Also, from the destructive and pernicious consequences which Sir Bazil Firebrasse v. Bret, must necessarily attend excessive gaming, both the courts of law and equity have shewn their abhorrence of it. Hence in a case 2 Vern. 71. where A. came to the house of B., and won of him 900*l.* which S. C. where he carried away, and afterwards won 1500*l.* more, which he had in his possession, but which B. and his servants took from him by violence, upon which A. brought an action of trespass, the court of Chancery granted an injunction.

that the court inclined so strongly against him, submitted to a proposition made by the counsel, which was afterwards decreed, as by consent; and on this occasion my Lord Chancellor cited the case of Sir Cecil Bishop and Sir Thomas Staples, that came before the Lord Chief Justice Hale in the King's Bench, upon a wager won at a horse-race, where Lord Hale declared, he would give the defendant leave to imparl from time to time.

2 Vern. 291. So, where one apprentice lost to another 100*l.* at two sittings at whist, 50*l.* of which was paid in ready money; and for the other 50*l.* he gave his bond of 100*l.* penalty, and on a bill to be relieved against it, the court of Chancery decreed the bond to be delivered up and cancelled, although the defendant insisted by his answer, that he was unwilling and declined playing for so much, and that he was pressed to it by the plaintiff. 2 Vern. 291. So, where one apprentice lost to another 100*l.* at two sittings at whist, 50*l.* of which was paid in ready money; and for the other 50*l.* he gave his bond of 100*l.* penalty, and on a bill to be relieved against it, the court of Chancery decreed the bond to be delivered up and cancelled, although the defendant insisted by his answer, that he was unwilling and declined playing for so much, and that he was pressed to it by the plaintiff.

master to turn away his apprentice that he frequents gaming; and he may justify it before the Chamberlain.

(B) How far restrained by Statute.

Of gaming by persons becoming bankrupts vide tit. Bankrupts.

THERE have been several statutes made for the restraining of gaming, such as the 33 H. 8. cap. 9. 2 & 3 Ph. & Ma. cap. 9. 16 Car. 2. cap. 7. 9 An. cap. 14. and 2 Geo. 2. cap. 28. which re-citing

citing the 33 H. 8. and that no power is given unto justices of the peace to demand and take from persons found playing contrary to law, any other security than their own recognizances, &c. enacts, "That where it shall be proved upon the oath of two or more credible witnesses, before any justice or justices of the peace, as well as where such justice or justices shall find, upon his or their own view, that any person or persons have or hath used or exercised any unlawful game, contrary to the said statute, the said justice or justices shall have full power and authority to commit all and every such offender and offenders to prison, without bail or mainprize, unless and until such offender and offenders shall enter into one or more recognizance or recognizances, with sureties, or without, at the discretion of the said justice or justices of the peace, that he or they respectively shall not from thenceforth play at, or use such unlawful game.

But the most remarkable statutes to this purpose are the 16 Car. 2. cap. 7. and the 9 Ann. cap. 14.

By the first of which it is enacted, "That if any person or persons of any degree or quality whatsoever, at any time or times, do or shall by any *fraud, shift, covenage, circumvention, deceit, or unlawful device, or ill practice* whatsoever, in playing at or with cards, dice, tables, tennis, bowls, kittles, shovelboard, or in or by cock-fighting, horse-races, dog-matches, or foot-races, or other pastimes, game or games whatsoever, or in or by bearing a share or part in the stakes, wagers, adventures, or in or by betting on the sides or hands of such as do or shall play, act, ride, or run as aforesaid, win, obtain, or acquire to him or themselves, or to any other or others, any sum or sums of money, or other valuable thing or things whatsoever, that then every person and persons so offending, as aforesaid, shall *ipso facto* forfeit and lose treble the sum or value of money, or other thing or things so won, gained, obtained, or acquired; the one moiety thereof to our sovereign lord the king, his heirs and successors, and the other moiety thereof unto the person or persons grieved, or who shall lose the money or other thing or things so gained, so as every such loser and person grieved in that behalf do or shall prosecute and sue for the same within six kalendar months next after such play, and in default of such prosecution, the same other moiety to such person or persons as shall or will prosecute or sue for the same, within one year next after the said six months expired; and that the said forfeitures shall and may be sued for or recovered by action of debt, bill, plaint, or information, in any of his majesty's courts at *Westminster*, wherein no essoin, protection, or wager of law shall be allowed; and that all and every such plaintiff or plaintiffs, informer or informers, shall, in every such suit and prosecution, have and recover his and their *treble* costs against the person offending and forfeiting as aforesaid."

And by § 3. of the said statute it is further enacted, "That if any person or persons shall at any time play at any of the said
VOL. III. Z " games

[(a) The words "contract or contracts for the same" are not in 9 Ann. c. 14., and were probably left out designedly. 2 Bur. Rep. 1081.]

"games, or any other pastime, game or games whatsoever,
 " (other than with and for ready money,) or shall bet on the
 " sides or hands of such as do or shall play thereat, and shall
 " lose any sum or sums of money, or other thing or things so
 " played for, *exceeding the sum of one hundred pounds*, at any time
 " or meeting upon ticket or credit, or otherways, and shall not
 " pay down the same at the time when he or they shall so lose
 " the same; the party and parties who loseth or shall lose the said
 " monies, or other thing or things so played, or to be played for,
 " *above the said sum of one hundred pounds*, shall not in that case
 " be bound or compelled, or compellable, to pay or make good
 " the same, but the contract (a) or contracts for the same, and
 " for every part thereof; and all and singular judgments, statutes,
 " recognizances, mortgages, conveyances, assurances, bonds, bills,
 " specialties, promises, covenants, agreements, and other acts,
 " deeds, and securities whatsoever, which shall be obtained, made,
 " given, acknowledged, or entered into for security or satisfaction
 " of or for the same, or any part thereof, shall be utterly void
 " and of none effect; and that the person or persons so winning
 " the said monies or other things, shall forfeit and lose treble the
 " value of all such sum and sums of money, or other thing or
 " things, which he shall so win, gain, obtain, or acquire, above
 " the said sum of one hundred pounds; the one moiety thereof
 " to our said sovereign lord the king, his heirs and successors, and
 " the other moiety thereof to such person or persons as shall pro-
 " secute or sue for the same within one year next after the time
 " of such offence committed, and to be sued for by action of
 " debt, bill, plaint, or information, in any of his majesty's courts
 " of record at *Westminster*, wherein no essoin, protection, or
 " wager of law shall be allowed; and that every such plaintiff
 " or plaintiffs, informer or informers, shall in every such suit or
 " prosecution have and receive his treble costs against the person
 " or persons offending and forfeiting, as aforesaid."

In the construction of this statute the following opinions have been holden :

Salk. 344.
 pl. 2.
 Huxley and
 Jacob, ad-
 judged.
 Carth. 356.
 and 5 Mod.
 175. S. C.
 adjudged.
 Holt, 328.
 pl. 2.
 Comyns, 4.
 12 Mod. 96.

1. That if the loser draws a bill for 120 guineas on his banker, who accepts the bill, to an action brought against him by the winner, the drawee may well plead this statute, although it was objected, that the nature of the duty was altered, and a new contract created by the acceptance, and that it would endanger the credit of such bills, if they could be avoided on this account; but these reasons did not prevail, for though it be in the nature of a new contract, yet all is founded on the illegal and tortious winning, to which the plaintiff is privy.

Ld. Raym. 87.

Salk. 345.
 pl. 3.
 Carth. 357.
 [But see
 Bowyer v.
 Brompton,
 2 Str. 1155.]

2. But it seems, that if the winner had assigned this bill or note *bona fide*, upon good consideration, to a stranger, he had not been within the statute, not being privy to the tort, but an honest creditor.

Lowe v. Waller, Dougl. 736.]

3. Also

3. Also it hath been adjudged, that if a man wins above the sum mentioned in the statute at play, and the winner owes *J. S.* the like sum, who demands his money, and thereupon the winner tells him, that such a one, *viz.* the loser, was indebted to him, and that he would give him his bond for the money, which he accordingly does; in this case, if *J. S.* is not privy to the monies being won at play, he is not within the statute. 2 Mod. 273.

4. It seems to be the better opinion, that a person's losing 80*l.* at one meeting, for which he gives security, and 70*l.* more at another meeting, to the same person, is not within the statute; but if these several meetings were appointed to evade the statute, it might be otherwise. 2 Mod. 54.
Hill and
Pheasant.

5. But it hath been adjudged, that if *A.* and *B.* enter into articles to run a horse-race such a day for 100*l.* which is won by *A.*, and further in the same articles, that on a subsequent day, *A.* should, at *B.*'s request, bring his horse to run against his for 200*l.* more, which *B.* never requests, though only 100*l.* is won by *A.* which is not above the sum mentioned in the statute, yet the contract being for more than 100*l.* makes the whole bargain void *ab initio*, and within the statute; which being made to prevent the use of excessive gaming, ought to be construed in the most extensive manner that can be to answer that end. Lev. 94.
Edgebury
and Rosin-
dale, ad-
judged.
Vent. 253.
S. C. ad-
judged.

6. If *A.* wins a watch from *B.* of 10*l.* value, which is presently delivered, and also 100*l.* for which a bond is given; this is not within the statute, which extends only to those cases where credit is given for any sum lost at play above 100*l.* without any regard to what was lost in ready money; and here the watch is in nature of ready money, and therefore not within the statute. Lev. 244.
Danvers and
Thistle-
thwayte,
Sid. 394.
S. C.
Salk. 345.
pl. 4. S. C.
cited as law by Holt, Ch. Just.

7. It hath been adjudged, that if a person loses 60*l.* to one, and 60*l.* to another, at one sitting, or if he loses to each of three or four people 50*l.* or any other sum not exceeding 100*l.* that this is not within the statute. 5 Mod. 351.
Stanhope
and Smith,
Salk. 345.
pl. 4.
Dickson and

Pawlet, S. P. adjudged, unless they go shares fraudulently and join in the stakes; for then, as to the change of the game, they are as one person.

8. If two are at play at backgammon, and one of the players stirs a man, but does not move it from the point, upon which there ensues a wager of 100 guineas, *viz.* whether he who stirred the man was obliged to play it, and the determination left to the groom-porter, who determines that he was not; this is not within the statute, for the money was not lost on the chance of the play, but on the right of the play, which is a collateral matter. Salk. 344.
pl. 1. Pope
v. St. Leger,
4 Mod. 409.
10 Mod.
336.
12 Mod. 81.
5 Mod. 1.
Skin. 572.
pl. 16.

Lutw. 487. Carth. 322. S. C.; but note, the judgment in this case was reversed for a fault in the pleading.

By the 9 *Ann. cap. 14.* it is enacted, "That all notes, bills, bonds, judgments, mortgages, or other securities or conveyances whatsoever given, granted, drawn, or entered into, or executed by any person or persons whatsoever, where the By 12 G. 2.
c. 28. § 2.
the game
of ace of
hearts, faro,

baſſet, and hazard, ſhall be deemed games or lotteries by cards or dice; and every perſon who ſhall ſet up or keep theſe games ſhall be liable to all the penalties for letting up or keeping any of the games or lotteries in this act mentioned. By 13 G. 2. c. 19. § 9. the game of paſſage, and every other game with one or more die or dice, or with any other inſtrument, engine or device, in the uſe of dice, having

one or more figures or numbers thereon, (backgammon and the other games played with backgammon-tables only excepted,) ſhall be deemed games or lotteries by dice within the ſaid act. By 18 Geo. 2. c. 34., no perſon ſhall keep any houſe, room or place for playing, or ſuffer any perſon whatſoever within any ſuch houſe, room or place, to play at the game of rowlet, otherwiſe roly-poly, or at any other game with cards or dice prohibited by law, and the offender ſhall incur the penalties, and be liable to ſuch proſecution as directed by this act. By § 5., no perſon incapable of being a witneſs (except the parties) for having played, betted, &c. By § 7., no privilege of parliament to be allowed in proſecutions, &c. By 30 G. 2. c. 24. § 14., if any publican permits journeymen, &c. to game in his houſe, he ſhall forfeit 40 s., and ten pounds for every ſubſequent offence, to be levied by diſtreſs and ſale.

[To loſe 10 l. at one time is to loſe it by a ſingle ſtake or bet: to loſe at one ſitting, is to loſe it in a courſe of play where the company never parts, tho' the perſon may not be actually gaming the whole time. Per Black-Roar, J.

“ whole, or any part of the conſideration of ſuch conveyances or ſecurities ſhall be for any money, or other valuable thing whatſoever, won by gaming or playing at cards, dice, tables, tennis, bowls, or other game or games whatſoever, or by betting on the ſides or hands of ſuch as do game at any of the games aforeſaid, or for the reimbursing or repaying any money knowingly lent or advanced for ſuch gaming or betting as aforeſaid, or lent or advanced at the time and place of ſuch play, to any perſon or perſons ſo gaming or betting as aforeſaid, or that ſhall, during ſuch play, ſo play or bet, ſhall be utterly void, frustrate, and of none effect, to all intents and purpoſes whatſoever; and that where ſuch mortgages, ſecurities, or other conveyances ſhall be of lands, tenements, or hereditaments, or ſhall be ſuch as incumber or affect the ſame, ſuch mortgages, ſecurities, or other conveyances, ſhall enure, and be to and for the ſole uſe and benefit of, and ſhall devolve upon ſuch perſon or perſons as ſhould or might have, or be entitled to ſuch lands, tenements, or hereditaments, in caſe the ſaid grantor or grantors thereof, or the perſon or perſons ſo incumbering the ſame, had been naturally dead, and as if ſuch mortgages, ſecurities, or other conveyances had been made to ſuch perſon or perſons ſo incumbering the ſame; and that all grants or conveyances to be made for the preventing of ſuch lands, tenements, or hereditaments from coming to, or devolving upon ſuch perſon or perſons hereby intended to enjoy the ſame, as aforeſaid, ſhall be deemed fraudulent and void, and of none effect to all intents and purpoſes whatſoever.

“ And it is further enacted, That any perſon who ſhall at any time or ſitting, by playing at cards, dice, tables, or other game or games whatſoever, or by betting on the ſides or hands of ſuch as do play at any of the games aforeſaid, loſe to any one or more perſon or perſons ſo playing or betting, in the whole the ſum or value of ten pounds, and ſhall pay or deliver the ſame, or any part thereof, the perſon or perſons ſo loſing and paying, or delivering the ſame, ſhall be at liberty, within three months then next, to ſue for and recover the money or goods ſo loſt, and paid or delivered, or any part thereof, from the reſpective winner and winners thereof, with coſts of ſuits, by action of debt founded on this act, to be proſecuted in any of her majeſty's courts of record, in which actions or ſuits, no eſſoin, protection, wager of law, privilege of parliament, or more than one imparlance ſhall be allowed; in which actions it ſhall “ be

“ be sufficient for the plaintiff to allege, that the defendant or defendants are indebted to the plaintiff, or received to the plaintiff’s use, the monies so lost or paid, or converted the goods won of the plaintiffs to the defendants use, whereby the plaintiff’s action accrued to him, according to the form of this statute, without setting forth the special matter; and in case the person or persons, who shall lose such money or other thing as aforesaid, shall not within the time aforesaid, really and *bonâ fide*, and without covin or collusion, sue, and with effect prosecute for the money or other thing, so by him or them lost and paid or delivered, as aforesaid, it shall and may be lawful to and for any person or persons, by any such action or suit, as aforesaid, to sue for and recover the same, and treble the value thereof, with costs of suit, against such winner or winners as aforesaid; the one moiety thereof to the use of the person or persons that will sue for the same, and the other moiety to the use of the poor of the parish where the offence shall be committed.

2 Bl. Rep.
1227.]

“ And for the better discovery of the monies, or other thing so won and to be sued for and recovered as aforesaid, it is further enacted, That all and every the person or persons who, by virtue of this present act, shall or may be liable to be sued for the same, shall be obliged and compellable to answer upon oath such bill or bills as shall be preferred against him or them, for discovering the sum and sums of money, or other thing so won at play, as aforesaid.

“ Provided, That upon the discovery and repayment of the money, or other thing so to be discovered and repaid as aforesaid, the person or persons, who shall so discover and repay the same as aforesaid, shall be acquitted, indemnified, and discharged from any further or other punishment, forfeiture, or penalty, which he or they might have incurred by the playing for, or winning such money or other thing so discovered and repaid as aforesaid.

“ And it is further enacted, “ That if any person do or shall, by any fraud or shift, cosenage, circumvention, deceit, or unlawful device or ill practice whatsoever, in playing at or with cards, dice, or any the games aforesaid, or in or by bearing a share or part in the stakes, wagers, or adventures, or in or by betting on the sides or hands of such as do or shall play as aforesaid, win, obtain, or acquire to him or themselves, or to any other or others, any sum or sums of money, or other valuable thing or things whatsoever, or shall at any one time or sitting win of any one or more person or persons whatsoever, above the sum or value of ten pounds; that then every person or persons so winning by such ill practice as aforesaid, or winning at any one time or sitting above the said sum or value of ten pounds, and being convicted of any of the said offences, upon an indictment or information to be exhibited against him or them for that purpose, shall forfeit five times

“ the value of the sum or sums of money, or other thing so won
 “ as aforesaid ; and in case of such ill practice as aforesaid, shall
 “ be deemed infamous, and suffer such corporal punishment as in
 “ cases of wilful perjury ; such penalty to be recovered by such
 “ person or persons as shall sue for the same by such action as
 “ aforesaid.

“ And whereas divers lewd and dissolute persons live at great
 “ expences, having no visible estate, profession, or calling to
 “ maintain themselves, but support those expences by gaming
 “ only ; it is further enacted, That it shall and may be lawful for
 “ any two of her majesty's justices of the peace in any county,
 “ city, or liberty whatsoever, to cause to come, or to be brought
 “ before them, every such person or persons within their respec-
 “ tive limits, whom they shall have just cause to suspect to have
 “ no visible estate, profession, or calling to maintain themselves
 “ by, but do for the most part support themselves by gaming ;
 “ and if such person or persons shall not make it appear to such
 “ justices, that the principal part of his or their expences is not
 “ maintained by gaming, that then such justices shall require of
 “ him or them sufficient sureties for his or their good behaviour
 “ for the space of twelve months, and in default of his or their
 “ finding such securities, to commit him or them to the common
 “ gaol, there to remain until he or they shall find such sureties.

“ And it is further enacted, That if such person or persons so
 “ finding sureties shall, during the time for which he or they shall
 “ be so bound to the good behaviour, at any one time or sitting,
 “ play or bet for any sum or sums of money, or other thing ex-
 “ ceeding in the whole the sum or value of twenty shillings, that
 “ then such playing shall be deemed or taken to be a breach of
 “ his or their behaviour, and a forfeiture of the recognizance
 “ given for the same.

“ And for the preventing of such quarrels as shall or may happen
 “ on the account of gaming, it is further enacted, That in case any
 “ person or persons whatsoever shall assault and beat, or shall chal-
 “ lenge or provoke to fight any other person or persons whatso-
 “ ever, upon account of any money won by gaming, playing, or
 “ betting at any of the games aforesaid, such person or persons
 “ assaulting and beating, or challenging or provoking to fight, such
 “ other person or persons, upon the account aforesaid, shall, being
 “ thereof convicted upon an indictment or information to be ex-
 “ hibited against him or them for that purpose, forfeit to her
 “ majesty all his goods, chattels, and personal estate whatsoever,
 “ and shall also suffer imprisonment without bail or mainprize, in
 “ the common gaol of the county where such conviction shall be
 “ had, during the term of two years.

“ Provided, That nothing in this act shall extend to prevent
 “ or hinder any person or persons from gaming or playing at any
 “ of the games aforesaid, within any of her majesty's palaces of
 “ *St. James's* or *Whitehall*, during such time as her majesty, her
 “ heirs or successors, shall be actually resident at either of the
 “ said

“ said two palaces, or in any other royal palace, where her majesty, her heirs or successors, shall be actually resident, during the time of such actual residence, so as such playing be not in any house, lodging, or other part of any of the said palaces, the freehold or inheritance whereof is or shall be out of the crown, or is or shall be in lease to any person or persons, during such time as such freehold and inheritance shall be out of the crown, or such lease shall continue, and so as such playing be for ready money only.”

[Upon this act it hath been determined, that although both the security and the contract are void as to money won at play, only the security is void as to money lent at play; and that the contract as to that remains, and the lender may maintain an action for it.

2 Wils. 309. Robinson v. Bland, 2 Burr. 1077.

A bill of exchange given for money won at play, cannot be recovered upon by an indorsee for valuable consideration, and without notice, the original vice of the consideration affecting the security even in the hands of an innocent and *bonâ fide* holder.

Dougl. 614. Lowe v. Waller, *id.* 716.

If money be paid on a security made void by the statute, it may be recovered back; and the action may be brought after the expiration of three months, the time within which the loser of money actually paid at the time it is lost must bring his action to recover it back; for that limitation doth not extend to payments made on account of such void securities.

As the second section of this statute impowers any person to sue for and recover the money; and then directs that a moiety of it shall be to the use of the poor of the parish where the offence shall be committed; therefore, the declaration may be laid either “to render to the informer only,” or, “to render to the informer and the poor;” and consequently, so may the judgment be likewise.

If a defendant be convicted in an information upon that clause of the statute, which says that he shall forfeit five times the value, the court cannot impose a fine upon him; but the only judgment they can give, is, *quod convictus est*; a new action must be brought upon that judgment for the forfeiture.

In an action to recover back money lost at any game within this statute, it must be stated that some one was actually playing at such game, else a wager of above 10*l.* laid upon his side is not a betting within the act.

that this statute is penal, and not remedial: but where the action is, as here, by the party who has lost the money, the statute is remedial, and not penal, and therefore a new trial may be had after verdict for the defendant. *Bones v. Booth*, 2 Bl. Rep. 1226. And so it was considered in the case of *Turner v. Warren*, 2 Str. 1149., where the court obliged the defendant to give special bail.

A foot-race, and a horse-race, are games within the statute: so it seems in cricket. Indeed, it seems immaterial to consider whether the game itself be lawful or not; if a man loses 10*l.* by playing or betting at it, it is within the statute.

id. 309. *Goodburn v. Marley*, 2 Str. 1159. *Jeffreys v. Walter*, 1 Wils. 220. *Clayton v. Jennings*, 2 Bl. Rep. 706.

Parjeau v. Walmley, 2 Str. 1249. *Alcinbrook v. Hall*, 2 Burr. 1077.

Bowyer v. Bampton, 2 Str. 1155. *Peacocke v. Rhodes*, Dougl. 614.

Rawden v. Shadwell, Amb. 269.

Turner v. Warren, 2 Str. 1079.

Frederick v. Lookup, 4 Burr. 2021.

Rex v. Luckup, 2 Str. 1042.

Lynall v. Longbottom, 2 Wils. 36. It was said in this case,

Lynall v. Longbottom, 2 Wils. 36. *Blaxton v. Pye*,

Rex v.
Lifton,
5 Term
Rep 338.

The statute of 27 *Geo. 3. c. 1.* which takes away the summary jurisdiction of magistrates over the lotteries, extends only to state lotteries; and does not repeal their power over the games of chance or lotteries prohibited by stat. 12 *Geo. 2. c. 28.*

The 13 *Geo. 2. cap. 19.* enacts that no plate under the value of 50 *l.* shall be run for, or be advertised or proclaimed to be run for, by any horse, &c. under a penalty of 200 *l.*; and that no person shall run any match between any horse, &c. for any sum of money, plate, prize, or other thing whatsoever, unless such match shall be started or run at *Newmarket* or *Black Hambleton*, or such sum of money, &c. be of the real and intrinsic value of 50 *l.* or upwards.

Bidmead
v. Gale,
4 Burr.
2432., and
1 Bl. Rep. 671.

Upon this act it hath been determined, that a match for 25 *l.* each side, play or pay, the plaintiff to pay the defendant 5 *l.* before-hand, is a match for 50 *l.*

Johnson v.
Bann,
4 Term
Rep. 1.

The statute having prohibited any horse-race for a smaller stake than 50 *l.*, of course no action can be maintained to recover a wager on such a race.]

Gaol and Gaoler.

- (A) Gaols, by what Authority erected, and to whom they belong.
- (B) Who are to be at the Charge of repairing them.
- (C) To what Place Offenders are to be committed :
And herein what shall be said a Gaol, and where to be kept.
- (D) Of the Duty and Power of Gaolers and Keepers of Prisons : And herein,
 - 1. What Acts they may lawfully do, and for what Abuses they are punishable.
 - 2. For what Offences they shall forfeit their Offices.
- (E) At whose Charge Prisoners are to be carried to Gaol.
- (F) How maintained there.
- (G) Of the Offence of breaking Gaol.

(A) Gaols,

(A) Gaols, by what Authority erected, and to whom they belong.

GAOLS are of such universal concern to the (a) publick, that none can be erected by any less authority than by act of parliament. 2 Inst. 705. (a) Hence the coroner is to inquire of the death of all persons whatsoever who die in prison, to the end that the publick may be satisfied whether such persons came to their end by the common course of nature, or by some unlawful violence, or unreasonable hardships put on them by those under whose power they were confined. 3 Inst. 52. 91.

Also all prisons or gaols belong to the king, although a subject may have the (b) custody or keeping of them. 2 Inst. 100. (b) Where a person Roll. Abr. may be judge and gaoler, as the sheriff of London is of the Compter both judge and keeper. 806. Show. Rep. 162. cited.

And to this purpose by the 5 H. 4. cap. 10. reciting, "That divers constables of castles within the realm, being assigned justices of peace by the king's commission, had by colour of such commission used to take people to whom they bore evil will, and imprisoned them within the said castles till they had made fine and ransom with the said constables for their deliverance; thereupon it is enacted, that none be imprisoned by any justice of the peace but only in the common gaol, saving to lords and others, which have gaols, their franchise in this case."

And it hath been holden, that the king's grant, since this statute, to private persons to have the custody of prisoners committed by justices of peace, is void; and that the sheriff shall have the custody of all persons taken by virtue of any precept or authority to him directed, notwithstanding any grant by the king of the custody of prisoners to another person. And. 345. 4 Co. 34. a. 9 Co. 119. Cro. Eliz. 829, 830.

Also it is said, that none can claim a prison as a franchise, unless they have also a gaol-delivery; and that therefore the dean and chapter of *Westminster*, though they have the custody of the *Gate-house* prison, yet as they have no gaol-delivery, they must send a kalendar of the prisoners to *Newgate*. Salk. 343. pl. 1. Farell. 31. per Holt, C. J.

By the 14 E. 3. stat. 1. cap. 10. it is enacted, "In the right of the gaols, which were wont to be in ward of the sheriffs, and annexed to their bailiwicks, it is assented and accorded that they shall be rejoined to the sheriffs; and the sheriffs shall have the custody of the same gaols as before this time they were wont to have, and they shall put in such under-keepers for whom they will answer *."

This statute confirmed by 19 H. 7. c. 10. & 5 Ann. c. 9. * And by 11 & 12 W. 3. c. 19. § 3. The sheriffs shall have the custody of gaols. — As to the King's Bench prison and the Fleet, see *infra*.

By the 3 Geo. 1. cap. 15. "None shall purchase the office of gaoler, or any other office pertaining to the high sheriff, under pain of 500 l."

(B) Who are to be at the Charge of repairing them.

2 Inst. 589. **A**LTHOUGH divers lords of liberties have the custody of prisons, and some in fee, yet the prison itself is the king's *pro bono publico*, and therefore it is to be repaired at the common charge (a)-

[(a) In a report which was made by the Attorney and Solicitor General, De Grey and Willes, and submitted to the king, 21 Jan. 1767, upon a question which was at that time agitated between the Bishop of Ely, as lord of the franchise of Ely, on the one part, and the inhabitants of the franchise on the other, touching the repairs of the gaol, the editor meets with the following passage: "Although all gaols, whether in counties at large, or in particular franchises, are deemed to belong to the crown, as far as the publick administration of justice is concerned, and it is but the custody of them that is placed in the hands of sheriffs or the lords of franchises, yet we are not able, in a matter which lies buried in much obscurity, and has scarcely ever been called into publick discussion in modern times, to find upon what authority a great writer in our law, has inferred from the position "that all prisons belong to the crown," "they are therefore to be repaired at the common charge." Nor does it appear by whom, and from what persons, and in what manner the charge could have been raised. It seems to us more probable, that from the time that the publick gaols were rejoined to the counties, and committed to the sole custody of the sheriffs, the charge of keeping and preserving them in a proper condition lay in the first instance on the sheriffs, and it is probable that the sheriffs might have an allowance for extraordinary expences of that sort in their accounts in the Exchequer: and we observe, that in the statute of 23 H. 8. for building new gaols in several counties particularly mentioned, at the charge of the respective counties, provision is made that sheriffs shall be allowed what they shall expend in the future necessary reparations of such new-built gaols in their accounts in the Exchequer. In the same manner, it should seem, that lords of franchises who have the custody of publick gaols in their respective jurisdictions committed to them, and are thereby responsible to the publick for their prisoners, should be bound to provide secure and sufficient gaols as incidental to their publick trust; and they having no accounts with the Exchequer, can have no such allowance made to them, but may well be supposed to submit to such charge in consideration of the honourable exemption of their franchise."—In this case it was the opinion of the above great law officers, that the *onus* of repairing the gaol at Ely lay upon the see of Ely, and not upon the inhabitants; an opinion which they grounded, not upon the general law of the question, but upon evidence laid before them of such a charge upon the lords of the franchise being coeval with the franchise. In consequence of this opinion orders were given by the Lords of the Treasury to the Attorney General to proceed at the expence of the crown against the Bishop of Ely, in order to have the point solemnly settled; but Dr. Mawson, who then filled that see, was so well satisfied with the report, that he readily submitted without any farther litigation, and gave immediate orders for the repair of the gaol, which was accordingly done at his expence.]

(b) Revived and continued for seven years, by 10 Ann. c. 14., and made perpetual by 6 Geo. c. 19. [Explained and amended by 24 G. 3. c. 54.]

But this matter is now regulated by the (b) 11 & 12 W. 3. cap. 19. by which it is enacted, "That it shall and may be lawful for the justices of the peace, or the greater number of them, within the limits of their commissions, upon presentment of the grand jury or grand juries, at the assize, great sessions, and general gaol-delivery held for the said county, of the insufficiency or inconvenience of their gaol or prison, to conclude and agree upon such sum or sums of money, as upon examination of able and sufficient workmen shall be thought necessary for the building, finishing or repairing a public gaol or gaols belonging to the shire or county whereof they are justices of the peace; and by warrant under their hands and seals, or under the hands and seals of the greater number of them, by equal proportion, to distribute and charge the sum or sums of money, to be levied for the uses aforesaid, upon the several hundreds, lathes, wapentakes, rape, ward or other divisions of the said county; and the justices of the peace are hereby authorised and empowered at the general quarter-sessions held for the respective division of the said county, to direct their warrants or precepts to high constables,

“ constables, petty constables, bailiffs, or other officer or officers, as they in their discretion shall think most convenient for levying and collecting the same.”

And it is further enacted by the said statute, “ That if any person shall refuse or neglect to pay his or their assessment, by the space of four days after demand thereof by the proper officer appointed to collect the same, or shall convey away his or their goods or estate, whereby the sum or sums of money so assessed cannot be levied, then it shall and may be lawful to and for the said collectors, by warrants from any one of the justices of the peace present at the said general quarter-sessions as aforesaid, to levy the sum so assessed by distress and sale of the goods and chattels of such persons so refusing or neglecting to pay; and the goods and chattels then and there found, and the distress so taken, to keep by the space of four days at the costs and charges of the owner thereof; and if the said owner do not pay the sum or sums of money so rated or assessed within the space of the said four days, then the said distress to be appraised by two or more of the inhabitants where the same shall be taken, or other sufficient persons, and to be sold by the collector for payment of the said money, and the overplus of such sale, (if any be,) over and above the sum so assessed, and charges of taking and keeping of the distress, to be immediately returned to the owner thereof; and the said justices of the peace are hereby authorised and empowered, under their hands and seals, or under the hands and seals of the greater number of them, to constitute and appoint one or more sufficient person or persons to be receiver of the money so assessed; the said receiver first giving security to be accountable, when thereunto required, for all sums of money received or disbursed by him, in pursuance of such order as he shall have received under the hands and seals of the justices of the peace, or the greater number of them; and if the said receiver or receivers, high constable, petty constable, or other officers, shall by the space of four days after demand refuse to account for all sums of money received by them in pursuance of this act; then it shall and may be lawful for the justices of the peace, or the greater number of them, to commit him or them to prison, there to remain without bail or mainprise, until he or they shall have made a true account, and satisfied or paid such sum or sums of money as shall appear to remain in his or their hands; and the receipt of such receiver shall be a sufficient discharge to all high constables, petty constables, or other officer or officers, paying their proportion of such assessments; and the discharge under the hands and seals of the justices of the peace, or the greater number of them, at the assize, great sessions, and general gaol-delivery, to such their receivers, shall be deemed and allowed as a good and sufficient release, acquittance or discharge in any court of law or equity, to all intents and purposes whatsoever; and the said justices of the peace are hereby authorised and empowered to covenant,

“ contract

“ contract and agree with any person or persons for the well
 “ and sufficient building, finishing and repairing of the said gaol
 “ or gaols.

“ Provided that this act be not any wise hurtful or prejudicial
 “ to any person or persons having any common gaol by inherit-
 “ ance, for term of life or for years; but that they shall have and
 “ enjoy the said gaols, and the profits, fees and commodities of
 “ the same, as they had, or might lawfully have had before the
 “ making this act, and as if this act never had been made.

“ Provided also, that this act shall not extend to charge any
 “ person inhabiting in any liberty, city, town or borough corpo-
 “ rate, which have common gaols for felons taken in the same,
 “ and commissions of assize, or gaol-delivery of such felons, for
 “ any assessment, to the making the common gaol or gaols of the
 “ respective shire or county.”

And it is further enacted by the said statute, “ That where
 “ any prisons or gaols (belonging to any county of this realm, or
 “ the dominions of *Wales*) are situate upon any lands or heredita-
 “ ments of or belonging to the king’s majesty, in right of the
 “ crown, that the said lands and hereditaments, with their and
 “ every of their appurtenances, shall not at any time be alienated
 “ from the crown, but remain and be for the publick service and
 “ benefit of the county.”

(C) To what Place Offenders are to be committed :
 And herein, what shall be said a Gaol, and where
 to be kept.

2 Inst. 43.
 That this
 statute is
 only decla-
 rative of the
 common law.
 Moor, 666.
 pl. 913.
 Sid. 145.

BY the 5 *H. 4. cap. 10.* it is enacted, “ That none shall be im-
 “ prisoned by any justice of the peace but only in the common
 “ gaol, saving to lords and others, who have gaols, their franchise
 “ in this case.”

But the court of *King’s Bench* may commit offenders to any prison
 in the kingdom which they shall think most proper, and the
 offenders so committed or condemned to imprisonment cannot be
 removed or bailed by any other court.

But by the 31 *Car. 2. cap. 12.* it is enacted, “ That no subject
 “ of this realm, being an inhabitant or resident of this kingdom of
 “ *England*, dominion of *Wales*, or town of *Berwick upon Tweed*,
 “ shall or may be sent prisoner into *Scotland*, *Ireland*, *Jersey*,
 “ *Guernsey*, *Tangier*, or into parts, garrisons, islands, or places be-
 “ yond the seas, which then were, or at any time hereafter shall
 “ be within or without the dominions of his majesty, his heirs or
 “ successors, and that every such imprisonment is by the said
 “ statute enacted and adjudged to be illegal; and that every subject
 “ so imprisoned shall have an action of false imprisonment, &c.,
 “ and recover treble costs, and no less damages than five hundred
 “ pounds, against the person making such warrant, who shall incur
 “ a *premunire*.

And as prisoners ought to be committed at first to the proper prison, so ought they not to be removed from thence, except in some special cases.

To which purpose, by the 31 *Car. 2. cap. 2. § 9.* it is enacted, "That if any subject of this realm shall be committed to any prison, or in custody of any officer or officers whatsoever, for any criminal or supposed criminal matter, that the said person shall not be removed from the said prison and custody into the custody of any other officer or officers, unless it be by *habeas corpus*, or some other legal writ; or where the prisoner is delivered to the constable or other inferior officer, to carry such prisoner to some common gaol; or where any person is sent by order of any judge of assize, or justice of the peace, to any common work-house, or house of correction; or where the prisoner is removed from one prison or place to another within the same county, in order to a trial or discharge by due course of law; or in case of sudden fire (a) or infection, or other necessity; upon pain that he, who makes out, signs, or countersigns, or obeys or executes such warrant, shall forfeit to the party grieved one hundred pounds for the first offence, two hundred pounds for the second, &c."

(a) *Vide the 19 Car. 2. c. 4. § 2. for empowering justices of the peace to remove prisoners in case of infection.*

Felons shall be imprisoned in the common gaol, 11 & 12 *W. 3. cap. 19. § 3.*—Vagrants and other offenders may be committed to gaol, or the house of correction. 6 *Geo. 1. cap. 19. § 2.*

(D) Of the Duty and Power of Gaolers and Keepers of Prisons: And herein,

1. What Acts they may lawfully do, and for what Abuses punishable.

A Gaoler is considered as an officer relating to the administration of justice, and is so far under the protection of the law, that if a person threatens him for keeping a prisoner in safe custody, he may be indicted and fined and imprisoned for it.

If a criminal endeavouring to break the gaol assault his gaoler, he may be lawfully killed by him in the affray.

But if a prisoner gets out of gaol, and the gaoler in pursuit of him kills him, he is guilty of an escape though he never lost sight of him, and could not otherwise take him; not only because the king loses the benefit he might have had from the attainder of the prisoner by the forfeiture of his goods, &c. but also because the publick justice is not so well satisfied by killing him in such an extrajudicial manner.

Besides the duties enjoined (b) gaolers by acts of parliament, and the abuses for which by statute they are punishable, the common law subjects them to fine and imprisonment, as also to the forfeiture

2 Roll. Abr. 76.

Jenk. 23.
Hawk. P. C. c. 28. § 13.
Fitz. Coron. 328. 346.
Staundf. P. C. 33.
2 Hawk. P. C. c. 19. § 6.

9 Co. 50.
Raym. 216.
(b) That a gaoler de

facto, who takes upon him without any legal authority to
2 *Inst.* 381,

feiture of their offices, for gross and palpable abuses in the execution of their offices, such as suffering prisoners to escape, barbarously misusing them, &c.

keep prisoners, as also some coverts and infants, are answerable for their miscarriages.
8 *Co.* 44.

By the 14 *E. 3. cap.* 10. "If any keeper of a prison, or under-keeper, by too great dures of imprisonment, and by pain, make any prisoner that he hath in his ward to become an appellor against his will, he is guilty of felony."

Staundf.
P. C. 36.
3 *Inst.* 91.

In the construction of this statute it is said to be no way material, whether the approvement be true or false, or whether the appellee be acquitted or condemned; but at law this offence was esteemed a misprison only, unless the appellee were hanged by reason of the appeal.

2 *Hawk.*
P. C. c. 22.
§ 31. &
vide tit.
Habeas
Corpus.
(a) But a
gaoler is not
punishable by attachment for the bare escape of a person in his custody by civil process, but the party
grieved by such escape ought to take his remedy by action.

Also gaolers are punishable by (a) attachment, as all other officers are by the courts to which they more immediately belong, for any gross misbehaviour in their offices, or contempts of the rules of such courts, and punishable by any other courts for disobeying writs of *habeas corpus* awarded by such courts, and not bringing up the prisoner at the day prefixed by such writs.

By the 4 *E. 3. cap.* 10. reciting, that whereas in times past, sheriffs, and gaolers of gaols would not receive thieves, persons appealed, indicted or found with the manner, taken and attached by the constables and townships, without taking great fines and ransoms of them for their receipt, whereby the said constables and townships have been unwilling to take thieves and felons because of such extreme charges, and the thieves and the felons the more encouraged to offend, it is enacted, "That the sheriffs and gaolers shall receive, and safely keep in prison from henceforth, such thieves and felons, by the delivery of the constables and townships, without (b) taking any thing for the receipt; and the justices assigned to deliver the gaol shall have power to hear their complaints, that will complain against the sheriffs and gaolers in such case, and moreover to punish the sheriffs and gaolers, if they be found guilty."

(b) By 23 *H.*
S. c. 10. a
gaoler upon
a commit-
ment may
take 4 *d.*

By the 3 *H. 7. cap.* 3. it is enacted, "That every sheriff, bailiff of franchise, and every other person having authority or power of keeping of gaol, or of prisoners for felony, do certify the names of every such prisoner in their keeping, and of every prisoner to them committed for any such cause, at the next general gaol-delivery, in every county or franchise where any such gaol or gaols have been, or hereafter shall be, there to be kalendered before the justices of the deliverance of the same gaol, whereby they may, as well for the king as for the party, proceed to make deliverance of such prisoners according to law; upon pain to forfeit to the king for every default there recorded one hundred shillings."

By

[By 29 Geo. 3. c. 67. it is enacted, "That at the first session of the peace to be holden after *Michaelmas* in every year, the gaoler, or other officer having the care or superintendence of any gaol within the jurisdiction of the court holding such session, shall deliver to the chairman or other magistrate presiding in such court, a certificate according to the form hereunto annexed, subscribed by himself and verified by him, to the best of his knowledge and belief, on his oath, to be taken either before such court, or in case of sickness, or inability from any other cause to attend, then before some justice of the peace for the county, town, or district in which such gaol shall be situated, and that such certificate shall express, after each of the provisions therein enumerated, whether such provision is or is not complied with or observed within such gaol; and such certificate shall be read publicly in open court in the presence of the grand jury, and entered upon record as part of the minutes of the said session."

And by § 2. "The said court of quarter session shall thereupon take the said certificate into their consideration, and summon any person or persons named therein to appear before them, and shall give such directions, and make such orders relative to any of the matters contained in such certificate, as to such justices shall seem meet, and shall and may take security from any person or persons whom the same may concern for his or their due compliance therewith."

By § 3. a gaoler neglecting to deliver such certificate forfeits 50*l.* if the gaol be a county gaol, and 20*l.*, if any other gaol.

Certificate referred to in the body of this act.

to wit. } AT the general quarter sessions of the peace, for the
day of } holden at this
the certificate of } in the year of our Lord
in pursuance of the statute in this
case made and provided, respecting the gaol of

22 & 23 C. 2. c. 20, enacts, that

Felons and debtors shall be kept separate, under penalties upon the sheriff or gaoler.

24 G. 2. c. 40, enacts, that,

1. No gaoler shall sell, lend, use, give away, or suffer spirituous liquors within any gaol, under a penalty.

2. Copy of the clause last mentioned, as also of two other clauses respecting the same, shall be hung up in the gaol, under a penalty.

32 G. 2. c. 28, enacts, that

The clerk of the peace shall cause a list of the fees payable by debtors, and the rules and orders for the government of gaols and prisons, to be hung up in the court where the assizes or sessions shall be held, and send another copy to the gaol; and the gaoler shall cause the same to be hung up in a conspicuous place in the said gaol.

13 G. 3. c. 58, enacts, that
Clergymen may be provided to officiate in gaols.

14 G. 3. c. 20, enacts, that
Persons acquitted, or discharged upon proclamation
for want of prosecution, shall be discharged immediately, in open court, and without fee.

14 G. 3. c. 59. enacts, that,
1. The walls and ceilings of cells in gaols shall be scraped and white-washed once in the year at least.
2. That the cells shall be kept clean; and
3. That they shall be supplied with fresh air, by ventilators or otherwise.
4. That there shall be two rooms set apart for the sick.
5. That a warm and cold bath, or bathing tubs, shall be provided.
6. That this act shall be hung up in the gaol.
7. That a surgeon or apothecary shall be appointed, with a salary.]

But for the more effectual regulating the fees of gaolers, *vide* 2 G. 2. c. 22.
3 G. 2. c. 27.
8 G. 2. c. 24.
21 G. 2. c. 33.
32 G. 2. c. 28.

By the 22 & 23 Car. 2. cap. 20. § 12. it is enacted, "That the several rates of fees, and the future government of prisoners, be signed and confirmed by the lord chief justices, and lord chief baron, or any two of them for the time being; and the justices of the peace in London, Middlesex, and Surrey; and by the judges for the several circuits, and justices of the peace, for the time being, in their several precincts, and fairly written and hung up in a table in every gaol and prison, and likewise be registered by each and every clerk of the peace within his or their particular jurisdiction; and after such establishment, no other or greater fee or fees, than shall be so established, shall be demanded or received."

And by the said statute, § 13. it is enacted, "That it shall not be lawful hereafter for any sheriff, gaoler, or keeper of any gaol or prison to put, keep, or lodge prisoners for debt and felons together in one room or chamber, but that they shall be put, kept, and lodged separate and apart one from another in distinct rooms; upon pain that he, she, or they, which shall offend against this act, or the true intent and meaning thereof, or any part thereof, shall forfeit and lose his or her office, place, or employment, and shall forfeit treble damages to the party grieved, to be recovered by virtue of this act."

2. For what Offences they shall forfeit their Offices.

Co. Lit. 233. It seems clearly agreed, that a gaoler, by suffering voluntary escapes, by abusing his prisoners, by extorting unreasonable fees from them, or by detaining them in gaol after they have been legally discharged, and paid their just fees, forfeits his office; for that in the grant of every office, it is implied that the grantee execute it faithfully and diligently.

2 Inst. 43. As where the king granted to the abbot of *St. Albans* to have a gaol, and to have a gaol-delivery, and divers persons were committed

mitted to that gaol for felony; and because the abbot would not be at the cost to make deliverance, he detained them in prison a long time without making lawful deliverance; it was resolved, that the abbot had for that cause forfeited his franchise, and that the same might be seized into the king's hand.

So, the lady *Broughton*, keeper of the *Gate-house* prison in *Westminster*, was informed against, and upon not guilty pleaded, she was found guilty; and her crime was extortion of fees, and hard usage of the prisoners in a most barbarous manner; and after she had by her counsel moved in arrest of judgment and could not prevail, she had judgment given against her, viz. she was fined one hundred marks, removed from her office, and the custody of the prison was delivered to the sheriff of *Middlesex*, till the dean and chapter should farther order the same, *salvo jure cjugustibet*.

Raym. 216.
2 Lev. 71.
Lady
Brough-
ton's case.

And by the 8 & 9 *W. 3. cap. 27.* it is enacted, "That if any marshal or warden, or their respective deputy or deputies, or any keeper of any other prison within this kingdom, shall take any sum of money, reward, or gratuity whatsoever, or security for the same, to procure, assist, connive at, or permit any escape, and shall be thereof lawfully convicted, the said marshal or warden, or their respective deputy or deputies, or such other keeper of any prisons as aforesaid, shall for every such offence forfeit the sum of 500 *l.* and their said office, and be for ever after incapable of executing any such office."

It hath been resolved, that a forfeiture by a gaoler who hath but a particular interest, as of him who hath custody of a gaol for life or years, does not affect him in remainder or reversion who hath the inheritance, but that upon such forfeiture his title shall accrue, and not go to the king.

Poph. 119.
Lev. 71.
Raym. 216.
3 Lev. 283.

But by the 8 & 9 *W. 3. cap. 27.* it is enacted, "That the offices of marshal of the *King's Bench* prison, and warden of the *Fleet*, shall be executed by the several persons to whom the inheritance of the prisons, prison-houses, lands, tenements, and other hereditaments of the said prisons of *King's Bench* and *Fleet*, or either of them, shall then belong or appertain respectively, in his or their respective proper person or persons, or by his or their sufficient deputy or deputies, for which deputy or deputies, and for all forfeitures, escapes, and other misdemeanours, in their respective offices, by such deputy or deputies permitted, suffered, or committed, the said person or persons, in whom the aforesaid inheritances respectively are, or shall then be, shall be answerable; and the profits and aforesaid inheritances of the said several offices shall be sequestered, seized, or extended to make satisfaction for such forfeitures, escapes, or misdemeanours respectively, as if permitted, suffered, or committed by the person or persons themselves, or either of them, in whom the respective inheritances of the said prisons shall then be."

See 27 G. 2.
c. 17.

(E) At whose Charge Prisoners are to be carried to Gaol.

By 27 G. 2.
c. 3. the
expence of
conveying
poor offend-
ers to gaol,
or the house
of correc-
tion, is to be
paid by the
treasurer of
the county,
except in
Middlesex.

BY the 3 *Jac. 1. cap. 10.* it is enacted, "That every person or
" persons, that shall be committed to the common or usual
" gaol, within any county or liberty within this realm, by any
" justice or justices of the peace, for any offence or misdemeanour,
" having means or ability therunto, shall bear their own reason-
" able charges for so conveying or sending them to the said gaol,
" and the charges also of such as shall be appointed to guard
" them to such gaol, and shall so guard them thither; and if any
" such person or persons, so to be committed, shall refuse at the
" time of their commitment, and sending to the said gaol, to
" defray the said charges, or shall not then pay or bear the
" same, that then such justice or justices of the peace shall and
" may by writing under his or their hand and seal, or hands and
" seals, give warrant to the constable or constables of the hun-
" dred, or constable or tithing-man of the tithing or township
" where such person or persons shall be dwelling and inhabit, or
" from whence he or they shall be committed, or where he or
" they shall have any goods within the county or liberty, to sell
" such and so much of the goods and chattels of the said persons,
" as by the discretion of the said justice or justices of the peace
" shall satisfy and pay the charges of such his or their conveying
" or sending to the said gaol; the appraisement to be made by
" four of the honest inhabitants of the parish or tithing where
" such goods or chattels shall remain and be, and the overplus
" of the money which shall be made thereof, to be delivered to
" the party to whom the said goods shall belong."

And it is further enacted, "That if the said persons shall
" not have or be known to have any goods or chattels, which may
" be sold for the purpose aforesaid, within the county or liberty,
" an indifferent assessment shall be made by the constables and
" churchwardens, and two or three other the honest inhabitants
" of the parish or tithing where such offenders shall be taken or
" apprehended; the said taxation being allowed under the hand
" of one or more justice or justices of the peace, if there be
" such constables or churchwardens there inhabiting, and in de-
" fault of them, by four of the principal inhabitants of the said
" parish, township, or tithing where such offenders shall be taken
" or apprehended; and if any so assessed shall refuse to pay their
" said taxation, then the justice or justices of the peace by whom
" the said offenders shall be committed to prison, or any justice of
" peace near adjoining, shall and may give warrant, as aforesaid, to
" the constable, tithingman, or other officer, there to distrain the
" goods of any so assessed which shall refuse to pay the same, and
" to sell the same, and that such person or persons so authorised
" shall have full power so to distrain, and by appraisement of
" four

" four substantial inhabitants of the said place, to sell a sufficient quantity of the goods and chattels of the said person so refusing, for the levying of the said taxation; and if any overplus of the money come by the sale thereof, the same to be delivered to the owner."

(F) How maintained in Prison.

B^X (a) some opinions, a gaoler is compellable to find his prisoner sustenance; but as this is denied by (b) others, and as there are several statutes which provide for the maintenance of prisoners, without supposing the gaoler any way obliged to it, it seems this opinion is not maintainable.

(a) As 9 Co. 87., so Co. Lit. 295. a. where my Lord Coke says, that in an action

of debt by a gaoler against the prisoner for his victuals, the defendant shall not wage his law; for he cannot refuse the prisoner, and ought not to suffer him to die for default of sustenance; otherwise it is for tabling a man at large. [This privilege, that the defendant shall not wage his law, appears to be given to the gaoler, not because he is compellable to maintain the prisoner, as Lord Coke supposeth, but merely as a reward or additional incitement to the exercise of humanity; and in that sense it seems to be explained by the court in 1 Ld. Rolle's Reports, 338., where it is said, "that the defendant shall not in such case wage his law, because it is a work of charity;" and therefore the gaoler has not the same remedy for provisions thus supplied to the prisoner, as he has for the customary fees due to him, that of detaining him in prison till payment.—The editor is indebted for this remark to the case from Ely above referred to.] (b) As Plow. 68. a. 2 Roll. Abr. 32.

By the 14 *Eliz. cap. 5.* it is enacted, "That it shall and may be lawful for the justices of peace of every shire within this realm, at their general quarter-sessions of the peace to be holden within the same shires, or the most part of the said justices, being then present, to rate and tax every parish within the said shires, at such reasonable sums of money, for and towards the relief of prisoners, as they shall think convenient, by their discretions, so that the said taxation and rate doth not exceed above 6*d.* or 8*d.* by the week, out of every parish, and the churchwardens of every parish within this realm, for the time being, shall every *Sunday* levy the same, and once every quarter of a year pay the high constables or head officers of every town, parish, hundred, riding, or wapentake within this realm, all such sums of money as their parish shall be rated and taxed, for and towards the relief of the said prisoners within their said several parishes; and that the said high constables and head officers, and every of them, shall pay all such sums of money so to them paid by the said churchwardens, at every general quarter-sessions, to be holden within the said several shires, to sufficient persons dwelling nigh the said gaols, as shall be appointed by the said justices in their said open quarter-sessions, to be there ready to receive the said money so collected as is aforesaid; and that the collectors for the said prisoners shall weekly distribute and pay all such sums of money as they and every of them shall receive for the relief of the said prisoners as aforesaid; upon pain, as well the said churchwardens of every parish, constables and head officers of every hundred or wapentake, as also the said collectors appointed for the collection and contribution of the said prisoners for making

“ default as aforesaid, to forfeit 5 *l.* the one moiety thereof shall be to the use of the queen’s majesty, her heirs and successors, and the other moiety to the relief of the prisoners.

“ Provided, That the justices of peace within any county of this realm or *Wales* shall not intromit or enter into any city, borough, place, or town corporate, for the execution of any branch, articles, or sentences of this act, for or concerning any offence, matter, or cause growing or arising within the precincts, liberties, or jurisdictions of such city, borough, place, or town corporate, but that it may and shall be lawful to the justice and justices of the peace, mayor, bailiffs, and other head officers of those cities, boroughs, places, and towns corporate, where there be justice or justices, to proceed to the execution of this act within the precinct and compass of their liberties, in such manner and form as the justices of peace in any county may or ought to do within the same county by virtue of this act; any matter or thing in this act expressed to the contrary thereof notwithstanding.”

Sec stat.
31 Geo. 3.
c. 46.

And by the 19 *Car. 2. cap. 4.* it is enacted, “ That the justices of peace of the respective counties, at any their general sessions, or the major part of them then there assembled, if they shall find it needful so to do, may provide a stock of such materials as they find convenient for the setting poor prisoners on work, in such manner and by such ways, as other county charges by the laws and statutes of the realm are and may be levied and raised, and to pay and provide fit persons to oversee and set such prisoners on work, and make such orders for accounts of and concerning the premises, as shall by them be thought needful, and for punishment of neglects and other abuses, and for bestowing the profit arising by the labour of the prisoners so set on work for their relief, which shall be duly observed, and may alter, revoke, or amend such their orders from time to time; provided that no parish be rated above 6*d.* by the week towards the premises, having respect to the respective values of the several parishes.”

The like clause in 2 Geo. 2. c. 22. p. 3. and 32 G. 2. c. 28. § 4. [But such clause does not exclude a limitation of the quantity of liquor allowed to each person. See Lord Loughborough’s Observations on *English Prisons*, 31.

By the 22 & 23 *Car. 2. cap. 20. § 10.* it is enacted, “ That every under-sheriff, gaoler, keeper of prison or gaol, and every person or persons whatsoever, to whose custody any person or persons shall be delivered or committed by virtue of any writ or process, or any pretence whatsoever, shall permit and suffer the said person or persons at his and their will and pleasure to send for and have any beer, ale, victuals, and other necessary food, where and from whence they please, and also to have and use such bedding, linen, and other things, as the said person or persons shall think fit, without any purloining, detaining, or paying for the same, or any part thereof.”

Like clause in 22 & 23 *Car. 2. c. 20. § 12.* and 32 Geo. 2. c. 29.

By the 2 *Geo. 2. cap. 22.* it is enacted, “ That the lords chief justices, lord chief baron, judges of assize, and justices of the peace, in their respective jurisdictions, and all commissioners
“ for

“ for charitable uses, do their best endeavours and diligence to
 “ examine and discover the several gifts, legacies, and bequests
 “ bestowed and given for the benefit and advantage of the poor
 “ prisoners in the said several gaols and prisons, and to send for
 “ any deeds, wills, writings, and books of account whatsoever,
 “ and any person or persons concerned therein, and to examine
 “ them upon oath to make true discovery thereof, (which they
 “ have full power and authority to do,) and to order and settle
 “ the payment, recovery, and receipt of the same, when so dis-
 “ covered and ascertained, in such easy and expeditious manner
 “ and way, that the prisoners for the future may not be defraud-
 “ ed, but receive the full benefit thereof according to the true
 “ intent of the donors, and that lists or tables of such gifts, le-
 “ gacies, and bequests, for the benefit of the prisoners in every
 “ gaol or prison respectively, fairly written, shall be likewise hung
 “ up in such gaols and prisons respectively, in some open room
 “ or place, to which the prisoners may have resort, as occasion
 “ shall require, without fee, and shall be registered by the clerks
 “ of the peace of the respective counties and places in manner
 “ aforesaid.”

(G) Of the Offence of breaking Gaol.

THE offence of breaking a gaol or prison by the common law was no less than felony; and this, whether the party were committed in a criminal or civil case, or whether he were actually in the walls of a prison, or only in the stocks, or in the custody of any person who had lawfully arrested him, or whether he were in the king's prison, or one belonging to a lord of franchise.

But now by the 1 E. 2. st. 2. the severity of the law is relaxed, and the breaking of prison is (a) only felony, as herein declared, *de prisonariis frangentibus prisonam dominus rex vult & præcipit, quod nullus de cætero, qui prisonam fregerit, subeat vitæ vel membrorum damnum pro fractione prisonæ tantum, nisi causa pro qua captus & imprisonatus fuerit tale judicium requirit, si de illa secundum legem & consuetudinem terræ fuisset convictus, licet temporibus præteritis aliter fieri consuevit.* 2 Inst. 589. Staundf. P. C. 31. Cro. Car. 210. (a) But offences of this kind, which are not felony within 1 E. 2. a.c. still punishable as high P. C. c. 13.

māprisons by fine and imprisonment. Hale's P. C. 116. 2 Hawk.

In the construction of this statute the following opinions have been holden :

1. That any place whatsoever, wherein a person under a lawful arrest for a supposed capital offence is restrained from his liberty, whether in the stocks or street, or in the common gaol, or the house of a constable or private person, or the prison of the ordinary, is a prison within the statute. 2 Inst. 589. Dyer, 99. pl. 60. Cromp. 38. Cro. Car. 210. Hale's P. C. 107.

2. That if the party who breaks from prison was taken on a *capias* on an indictment or appeal, it is not material, whether any such crime, as that of which he is accused, were in truth committed, 2 Inst. 590. Hale's P. C. 109.

mitted, or not, for there is an accusation against him on record, which makes the commitment lawful, be he ever so innocent.

Hale's P. C. 109.
2 Inst. 590.
Dyer, 99.
pl. 60.
Crompt.
38. a. Also if an innocent person be committed by a lawful *mittimus* on such a suspicion of felony, actually done by some other, as will justify his imprisonment, though he be neither indicted nor appealed, he is within the statute if he break the prison, for that he was legally in custody, and ought to have submitted to it till he had been discharged by due course of law.

Hale's P. C. 109.
2 Inst. 590.
cont. 2 Leon.
166. But if no felony at all were done, and the party be neither indicted or appealed, no *mittimus* for such a supposed crime will make him guilty within the statute by breaking the prison, for that his imprisonment was unjustifiable.

2 Inst. 591.
H. P. C. 109.
2 Hawk.
P. C. c. 18.
§ 8. Also, if a felony were done, yet if there were no just cause of suspicion either to arrest or commit the party, and the *mittimus* be not in such form as the law requires, his breaking of the prison cannot be felony, because the lawfulness of the imprisonment, in such case, depends wholly on the *mittimus*, which, if it be not according to law, the imprisonment will have nothing to support it.

2 Inst. 589.
590. Hale's
P. C. 108.
Staundf.
P. C. 31. 3. That there must be an actual breaking, for the words *felonice fregit prisonam*, which are necessary in every indictment for this offence, cannot be satisfied without some actual force or violence; and therefore if the prisoner, without the use of any violent means, go out of the prison doors, which he finds open by the negligence or consent of the gaoler, or if he escape through a breach made by others without his privity, he is guilty of a misdemeanour only, and not of felony.

Plow. 136.
2 Inst. 590.
Hale's P. C.
108. Nor will the breaking of prison, which is necessitated by an inevitable accident, happening without any default of the prisoner, as where the prison is fired by lightning, or otherwise, without his privity, and he breaks out to save his life, come within the statute.

Keilw. 87. a. Nor is it felony to break a prison, unless the prisoner escape.

Hale's P. C. 108.
2 Inst. 591.
Plow. 258. 4. That if the imprisonment be for an offence made capital by a subsequent statute, the breach of prison is as much within the act of 1 E. 2. §. 2. as if the offence had always been felony; but if the offence, for which a man is committed, were but a trespass at the time when he breaks the prison, and afterwards become felony by matter subsequent, as where one committed for having dangerously wounded a man, who afterwards dies, breaks the prison before he dies, the fiction of law, which to many purposes makes the offence a felony *ab initio*, shall not be carried so far as to make the prison-breach also a felony, which at the time when it was committed was but a misdemeanour.

But for this
vide 2
Hawk. P. C.
c. 18. § 14. Also, it seems, the better opinion, that if the offence, for which the party was committed, be in truth but a trespass, the calling it felony in the *mittimus*, will not make the breaking of the prison amount to felony; and that on the other side, if the offence were in truth a capital one, the calling it a trespass in the *mittimus* will not bring it within the statute; for the cause of the imprisonment is what

the statute regards, and that is the offence, which can neither be lessened nor increased by a mistake in the *mittimus*. *

* But *vide* Hawk. for the opinions it in doubt.

5. That the breach of prison by a person attainted is within the statute, though his crime doth not now require any judgment, because it hath been given already, whereby he is out of the strict letter of the statute, but clearly still within the meaning of the words.

2 Hawk.
P. C. c. 18.
§ 16.

6. That the offence of breaking prison is but felony, whatsoever the crime were for which the party was committed, unless his intent were to favour the escape of others also who were committed for treason, for that will make him a principal in the treason.

2 Hawk.
P. C. c. 18.
§ 17.

7. That he that breaks prison may be proceeded against for such crime before he be convicted of the crime for which he is committed, because the breach of prison is a distinct independent offence; but the sheriff's return of a breach of prison is not a sufficient ground to arraign a man without an indictment.

2 Hawk.
P. C. c. 18.
§ 18.

8. That it is not sufficient to indict a man generally for having feloniously broken prison; but the case must be set forth specially, that it may appear that he was lawfully in prison, and for a capital offence.

Hale's P. C.
109.

By the *stat.* 16 *Geo.* 2. c. 31. assisting prisoners to escape from any gaol, although no escape be actually made, in case such prisoners then were attainted or convicted of treason or any felony, except petty larceny, or lawfully committed to, or detained in gaol for treason, or any felony except petty larceny, expressed in the warrant of commitment, or detainer, is made felony, and the persons assisting, &c., are to be transported for seven years; and in case such prisoners then were convicted of, committed to, or detained in any gaol, for petty larceny, or other crime not being treason or felony, expressed in the warrant of commitment, &c. or then was in gaol upon process for any debt, damages, &c., amounting to 100*l.*, the persons assisting, &c., are adjudged guilty of a misdemeanour, for which they shall be liable to fine and imprisonment.

2 Inst. 591.

By § 2. of the same statute, any person conveying any disguise, instrument, or arms, to help an escape without the knowledge of the keeper, if the prisoner be attainted of treason or felony, or committed for treason or felony, being thereof convicted, is deemed guilty of felony, and shall be transported for seven years. Disguise, instrument, &c. given to any one detained for any less crime, or for debt, damages, &c. amounting to 100*l.* the offender being convicted, adjudged guilty of a misdemeanour for which he shall be fined and imprisoned.

[The extensive inquiries of the late Mr. Howard into the state of prisons, have lately excited the attention of the legislature to this subject, and the reader will find a variety of important provisions, too numerous to detail in a work of this kind, in *stat.* 19 *Geo.* 3. c. 54. 24 *Geo.* 3. *sess.* 2. c. 54, 55. 31 *Geo.* 3. c. 46. 34 *Geo.* 3. c. 84.]

Gavelkind.

(A) Of the Original, Continuance, and several Properties of this Custom.

(B) The particular Cases which have been adjudged relating to this Custom.

[For the etymology of the word *gavelkind*, and the origin, antiquity, and universality of this custom, see the three first

(A) Of the Original, Continuance, and several Properties of this Custom.

chapters of Mr. Robinson's *Common Law of Kent*; and see also Mr. Whitaker's *Hist. of Mancheser*, vol. 1. p. 360.] This tenure is reckoned by the best antiquaries to be the same with the *Saxon bockland*, which was allodial and exempt from the feudal services. Somner, 12. 35. 37.

Seld. Jan. 129.
Crag. 13.
Taylor's
History of
Gavelkind,
132. 171.
Somner, 12.

How this property came to escape, and to remain entire down to the people of *Kent* from their *Saxon* ancestors, is not agreed among the several antiquaries; some of them tell us, that the *Kentishmen* came with boughs, and demanded their customs to be confirmed by the conqueror, or else resolved to oppose his march: others reject that story as a monkish fable, and think the *Kentishmen* submitted, and that the custom came with *Odo*, bishop of *Bayeux*, from *Normandy*; which hath less probability, considering the many exemptions of the *Kentish* lands from feudal slaveries. Probably, notwithstanding the rejecting of this story as to the opposition of the conqueror with arms, it might thus far be true, that they came with their boughs to submit themselves to him on his first entry, and might petition for the establishment of their rights and customs; and the conqueror, who was a very politick prince, might, to gain reputation with his new people, shew this instance of his clemency; which seems the more probable, because the monks, the historians of those times, drop the story, and we all know they have not been at all favourable to his character; and the romantick part of the story might be invented by *Spot*, to aggrandize his own monastery.

The

The first quality of this land was, that it was alienable, without any licence, according to the true nature of the *Roman* patrimonial property, and very different from the feudal servitude.

nature of the contracts in the *Roman* law, and without any feudal words or reservation of tenure. Somner, 82.

Their grants were like-wife patrimonial, in

The next property is, that these lands are not forfeitable for felony, but for treason they are; for the feudal forfeitures only held in lands where there were tenures, and not in the allodial property; and the allodial property was only forfeitable, according to the *Roman* civil law, for the *crimen læsæ majestatis*; and therefore the clergy, that were judges with the earl, never allowed this land to be forfeited but for the crime of high treason: but subsequent statutes comprehend gavelkind, because such laws extend to the whole land of the kingdom, unless gavelkind were excepted; but if a man be outlawed, or abjure the realm for felony, * he shall forfeit his lands in gavelkind, and his wife her dower in them; and though the strictness in which the custom is to be taken, because derogatory from the common law, is usually given as a reason for this construction, yet the true reason is, that outlawry and abjuring the realm are punishments introduced since the conquest, and consequently since the establishment of gavelkind in *Kent*, and therefore like other new laws shall extend to that custom.

Lamb. 610, 611.
Bro. tit. Custom, 54.
* Gavelkind lands in *Kent*, belonging to felons, revert to the heir after the year and day.
17 E. 2. ft. 1. c. 16.
If outlawed or abjured, the custom does not prevail.
Dyer, 310. b. in margin.

Where any tenant died, his heir within age, might and did commit the guardianship to the next relation in the court of justice within whose jurisdiction the land was; but the lord was bound on all occasions to call him to an account, and if he did not see that the accounts were fair, the lord himself was bound to answer it. This province the chancellor hath taken from inferior courts since the conquest, only in *Kent*, where these customs are continued; but the custom is not used even in *Kent* to this day, because the lords, in giving tutors, do it at their own peril in the account, and therefore every man thinks it dangerous to intermeddle.

Lamb. 611, 612. 624.

The infant at fifteen was reckoned at full age to sell for money: this they undoubtedly took from the civil law, which reckons fourteen the *etas pubertatis*; for they reckoned, that though the infant had ended his years of guardianship at fourteen, yet he might not have completed his account with his guardian till the age of fifteen, and that was esteemed to be the age when he was completely out of guardianship.

Lamb. 624.

This guardian appointed by the lord is to have the same allowance, and no other, with the guardian in socage at common law, and is subject to the account of the heir for his receipts, and to the distress of the lord for the same cause.

Lamb.

The liberty of selling was allowed at the age of fifteen for the convenience and necessity of commerce, which in these small divided shares was absolutely necessary; yet it was allowed under such limitations and restrictions, that the infant could not be wronged or imposed upon; therefore an infant that sells must have a valuable consideration, because otherwise it is a plain sign that the

Lamb. 625. And. 193.

the infant was defrauded. If a woman sold at the age of fifteen *causâ matrimonii prælocuti*, this was a good conveyance; for marriage was reckoned to be a good and sufficient consideration.

Lamb. 628.
Whether
the cere-
mony of
livery was
ever annex-
ed to those
allodial

It must pass by feoffment, and the livery upon the feoffment must be made by the infant in person, because an infant cannot appoint an attorney by the common law; and since the express words of the custom do not derogate from the common law in that point, an equitable construction shall not be admitted to make it derogate, for all custom are to be construed strictly.

grants in the *Saxon* times, or whether it came in with the feudal grants, seems doubtful; yet if the lands did formerly pass by a grant, when the other way of conveyance was introduced, they always pass them by feoffment, as the most solemn manner; for subsequent laws having made that solemn ceremony before the men of the country absolutely necessary to convey land, the ceremony pass without distinction into the being of this custom, and so it hath always, I suppose, continued ever since the *Norman* times; but it hath been doubted, whether a lease and release will not be a good sale, as amounting to a feoffment. 9 Co. 76. Roll. Abr. 568. Lamb. 625.

Roll. Abr.
568.

This custom, like all others that are derogatory from the common law, is to be construed strictly; because as far as the particular custom hath not derogated from the law, the general custom of the whole kingdom ought to prevail; and we are not to presume that the particular custom goes farther than by notorious facts may appear; therefore in this case, if an infant in gavelkind be disseised, and release to his disseisor, or release to a discontinuee, it is not within the custom, and therefore void; so if he make a feoffment with warranty, the warranty is not comprehended within the custom, and so void; for the custom reaches no farther than a conveyance by a naked feoffment.

Bendl. 33.
pl. 52.
Lamb. 627.

It must be lands in possession, and not in reversion or remainder, because the true value of a reversion or remainder cannot be known or computed, and therefore the greater need of more than ordinary discretion in such a case, which is not found in infants; besides, a reversion or remainder could not be immemorial; and therefore the custom could not be thereunto appendant, because the immemorial customs only were confirmed by the conqueror; so that since the *Norman* conquest such a sale cannot be adjudged legal.

Bendl. 33.
pl. 52.
Lamb. 627.

It must be land coming by descent, and not by purchase, because the infant's purchase could not be a subject-matter for the custom; for the conqueror must, as is said, be presumed to confirm nothing but a privilege that is immemorial; therefore it must be governed by the general laws of the kingdom.

Roll. Abr.
744.

An infant in gavelkind shall have his age, and all other privileges of the infant at common law, because though he hath the privilege of alienation at fifteen, yet that doth not take from him any privilege he had before at the common law.

Lamb. 612.

As to the *geld*, or *allodial rent*, that was reserved upon the lands, the lord might distrain, having the same privilege for his rent as when the tenant held it *in modum beneficii*; for though the lord parted with the lands, yet the rent still remained to be the lord's as it was before, and therefore he had the same remedy for it, as all other persons had for rents reserved out of feudal lands;

but if the land lay fallow, and did not afford the lord his rent, the lord after such cessing of his tenant ought, by award of his three weeks court, to seek whether there were distresses to answer his rent, and this award of the court ought to be executed in the presence of good witnesses; and the same ought to be renewed for three courts, till the fourth court, and in the fourth court it shall be awarded, that the lord shall take the tenements into his hands as a distress or pledge for the rents and services, and shall detain them for a year and a day without manuring them; within which time, if the tenant come and make agreement with the lord for his arrears, he shall take the lands into his hands again; but if he come not within that space, the lord ought openly to declare all his proceedings to the county-court, which being done likewise at his own court next following, the land shall be finally awarded to him.

We come now to the descent to all the children, which runs through all the lands in *Kent*, and it is probable that all *bocklands* in *England* were thus partible, though it further happened, that all the lands in *Kent* were all allodial without villain, and for the most part without copyhold; for it is a sufficient plea in villenage to say, that the defendant's father was born in *Kent*, though not to say, that the party himself was born there; because for the father to be born there is a supposition that the defendant could by no means be a villain, that being a country totally free: it is probable that this happened, because they made all their slaves allodial proprietors, *Kent* being, by reason of the *cinque ports*, a trading country; and they were better pleased with the rent, than if they had their work in specie; and this country being untouched by the conqueror, there could be no villains. Lamb. 622.

As to the descent, that was, it seems, introduced by the notions of the clergy from the *Roman* law, where all the land was equally divided among the children and next relations, so are the laws of the *confeffor*. Seld. Jur. of Intestates, 26.

But there is a great difference between the descent of gavelkind land and the words of purchase of the same land; for if a remainder be limited to the right heir of *J. S.*, the heir at common law shall take it, and not the heirs in gavelkind; the reason is, because this remainder being newly created could not be reckoned to be within the old custom; for the confirmation of the conqueror was only of the old privileges, by which the land had been enjoyed, and not to make exposition of any grant afterwards arising. Co. Lit. 10.
Lamb. 607.
Hob. 31.
Rob. Gav. 117.

[But if a man has lands of the custom of borough-english, and likewise lands at common law; and having two sons, devises the latter to his heir according to the custom of borough-english, the youngest son shall take, and the devise shall not be defeated because he is not heir at common law, his elder brother being alive; since that was probably the reason of his making the devise, as the latter would have descended to him, had his brother been dead. So, if a man having gavelkind lands, devises other lands to his heirs in gavelkind, all his sons shall take as sufficiently described by this devise, though not heirs by the common law. Newcomen v. Barkham. 2 Vern. 732.
Pr. Ch. 464.

And

Co. Lit.
22. b.
Dav. 31. a.

And if a man seised in fee of lands in gavelkind make a gift in tail, or lease for life to *J. S.*, remainder to his own right heirs, it seems, all his sons shall take by the name of heirs, for the remainder limited to the right heirs of the donor is only a reversion, he bearing in himself during his life (in judgment of law) all his heirs, and, therefore, the heir shall have it by descent.

26 H. 8. 4.
b. Bro.
Custom, pl. 1.
Lamb. 548.
Rob. Gav.
119. See
Mr. Har-

So, if a man seised of lands in gavelkind, make a feoffment to the use of himself and his wife in tail, remainder to his own right heirs, this remainder shall go to the heirs by the custom. For it is the old use, and the heirs take by descent, their ancestor having a precedent estate of freehold, and not by purchase.]

grave's learned notes, Co. Lit. 10. a. n. 3. 27. b.

14 H. 8. 9.
26 H. 8. 4.
Noy, 15.

And as to lands descending, the custom is the law of the place, and cannot be altered but by act of parliament, for being the ancient *Saxon* law, and still continuing under the *Normans*, it cannot be altered but by the legislature; therefore if lands escheat to the crown, and be enjoyed in several descents, and be after granted out by the king in knights service, yet they descend in gavelkind, for the law of the place cannot be controlled by the king's charter.

Mod. 96,
97. Ran-
dal v. Jenk-
ing, Bro.
tit. Custom,
58. cont.

The gabel or rent issuing out of any gavelkind land shall ensue the nature of the land; for the conqueror confirming the privileges relating to the land, doth confirm also the privileges relating to the tribute or rent, which is but the profits of it. Hence, since the rent descends in the same manner the land did, it follows that all rents issuing out of such lands shall descend in gavelkind, nor is there any difference that can be well conceived between a rent-service and a rent-charge in this case; and it has been adjudged accordingly, that a rent-charge, granted out of gavelkind land, shall descend according to the rules of descent in that custom, because it is part of the profits of the land, and issues out of the land, and so shall submit to those rules which govern the land out of which it springs.

Lamb. 608.
Co. Lit.
11, 12.
[*Infra*, tit.
Heir and
Ancestor,
B. 2.]

For a condition broken, the heir at law shall enter, because the condition is a thing of new creation, and altogether collateral to the land, being not in any manner like the rent, which is part of the profits of the land itself; but when the eldest son hath entered for the condition broken, the younger children shall enjoy the land with him; and the reason is, because the eldest son is in of the old estate, which is still under the control and direction of the custom.

Moor, 113.
Godt. 2.
S. C.

[But we must distinguish between a condition in gross, and a condition incident to a reversion; for of the latter the special heir shall take advantage, though not of the former. A man made a lease of land, parcel borough-english, and parcel at common law, by indenture for twenty-one years. Provided that if the lessor, his heirs or assigns, should give a year's warning to the lessee, that he, his heirs or assigns, would dwell there, then the lease should be avoided: the lessor died leaving two sons; the eldest assigned over his part to the youngest; and the question was, whether the youngest son was such a person as could give warning, or, whe-

ther the condition was not gone by the severance of the reversion on the death of the father? *Manwood* and *Monson*, Justices, were of opinion, that he might give warning, and that the law which severed the reversion, has severed the condition also; and so for one part, as heir in borough-english, and for the other, as assignee of the elder brother, (by stat. 32 H. 8. c. 34.) he shall take advantage of the condition. But if a man makes a feoffment in fee of borough-english lands on condition, and dies, having issue two sons, the eldest only shall take advantage of the condition, for it is a condition in gross; but in this case there was a reversion in the lessor.

If a lease for years be made of two acres, one of the nature of borough-english, the other at common law, on condition, and the lessor die, leaving issue two sons, each of them shall enter for the condition broken; for by act of law, a condition may be apportioned.

with another in the same book; *viz.* That if a man seised of lands *ex parte matris*, makes a gift in tail or lease for life, the heir of the part of the mother shall have the reversion; and the rent also, as incident thereunto, shall pass with it; but the heir of the part of the mother shall not take advantage of a condition annexed to the same, because it is not incident to the reversion, nor can pass therewith. Co. Lit. 12. b. But as this is not warranted by the case cited as an authority for it by Lord Coke, Mr. Robins adheres to the other opinion as more agreeable to common reason. Robins. Gav. 121.]

Co. Lit. 215.
Mr. Robinson observes, that it is difficult to reconcile this passage

Manwood, in Dy. 316. b. puts this case: A man seised in fee of land in gavelkind, has issue two sons, and by his last will devises the land to his eldest son, on condition that he pay to the wife of the devisor 100*l.* at a certain day; and he fails of payment; whether the younger may enter on a moiety on his brother, by a limitation implied in the estate? *Qu.* But this doubt is, as Lord Coke observes, well resolved by the following determination: A copyholder in fee of land descendible in borough-english, having three sons and a daughter, after a surrender to the use of his will, devises the land to his eldest son, paying to his daughter and each of his other sons 40*s.* within two years after his death: the eldest son is admitted, and does not pay the money; the youngest son enters on the land, and his entry was holden lawful: for though the word *paying* in case of a will may make a condition, yet here the law construes it a limitation, of which the youngest son in borough-english may take advantage; and it is the same as if he had devised the land to his eldest son till he made default in payment: for if it should have been a condition, then it would have descended to the eldest, and it would, consequently, have been at his pleasure whether his brothers or sister should be paid or not.

Rob. Gav. 121.

Wellocke v. Hammond, 3 Co. 20. Cro. El. 204. 2 Leon. 114.

But if a man, having three sons, devise gavelkind lands to his second son, paying, or upon condition to pay to each of his other sons 100*l.* and the devisee fail of payment, Mr. *Robinson* thinks, that the youngest son cannot take advantage of this by entering into a third part, but in order to defeat the devise, the eldest son ought first to enter upon the whole, agreeably to the determination in the case of *Curtis v. Woolverstone*, Cro. Ja. 56. where a man having three sons and several daughters, devised lands descendible

Rob. Gav. 122.

in

in borough-english to his *second* son in fee, on condition to pay 20 *l.* to each of his daughters at their age of 21; and the devisee not paying the money at the time, the youngest son entered in his own name; such entry was holden ill; for this shall not be taken as a limitation, but as a condition, it differing from the reason of the case of *Wellocke v. Hammond*, where had it been construed a condition, it had been void and to no purpose; but it shall be expounded according to the common law, where it is not necessary to give it a contrary exposition.]

Lit. § 210.
Co. Lit.
140. a.
Lamb. 608.

Touching the manner of descent, it is first to male children, then to the female, then to collateral relations; and the descent had, after the manner of the civil law, regard to the *Stirpes*; and therefore, if the eldest son had issue a daughter, she should inherit her father's share with the younger sons.

Hob. 31.
Co. Lit.
376. a. b.

As to warranty, and its manner of affecting heirs in gavelkind, the law stands thus; if a man enfeoffs another of lands with warranty, and dies, leaving issue several sons, and lands in gavelkind to descend to them, the warranty shall descend only on the eldest son, as heir at common law; for warranty being a *covenant distinct from and collateral to* lands, it could not come under the character and denomination of privileges belonging to lands which the Conqueror confirmed, and therefore must be governed by the rules of the common law, which will carry it to the heirs at common law; however, in this case, if the feoffee is empleaded, he may vouch all the heirs in gavelkind, that he may have the full benefit of his warranty; and that their lands being subject to the warranty, they may be called in to the defence, that they may not lose their lands without being concerned in the defence against the opposite title; but in this case the feoffee may, if he pleases, vouch only the heir at common law, as the person on whom the warranty descends; so that it is left to his choice, either to vouch all the heirs by the custom, that he may recover in value from them all, or only vouch the heir at common law.

Co. Lit.
376. b.

But the great question is, in case all the heirs are vouched, and the heir at common law happens to have nothing at the time of the voucher, so that the recovery in value lies upon the younger brothers; who in such case shall deraign the warranty paramount, and recover the recompence in value? Some have been of opinion, that as they are vouched together, they shall all vouch over, and that the recompence in value shall enure according to the loss.

Co. Lit.
376. b.

Others have holden, that it is against the maxim in law, that they who are not heirs to the warranty should join in voucher, or take benefit of a warranty which did not descend to them; and therefore the heir at common law only, on whom the warranty descended, shall deraign it, and recover in value: but this is denied to be law on the other side; for by the rule of law, the vouchee shall never sue to have execution in value till execution is sued against him, and therefore he cannot have execution in value: they urge farther, it would be contrary to the rules of reason

son and equity, that the heir at common law should have all the benefit, while the special heirs sustain all the loss; and to strengthen this opinion, my Lord Coke adds (a), that the reason given in the books, why the special heirs should not be vouched only, is, because if they only were vouched, they would lose the benefit of the warranty paramount; and therefore the heir at common law, shall be called upon with the rest, that they may all deraign the warranty paramount; but 2.

the heirs in gavelkind, because of the possession, they all shall vouch over, and what is recovered in value shall go only to the heirs in gavelkind. So, if two be vouched where one has nothing, and they vouch over, the recovery in value goes only to him who had the interest. Cro. Ja. 218. And of the same opinion, both as to heirs in gavelkind and borough-english, was Holt, C. J. in the case of Page v. Hayward. Rob. Gav. 131.]

[(a) And in the case of Game v. Sims, Lord Coke saith, that if the heir at common law be vouched for warranty, who vouches

The eldest son only is rebutted by the warranty; for a warranty being a covenant distinct from lands, the confirmation of the conqueror, which related only to lands, and the privileges belonging to lands, could not extend to it; so that in its descent it must be directed by the rules of the common law, and so go to the eldest son and bind him.

in the last of these books there is a case to this effect: *A formedon in descender* was brought by three sons of lands in gavelkind, and the warranty of their ancestor was pleaded against them in bar; upon which they were at issue, if assets by descent; and it was found by special verdict, that the father of the demandants was seised in fee of lands in gavelkind, and devised them to the demandants, and to their heirs, equally to be divided among them; and the court was of opinion, that they were in as purchasers by the devise, and consequently that the lands were not assets; so that in this case the rebutter of all the sons, and not of the heir at law, was admitted.

Lamb. 608.
Co. Lit.
27. a.
Cro. Eliz.
431.
Leon. 112.
pl. 154.
But 2. for

[Three men levied a fine with a warranty for the heirs of them all: the court doubted whether they should receive it, for that the warranty should be for the heirs of one in certain; but because the land was gavelkind, and the consors heirs by the custom, the court received it.]

24 E. 3. 66.
b. Fitzh.
Fines, 113.
Bro. Fines,
65.

By the custom of gavelkind, a husband, after the decease of his wife, is to have a moiety of such gavelkind land whereof his wife had an estate of inheritance, whether he had issue by her or not, which he is to hold without committing waste, and the like, as in tenancy by the curtesy, as long as he continues unmarried.

Lamb. 615.
Co. Lit. 30.
a. 111. a.
Rob. Gav.
135., &c.

Likewise the wife, by the same custom, is to have, after the death of her husband, a moiety of his inheritance in gavelkind, to hold as long as she continues unmarried and chaste, the presumption (a) of her chastity to continue till she can be proved to have been delivered of a child got during her widowhood.

Cro. Eliz.
121.
Lamb. 616.
Leon. 133.
Roll. Abr.
553.
[(b) But

authorities are not wanting to shew that this presumption fails merely upon evidence of the commission of the act of fornication itself, though the detection of it be not made in this publick manner. Rob. Gav. 165., and the authorities there produced.]

A woman cannot waive this dower, and claim her dower at common law; for where gavelkind is the *lex loci*, it must govern the property of the place; and all controversies concerning lands, where such law obtains, must be determined with a strict regard to the customs which are annexed to such law; for if such law and its customs are not made the rules to decide the differences by,

Savil, 91.
Leon. 81.

by, that arise within the precinct where they obtain, they are not the law there.

Lamb. 618,
619.

[(a) There is no case in the books to warrant this opinion of Mr.

Lambard; and it is observable, that the word *vestu* is not in the edition of

Lambard is of opinion, that a *legal seisin* of lands in gavelkind in a husband will not entitle a wife to dower, as it will of an inheritance at common law, but that an *actual seisin* is required; and he founds his opinion on the words of the *Kentish* custom, which he hath placed in the latter end of his book (a); the words are these, that a woman shall be endowed *des tenements dont son baron morust seise & vestu*; which word *vestu*, in his opinion, must mean an actual seisin; and consequently, since customs derogatory from the common law must receive a severe construction, a wife will not be received to claim her dower in gavelkind without such seisin of the husband.

the book referred to, viz. the *Customal*, printed by Tottel; nor in a manuscript copy of that record fairly written on vellum, amongst a collection of the old statutes in *Lincoln's-Inn* Library. But were Mr. Lambard's the right reading, it might, as Mr. Robinson observes, bear some doubt whether he has not put too strong an interpretation on this word; for an estate *vested*, by no means imports that the tenant has a seisin in deed, but only that the estate is not in abeyance or contingency; and undoubtedly the estate *vests* in the heir at law immediately on the death of his ancestor, which is before entry called a seisin in law. But let the proper sense of this single word be what it will, it can scarcely be sufficient to add so unreasonable a qualification to the custom, as that the laches of the husband in gaining an actual seisin by entry, shall prejudice the wife, without a strong usage accordingly. Rob. Gav. 171, 2.

Cro. Eliz.

561, 562.

[Rob. Gav. 234.]

But by the express words of the sta-

ute of frauds, 29 Car. 2. c. 3. § 5. the devise of these, as of other lands, must be in writing.

All gavelkind land is deviseable, for the allodial property doth follow the rules of the civil law, which permits any person to make his will, and to dispose of his estate; and this notion the clergy seem to have brought over into all those allodial possessions, and the custom hath continued ever since.

All the children shall join in a writ of attain, and in a writ of error touching the gavelkind lands; for since they have a joint title, they are to join in all actions for the recovery of their rights.

(B) The particular Cases which have been adjudged relating to this Custom.

Leon. 133.
pl. 82.

IN dower brought by a husband and wife, the defendant pleads, that the land, of which dower is demanded, is of the nature of gavelkind; and that the custom is in land of such nature to endow the wife of a moiety *tenendum quamdiu non maritata remanserit, & non aliter*; upon which the demandants demurred, and judgment was given against them, because the custom is well pleaded against the dower in the affirmative, with the negative & *non aliter*, and is confessed by the demurrer; and therefore the feme cannot be endowed contrary to the custom so expressly allowed.

Co. Lit.
27. a.

If a man seised of lands in gavelkind give or devise them to a man and his eldest heirs, this does not alter the customary inheritance, or hinder the descent, according to the rules in gavelkind, for that can be only done by act of parliament.

If lands in gavelkind descend to the king and his brother, the king shall take one moiety, and his brother the other; but if the king dies, his moiety shall descend to his eldest son, and not according to the rules of descent in gavelkind; for the king was seised of his moiety *jure coronæ*, therefore it shall attend the crown, and consequently go to the eldest son.

Plow. 205.
Co. Lit. 15.

A seised of lands in gavelkind had issue three sons, and devised part to one, part to another, and other part to a third; and appointed by his will, that if any of them died without issue, that the other should be his heir; and it was adjudged, that each of them had an estate-tail by implication, by that part of the will, *that if any of them died without issue, the other, &c.* and likewise that the word *heir* makes a fee-simple in that part that descends to the survivor, upon the death of the rest without issue.

Moor, 864.
Spark v.
Purnall.

A man seised of land in gavelkind makes a feoffment to the use of himself and his wife in tail, the remainder to his right heirs; the word *heirs* in the remainder is a word of limitation, and not of purchase; and therefore the remainder shall descend according to the custom of gavelkind.

Bro. tit.
Custom, (1).
[But where
a trust of
gavelkind
lands is ex-
ecutory,

and to be carried into execution by a court of equity, that court will direct the conveyance to be made according to the rules of the common law, and not according to the custom. Roberts v. Dixon, 1 Atk. 607. See *Starkey v. Starkey*, *infra*, tit. *Uses and Trusts* (H), S. P.]

Lands in *Kent* were disgavelled (by 31 H. 8. cap. 3. and a private act made 2 & 3 E. 6.) to all intents, constructions, and purposes whatsoever; and that they should descend as lands at common law, any custom to the contrary notwithstanding; and the question was, whether these lands lost by these statutes all their other qualities or customs belonging to gavelkind, as well as their partibility; and resolved that they lose only their partibility.

Raym. 59.
76, 77.
1 Sid. 77.
135.
Lev. 79.
2 Keb. 288.
Hard. 325.

For first, these acts were made at the petition of those gentlemen whose lands were disgavelled, to prevent the extinction of their families by the frequent divisions of those lands; therefore it is to be presumed, that the legislature intended only to destroy partibility, as that part of the custom which tended to the crumbling of families; and not those other beneficial customs annexed to such lands in *Kent*, such as devising, forfeiture for treason only, &c.

2. To expound this private act of the 2 & 3 E. 6. literally in the clause, (*that they should be as lands at common law to all intents and purposes*) would take away all manner of power of devising those lands; for lands at common law were not deviseable; and this act being subsequent to 32 H. 8. cap. 1. and 34 & 35 H. 8. cap. 5. of wills, must repeal them, and consequently prevent all future devises; but this restraint cannot be intended to be within the view of the petitioners, nor of the legislature that framed the act upon the petition.

3. Though in the beginning of the clause the words *to all intents and purposes*, &c. are large, yet they are restrained by the last words of the clause, *viz.* that they should descend as lands at common law, and consequently the custom of partibility is only

Sid. 137.
Raym. 59.
77.

destroyed; moreover it is very much to be doubted, whether the power of devising, and the other qualities annexed to the partible lands in *Kent*, be essential to gavelkind; for the custom of gavelkind prevails in other countries besides *Kent*; and yet it may be very much questioned, whether the gavelkind of *Kent*, and that in other countries, agree in any thing but the manner of descent; and if this doubt may be admitted, then those extraordinary customs in *Kent* cannot be extinguished in a statute, without particular words for that purpose.

Raym. 76.

1 Lev. 79.

Sid. 138.

Cro. Car.

562.

2 Sid. 153.

Brown v.

Brooks,

Lamb. 595.

Rob. Gav.

41.

To illustrate this point farther, it will be necessary to take notice, that it is sufficient for any one, who will entitle himself by the custom of gavelkind, to plead that the land is in *Kent*, and of the nature of gavelkind, without pleading the custom specially; but if any one will plead the custom of devising, or of having a moiety as tenant by the curtesy, or in dower, he must plead the custom specially, and not in that general manner he may plead gavelkind; and the reason of this difference seems to be this, That gavelkind in *Kent* is the general law of the place, and no particular custom; and therefore when it is generally alleged, the court shall take notice of it as of a law that prevails in a considerable part of the kingdom; but as for the other customs, they are not an essential part of gavelkind, and so are not laid before a court upon a general pleading of gavelkind, but require a particular manner of pleading them, as all other private customs do which are derogatory to the laws of the kingdom, that the judges may be apprised of them, and where they obtain, and so give their decisions with regard to them.

2 Ld. Raym.

1292.

Co. Lit.

175. b.

Lit. § 265.

Heirs in gavelkind shall make partition as parceners, and a writ of partition lies between them as it does between parceners; and in the declaration upon such writ the custom must be mentioned; as to say, that the land is of the custom of gavelkind; but they need not prescribe; for though the custom, as different from the general law of the kingdom, must be taken notice of to the judges, yet there is no necessity for prescribing, because it is *lex loci*.

2 Ld. Raym.

1124.

1 Salk. 243.

1 P. Wms.

63.

6 Mod. 120.

[If a man has three sons, and purchases lands in gavelkind, and a younger son dies in the lifetime of the father, leaving issue a daughter, the daughter shall inherit the part of her father *jure representationis*; for the custom having made all the sons heirs, the law implies all the necessary incidents and consequences in point of descent. And the representative would in like manner be admitted, though the lands were not purchased till after the death of her father.]

Grants.

THE word *grant* is regularly applied to things incorporeal, such as advowsons, rents, commons, reversions, &c. which are therefore said to lie in grant, and not in (a) livery, because they cannot pass from one to another without (b) deed.

Co. Lit.
172. a.
332. a.
[The legal
import of
the word

"grant," and its operation in conveyances of estates in fee-simple, in gifts in tail, and in leases for lives and for years, is explained by Mr. Butler in his very learned note upon Co. Lit. 384. a.] (a) What things lie in grant, and not in prescription, & *vice versa*, vide Dav. 13. (b) That a rent granted by one coparcener to another, for equality of partition, is good without deed, because they do not claim from each other, but as making one heir to their ancestor. Co. Lit. 169. a.

On this difference between things corporeal and incorporeal, it hath been holden, that there can be no discontinuance of things which lie in grant; and therefore if tenant in tail of a rent, advowson, common, or remainder, or reversion *expectant* on a freehold, make a grant by deed or fine, or disfeise the tenant of the land out of which the rent is issuing, whereof he is seised in tail, and make a feoffment with warranty, that these acts work no discontinuance of the entail, for nothing passes but during the life of tenant in tail, which is lawful.

Lit. § 627.
Co. Lit. 327.
b. 3 Co. 85.
Leon. 111.
& vide
2 And. 110.

Also, of things which may be transferred without the notoriety of livery and seisin, such as rents, advowsons, &c. which lie in grant, a man cannot by any disposition or act *in pais* forfeit them; and therefore, if a man seised of a rent, advowson, or common for life, grants them by deed to another in fee, this is no forfeiture, for this can be no way prejudicial to him in reversion, because, should the grantee claim an estate in fee, he can make no title without the original grant made to his grantor, by which it must appear what interest he had, and consequently what estate he could convey; and so the grantee, notwithstanding the grant in fee, can claim no larger estate than his grantor had power to make, and so he in reversion can receive no prejudice.

Co. Lit.
233. b.
8 Co. 45. a.

So, there can be no occupant of things which lie in grant (c), and which cannot pass without deed, as rents, &c. because these things having no natural existence, but consisting purely in the agreement, and depending on the institution of the society for their being, no man can enter to possess them; besides, as these things are framed, and have their existence by the municipal laws of the nation; so those laws have established the solemnity of a deed to transfer them; from whence it follows, that since no man can make himself a title to those things without deed, whoever claims them, must shew he is a party to the deed before he can derive himself a title to the things contained in the deed.

Co. Lit.
41. b.
2 Roll.
Abr. 150.
Cro. Eliz.
721. 901.
Vaugh. 199.
[(c) That is,
a general
occupant;
for accord-
ing to Lord
Coke, Co.
Lit. 388.,
if *bers* are

named in the grant of a rent *pur autre vie*, they shall take. Dy. 186. in marg. 1 Mo. 623. 664. Go db. 172.] Bulstr. 155.

But for the better understanding of this head we shall consider,

(A) What Persons may make good Grants : And herein,

1. Of Grants by Corporations.
2. Of Grants by Ecclesiastical Persons.
3. Of Grants by Infants.
4. Of Grants by Feme Coverts.
5. Of Grants by Idiots and Persons of insane Memory.
6. Of Grants by Persons under Durefs.

(B) What Persons may take by Grant.

(C) What Name or Description of the Grantor, or the Grantee, will make the Grant certain enough.

(D) Of what Interest in the Grantor he may dispose : And herein,

1. Where by Reason of Maintenance a Thing cannot be granted or assigned over.
2. Where the Grantor must have the absolute Property, so that the Grant be not to the Prejudice of a third Person.
3. Whether a bare Right or Possibility may be granted or assigned over.
4. What Seisin or Possession in the Grantor will enable him to grant it over.
5. Where the Grantor's Right, being joined with a Trust or Confidence, is incapable of being granted or assigned over.

(E) What Ceremony is requisite to the Perfection of a Grant : And herein of the Necessity of a Deed.

(F) What Words are sufficient to create a good Grant.

(G) Where a Thing shall be said to pass by Grant, or some other Conveyance.

(H) Where Grants shall be said to be good, or void, for Incertainty : And herein,

1. What shall be a sufficient Description of the Thing granted, notwithstanding any Misrecital thereof.
2. Where a Defect in the Description may be aided by Relation to a Thing certain.
3. Where

3. Where by an Election given to the Grantee, he may reduce an uncertain Grant to a Certainty.

(I) How Grants are to be expounded : And herein,

1. How to be construed where there appears a Repugnancy in the Words.
2. Where the Premises differ from the *Habendum*, and therein how far the *Habendum* may enlarge or abridge the Grant in the Premises.
3. How the Words of a Grant are to be construed as to the Things intended to be granted.
4. Where a Thing shall be said to pass as appendant, appurtenant, or incident.
5. What Estate or Interest shall be said to be granted.
6. At what Time the Thing granted becomes vested, and when the Grantee must take the same.

(A) What Persons may make good Grants : And herein,

1. Of Grants by Corporations.

Corporations aggregate, although they be invisible, and exist only in supposition and intendment of law, yet are they capable of making grants and parting with their possessions.

But for this vide tit. Corporations.

But a dean without the chapter, a mayor without his commonalty, the master of a college or hospital without his fellows, cannot grant or make any contract that will bind the corporation.

21 E. 4. 12.
Moor, 51.
Perk. § 31,
32.

2. Of Grants by Ecclesiastical Persons.

The grants of all persons dead in law, as monks, friars, canons professed, and such like religious persons, were always holden void.

Perk. § 3.

But it seems that by the common law, deans and chapters, masters and fellows of colleges, masters and brethren of hospitals, and such like corporations aggregate of many, might of themselves alone, without the consent or confirmation of any, have made long leases for lives or years, or gifts in tail, or estates in fee to others of their possessions, at their wills and pleasure.

Comp. Incumb. 415.

So, bishops, deans, &c. seised in the right of their bishopricks, deaneries, &c. so archdeacons, prebendaries, parsons, vicars, &c. with the consent and confirmation of others, might grant their possessions in the same manner as other aggregate corporations.

Comp. Incumb. 415.

Vide these statutes and the explanation of them, tit. *Leases and Terms for Years*.

But now by the statutes of 1 *Eliz. cap. 19.* and 13 *Eliz. cap. 10.* all gifts, grants, feoffments, or other conveyance by bishops, masters, and fellows of colleges, deans and chapters, &c. are void, except leases for the term of twenty-one years or three lives, being made conformable to the rules prescribed by these statutes.

Hetley, 57.

If a person obtains a grant to build houses on church or college land, and this is confirmed (where confirmation is necessary); this grant makes no alienation, but is only as a licence or covenant; for the soil remains in the grantor, and so by consequence the houses are also in him.

7 Co. 7. Bedford's case, if made by a bishop, though confirmed by dean and chapter, are void.

Ecclesiastical persons seised of advowsons in right of their churches, are restrained from alienating the same, or granting the next or other avoidance thereof, to the prejudice of their successors; for these are parcels of the possessions and hereditaments of the church, and not things whereof an annual rent or profit can be reserved.

Cro. Eliz. 207. 440. 690. Ander. 241.

But though these grants are void against their successors and the king, yet the grant of a bishop, in such case, is good against himself; so that he cannot avoid it during the time that he continueth bishop, the statutes being made only for the benefit of the successors and the king, that by the preceding possessors they might not be prejudiced in their respective rights; but not to restrain those in possession from doing any thing to bind themselves during their own time.

3 Co. 60. Cro. Jac. 173. — The grant of the next avoidance by a chapter,

'The like law in case of grants made by deans and chapters, for they are void when the dean (being principal member of the corporation) dies, and bind both dean and chapter during his life only.

not being made by the head of the corporation, is void immediately. 2 Mod. 50.

10 Co. 60. Keb. 182. Hard. 366. (a) So, if a bishop makes a lease for

So, the grant of the next avoidance of an advowson is only void against the successor, but shall bind the bishop himself, &c. So, if an annuity be granted by a bishop out of the possession of the bishoprick, this is not void (a) against the bishop that makes the grant thereof.

about twenty-one years, this shall bind the bishop during his time. 2 Leon. 134. — Or if a bishop lets tithes for three lives, which is a void lease against the successor, because there is not any remedy for the rent; yet it is not void against the bishop himself. Cro. Jac. 173. — So, where a bishop by deed enrolled granted to the queen, without the consent of the dean and chapter; it was holden that this was not void against the bishop himself. Roll. Rep. 151.

Goulds. 138.

Hetley, 24. (b) But

So, if an (b) archdeacon, dean, prebendary, &c. make leases, or other grants of any of their sole possessions, not warranted by statute, they shall be bound by their own grants for the time.

where there is a chapter that hath no dean, as the chapter of the collegiate church of *Southwell*, grants or leases made by them, contrary to the statute of 13 El. c. 10. are void *ab initio*, for they must be either so, or good for ever. Mod. 204. — So, in all cases where a corporation aggregate makes a lease not warranted by the statute of 13 Eliz. c. 10. such lease is void *ab initio* against themselves; but where a sole corporation makes such lease, it shall bind him that makes it, but shall be void against his successors. Leon. 308. Hard. 326.

Where.

Where the master and fellows of a college by deed enrolled made a lease not warranted by the statute, and levied a fine, and five years passed without claim; in this case, though it was holden, that the lease was void against the succeeding master, yet it was good during the life of the master that was party to the lease, and made no claim, because he is the head and principal part of the corporation.

11 Co. 67.
Roll. Rep.
151.
Leon. 306.

3. Of Grants by Infants.

Infants in regard to their want of understanding are so far protected by the law, that (a) regularly all their grants are void in the same manner as their contracts are.

Uide head of Infancy and Age.
(a) Where

an infant may dispose of lands in gavelkind, *vide tit. Gavelkind, ante.* — That an infant coparcener shall be bound by partition, *tit. Coparceners.* — What acts he may do when executor, *tit. Executors and Administrators.*

But herein the law distinguishes between such grants as are void, or only voidable; the first of which are all such gifts, grants, or deeds made by an infant, which do not take effect by delivery of his hand; as if an infant give a horse, and do not deliver the horse with his hand, and the donee take the horse by force of the gift, the infant shall have an action of trespass, for the grant was merely void.

Perk. § 12.
19.

But if an infant enter into an obligation, make a feoffment, levy a fine, or suffer a recovery, these are not merely void, but only voidable by him.

Perk. § 12,
13.

If an infant being seised of a carve of land, grant a rent-charge to be issuing out of the same carve by deed, and the grantee dis- train, he shall punish him as a trespasser, notwithstanding that the infant delivered the deed with his own hand.

Perk. § 13.

If an infant grant a rent by fine, this grant is voidable by him- self during his nonage, by writ of error; but if he do not avoid it during his nonage, it is good for ever; also if he die during his nonage, his heir shall not avoid it.

Perk. § 8.
19.; but
for this *vide*
head of

Fines and Recoveries, ante.

An infant being lord of a copyhold manor may grant copyholds, for those estates have their force and effect from the custom of the manor by which they have been demised, and are demisable, time out of mind, without any regard to the person of the grantor.

Noy, 41.
4 Co. 23.
8 Co. 63.

4. Of Grants by Feme Coverts.

A grant by a feme covert is void, for no act of hers can transfer that interest which the intermarriage has vested in the husband; and therefore (b) if a man be seised of land in right of his wife, and his wife grant a rent issuing out of the same land, without the knowledge of the husband; this grant is void; and so it is notwithstanding that the husband had consance of it, if it be made and delivered without his assent, or with his assent, if it be made in the name of the wife, and not in the name of the husband; and notwithstanding the husband be abroad out of the country, at

Uide tit. Baron and Feme.
(b) Perk.
§ 6.

the time of such grant made and delivered, so that it is not known whether he be alive or dead ; yet such grant is void if the husband be living ; inasmuch as if the grantee, by force of such grant, enter into the land and distrain, the husband, at his return, shall have, for his entry and distress, an action of trespass.

Perk. § 8. So, if there be a difference betwixt the husband and wife, by reason whereof certain lands of the husband are assigned unto the wife by the friends of the husband, and by his assent, and the wife grant a rent-charge to be issuing out of the same lands unto a stranger, the grant is void.

Perk. § 9. If a single woman being seised of a carve of land, by deed grant a rent-charge thereout, and she deliver the deed to a stranger as an escrol, upon condition, that if the grantee go to *Rome* and return back again before the feast of *Easter* then next following, that then he shall deliver the same escrol as her deed unto the grantee; the woman marry, and before the feast of *Easter*, and during the coverture, the grantee go to *Rome*, and return again, and the stranger deliver the escrol unto him as the deed of the woman ; this grant is good, notwithstanding that the husband was seised of the land in the right of his wife, before that the grant took effect, for it shall have relation to the first delivery, at which time she was a feme sole.

Perk. § 10. But in this case the grantee shall not have any rent by force of the said grant before the last delivery, when the same took effect as a complete deed.

Perk. § 11. Also in such case, if the woman had been married at the time of the delivery of the deed as an escrol, and her husband died, and the grantee, after his death, had performed the condition, the grant had been void ; for the delivery of the deed as an escrol, being at a time when she was a feme covert, no subsequent act can make it good.

5. Of Grants by Idiots and Persons of insane Memory.

For the learning on this head, see tit. *Idiots and Lunatics*, *infra*.

6. Of Grants by Persons under Durefs.

2 Inst. 483. The grants of persons under durefs are void, that is, if they
Vide tit. were made under an apprehension of some bodily hurt, or if the
Durefs. grantor were imprisoned without cause, and the grantee refused to release or discharge him, unless he made such grant.

4 Inst. 482. But menacing to burn houses, or spoil or carry away the party's
 Perk. § 18. goods, are not sufficient to avoid the grant ; for if he should suffer what he is threatened with, he may sue and recover damages in proportion to the injury done him.

(B) What Persons may take by Grant.

THERE are few or no persons excluded from being grantees, and therefore a man attainted of felony, murder, or treason, may be a grantee; so the king's villein, an alien, one outlawed in a personal action, or a bastard, may be grantees. Perk. § 42.

A feme covert may be a grantee, and therefore if a rent-charge be granted to a feme covert, and the deed be delivered to her without the privity or knowledge of her husband, and the husband die before any disagreement made by him, and before any day of payment, the grant is good, and shall not be avoided, by saying, that the husband did not agree, &c., but the disagreement of the husband ought to be shewn. Perk. § 42.

If an *Englishman* goes into *France*, and there becomes a monk, yet he is capable of taking by a grant made to him in *England*, because such profession is not triable; and also for that all such professions are taken away and declared unlawful, as being contrary to our established religion. 2 Roll. Abr. 43. said to be resolved by all the judges at Serjeants Inn, 44 Eliz. in *Ley's case*.

Although (a) aggregate corporations are invisible and exist only in supposition of law, yet are they capable of taking by grant, for the benefit of the members of the corporation. Co. Lit. 9. Saund. 344. (a) So, church-

wardens may take goods for the benefit of the church. Rol. Abr. 393. March 66. — But not lands. 12 H. 7. 27. Kelw. 32. a. Co. Lit. 3. a. Salk. 167. pl. 7. — Except in *London*, where the parson and churchwardens are a corporation, and may purchase and demise lands, &c. Cro. Jac. 532. March, 66. Lane, 21. 5 Mod. 395. See too tit. *Churchwardens*, *supra*.

As where the mayor and commonalty of *N.*, brought an action of covenant against the mayor, bailiffs, and commonalty of *Derby*, and declared, that the defendants' predecessors had by their deed granted to the plaintiffs' predecessors, that all the commonalty of *N.* should be discharged of murage, pontage, custom, and toll, for all their merchandize, &c. within the vill of *Derby*, and that the officers of *Derby* had taken toll and custom of the burgesses of *N.* against the covenant; it was holden that the action lay, and that the grant to the corporation for the benefit of the particular members was good. 48 E. 3. 17. Saund. 344. cited.

If a feoffment or grant be made by deed to a mayor and commonalty, or any other corporation aggregate of many persons capable to purchase, they have a fee-simple without the word *successors*, because in judgment of law they never die. Co. Lit. 94. b.

So, if a lease be made to them during their lives; this is equal to a grant made to them while they continue a body politick, which, by reason of the perpetual succession of its members, is in law looked upon to be for ever. 21 E. 4. 76. Roll. Abr. 843.

If *A.* grants to the mayor and burgesses of *D.*, the moiety of a yardland in the waste of ——— without describing in what part it should be, or how it is bounded, the corporation cannot make their election by attorney, but are first to resolve on having the land, Leon. 30.

land, and then they may make a special warrant of attorney, reciting the grant to them, and in which part of the waste the grant should take effect, and according to such direction the attorney is to enter.

(C) What Name or Description of the Grantor or Grantee will make the Grant certain enough.

Perk. § 36.
Gouldf.
122.
Hob. 32.

THE names of persons at this day are only sounds for distinction-
fake, though it is probable they originally imported something more, as some natural qualities, features, or relations; but now there is no other use of them, but to mark out the families or individuals we speak of, and to distinguish them from all others; and therefore in grants, which are to receive the most benign interpretation, and most against the grantor, if there be sufficient shewn to ascertain the grantor and grantee, and to distinguish them from all others, the grant will be good.

Co. Lit. 3.
2 Roll.
Abr. 43.
(a) But in pleading in these cases, the christian name ought to be shewn, for the death of

And this we may observe in those cases, where there are such sufficient marks of distinction, that the grant would be good without any name at all, consequently, a mistake in the name of baptism or surname, is to be looked upon but as surplusage, and will not vitiate; as a (a) grant by or to *George*, Bishop of *Norwich*, where his name is *John*, or to *Henry*, Earl of *Pembroke*, where his name is *Robert*, is good, for there cannot be more persons of those names.

the individual is a good plea in abatement, which often falls out, where the same office, dignity, or relation, continue in another. Co. Lit. 3.

Perk. § 36.
2 Roll.
Abr. 44.

So, a grant of an annuity by an abbot, by the name of the foundation, without his name of baptism, is good, if there be not any more abbots in *England* of the same name of foundation.

46 E. 3. 22. b.
2 Roll. Abr.
43. cited.

If a grant be made to a man and his wife, without naming her by the name of baptism, yet she shall take.

2 H. 4. 25.
2 Roll.
Abr. 43.
Co. Lit. 3.

So, if a grant be made to *T.* and *Elen* his wife, where in truth her name is *Emlyn*; yet the grant is good, for being called the wife of *T.*, reduces it to a sufficient certainty.

2 Roll.
Abr. 44.

If *A.* be created a herald, and in the patent he be called *Chester*, a grant or obligation made to him by the name of *Chester* is good, for this sufficiently distinguishes him from all other men.

Perk. § 37.

If there be father and son of the same name, and the father grant an annuity by his name, without any addition, it shall be intended the grant of the father; and if the son being of the same name with his father, grant an annuity without any addition; yet the grant is good, for he cannot deny his own deed.

Co. Lit. 3.
2 Roll.
Abr. 43, 4.
(b) So, a

A (b) bastard, who is known to be the son of such a one, may purchase, or be a grantee by such reputed name; for all surnames were originally acquired by reputation.

woman, who hath gotten the reputation of being the wife of such a one, may be a grantee by that name, though in truth she was never married to him. Hob. 32.

As where *George Shelly* conveyed lands to the use of himself, the remainder to *George Shelly* his son, whereas in truth *George* was born of one *B.* in matrimony of one *C.*, yet was reputed the son of *George*, and educated by him; though the boy was but six years old, it was ruled he should take the remainder, for having gotten by reputation the name of *George Shelly*, these words are a certain description of the person to take the remainder. Co. Lit. 3.

But if a remainder be limited to the eldest issue of *J. S.*, whether legitimate or illegitimate, and *J. S.* have issue a bastard, he shall not take this remainder, for it is not vested in *J. S.* as it was in the other case, but is in contingency, and the certain time is not defined when this contingency shall happen, for the bastard, at his birth, does not acquire the reputation of being the issue of *J. S.* and since the bastard, when first in being, cannot take by virtue of this limitation, he can never take it; for he cannot be understood to be the person designed and marked out by these words, if after his birth it depends on the uncertainty of popular reputation, whether he should take the remainder, or not; and such a designation of the person as contains no certainty in itself, or no relation to any other certain matter that may reduce it to certainty, is a void limitation. 2 Roll. Abr. 43, 44. Blonwell and Edwards. [See Mr. Hargrave's note upon these cases in Co. Lit. 3. b.]

But where a remainder is limited to the eldest son of *Jane S.*, whether legitimate or illegitimate, and she hath issue a bastard, he shall take this remainder, because he acquires the denomination of her issue by being born of her body, and so it never was uncertain who was designed by this remainder. Noy, 35.

If a grant be made to a father and his son, he having but one son, the grant is good for the apparent certainty of it; but if the father have several sons, or if a grant be made to a man's cousin or friend, these are void for uncertainty. Cro. Jac. 374. Co. Copyh. 95.

It seems by the better opinion of the books, that a mistake of the christian name will vitiate the grant; as where the grant is without any christian name at all, or where (a) a wrong name is made use of, as *Edmund* for *Edward*; neither can the party be declared against by his right name, with an averment, that he made the deed by a wrong name, for that would be to set up an averment contrary to the deed, and contrary to that sanction allowed by law to every solemn contract; and therefore if he be empleaded by the name in the deed, he may plead that he is another person, and that it is not his deed*. Vide 36 H. 6. 26. Dyer, 279. Owen, 107. Co. Lit. 3. Cro. Jac. 558. 640. Perk. § 38. (a) But if *J. S.* reciting by his deed, that his name is

J. S. by the same deed grants an annuity by the name of *Tho. S.*, this is a good grant; for the writ shall be brought upon the whole deed. Perk. § 40. — So, if *A.*, reciting by her deed, that she is a feme covert, and in truth she is a feme sole, grants an annuity, &c., it is a good grant; for whenever there is a sufficient expression and signification of the party's intent, whatever is redundant and over and above, like all other surplusage, though mistaken, cannot hurt and destroy the force of the grant, according to the rule, *utile per inutile non vitiatur*. Perk. § 40. — So, if *J. S.*, knight, reciting by his deed, that he is a yeoman, grants an annuity, the grant is good. Perk. § 40. — But if a feme covert, reciting by her deed that she is a single woman, grants an annuity; this recital shall not bind her, or deprive her of her privilege of coverture. Perk. § 41.

* *Sed quæ* the law? Few grants are without valuable consideration, and grants are to be construed most strongly against the grantors, for the benefit of the grantees; and it would be strange if the grantor, by his own fraudulent mistake, should avoid his grant. Nor do I see any reason why he should not be declared against by the name specified in his grant, and that grant be evidence that he is as well known by one name as the other. And *vide infra*.

But

3 H. 6. 25.
2 Roll.
Abr. 146.

But a mistake in a surname does not vitiate the grant, because there is no repugnancy that a person should have two different surnames, so that he may be empleaded by the name in the deed, and his real name brought in by an *alias*, and then he cannot deny the name in the deed, because he is estopped to say any thing contrary to his own deed.

46 E. 3.
22. b.
Co. Lit. 3.
2 Roll.
Abr. 43.
Brownl. 147.
Lit. Rep.
182.

Also, though a person cannot have two christian names at one and the same time, yet he may, according to the institution of the church, receive one name at his baptism, and another at his confirmation, and a grant made to or by him, by the name of confirmation, will be good; for though our religion allows no re-baptizing to make double names, yet it does not force men to abide by the names given them by their godfathers, when they come themselves to make profession of their religion.

2 Roll. Abr.
42. Hide
and Chal-
lenor.

So, if a man make a lease by a contrary name to that by which he was baptised, yet the lease is good; for this does not take effect (*a*) altogether by the indenture, but partly by the demise; as if *John* by the name of *Jane* lease lands, admitting that these are distinct names, yet the lease is good.

(a) So, of
things
which pass

by livery, if the deed of feoffment be made by a contrary name of baptism of the feoffor or feoffee; yet is the feoffment good if livery and seisin be made, for it takes effect by the livery, and not by the deed. Perk. § 42.——So, if a man delivers a horse by word, and by contrary name of baptism makes a gift of him in writing; yet the gift is good by word, though not by the writing. Perk. § 42.

Perk. § 56.
(b) If *J. S.*
hath issue
two sons,
and a grant
is made to
the first son

If a rent be granted to *J. S.* or *J. D.*, the grant is void for (*b*) uncertainty, for the deed is in the disjunctive; and though the deed be delivered to *J. S.*, yet this cannot make the grant good; for the deed was void at first, and cannot be made good by the delivery.

of *J. S.*, without name; this is certain enough. Perk. § 54. Hob. 32.——But if *J. S.* hath not any issue, and a rent is granted unto him who shall be the first issue of *J. S.*, whether it be son or daughter; this grant is void for uncertainty. Perk. § 54.

Perk. § 52.
(c) A grant
to the bishop
of *L.* and
his succes-
sors, when
there is no bishop
in being at the time,
or to the dean and
chapter of *St. Paul's*,
or to the mayor and
commonalty of such a
place, when there is
no dean or mayor
living at the time of
the grant, is void.
Vaugh. 199.

If a rent, or any thing else that lies in grant, be granted to the right heirs of *J. S.*, and *J. S.* be alive, this grant is void; for there is no person (*c*) capable of taking, as answering this description.

But for this
wide head of
Remainder
and Reversion.

But if a rent, &c. be granted to *A.* for life, remainder to the right heirs of *B.*, and *B.* be dead at the time the grant is to take effect; this is a good grant.

2 Inst. 666.
Dyer, 83.
Show, 392.

It has been already observed, that the naming of the right names of the grantor and grantee is for no other purpose but to ascertain the parties and distinguish them from others; and that if there be a sufficient verification to this purpose, the grant will receive the most favourable interpretation: and it seems the same indulgence will be allowed of in the mistake of additions, which are by law made part of the name. By additions we mean names of dignity, which are marks of distinction, imposed by publick authority, and always make up the very name of the person to whom they

they are given; and these are of two sorts; 1st, Such as exclude the surname, so that the persons may not seem to be of any common family; and such are the names of earls, dukes, &c. 2^{dly}, Such marks of distinction as are also imposed by the king, and parcel of the name itself, but do not exclude the surname, such as knight and baronet.

As to those names of dignity which exclude the surname, we have already observed, that in grants a mistake in the christian name will not vitiate the grant, because there cannot regularly be more than one person of that name. Co. Lit. 3.

So, a grant to a duke's eldest son, by the name of a *marquis*, or to the eldest son of a *marquis*, by the name of an earl, &c. is good, because of the common courtesy of *England*, and their places in heraldry. Carth. 440. Ld. Raym. 292.

So, where a conveyance was made of a reversion to *Ralph Evers*, knight, lord *Evers*, and he brought an action of covenant, to which the defendant pleaded, that at the time of the grant he was not *cognitus & reputatus per nomen mil.*, it was holden to be no good plea; for the person is sufficiently expressed by Lord *Evers*, and the addition of knight, though false, doth not take away the description of the true person. Bulst. 21. Lord Evers v. Strickland, Cro. Car. 240. S. C.

But it was adjudged in *C. B.* and affirmed by three judges in *B. R.* where the party set forth his title to an advowson by virtue of letters patent granted to *A. tunc armigero & postea militi*; and upon *oyer* of the letters patent it appeared, that the grant was made to *A.*, knight, that it could not be intended the same person, because knight is a name of dignity, but armiger or esquire, a name of worship; and if he is afterwards made a knight, the name of esquire is thereby extinguished, and consequently, that a grant made by the king to *A.* knight, when there was no such man a knight, was a void grant. Carth. 440. Skin. 651. pl. 1. The King v. Bishop of Chester, 5 Mod. 297. 2 Salk. 560. 1 Ld. Raym. 335. S. C. & vide Lit. Rep. 200. S. P. —But

Rokeby Just. held, that he might take by a grant made unto him by the name of knight, & sic vice versa, si constat de personâ, ut res magis valeat, &c. — And note, this judgment was reversed in parliament, because it was only a mistake in the pleader, the party being in truth a knight at the time of the grant. Carth. 441. Show. P. C. 224. 12 Mod. 187.

As to grants by and to corporations, the reader is referred to tit. *Corporations* (C 2.).

(D) Of what Interest in the Grantor he may dispose: And herein,

1. Where by Reason of Maintenance a Thing cannot be granted or assigned over.

THE common law hath so utter an abhorrence to any act that may promote maintenance, that regularly it will not suffer a possibility, right of entry, or thing in action, or cause of suit, or title for a condition broken, to be granted or assigned over. 21 E. 4. 24. Co. Lit. 214. 1 Roll. Abr. 376. 2 Roll. Abr. 45.

and Skin. 6. pl. 7. 26. pl. 1. that arrearages of rent are not assignable. — [See Mr. Justice Buller's comment upon the doctrine of maintenance in 4 Term. Rep. 340. and see the cases on this head in tit. *Assignment*.]

2. Where

2. Where the Grantor must have the absolute Property, so that the Grant be not to the Prejudice of a third Person.

Perk. § 65. It is laid down as a general rule, that a man cannot grant or charge that which he hath not; and therefore if a man grant a (a) rent-charge out of the manor of *Dale*, and in truth he hath not any thing in the manor of *Dale*, and afterwards he purchase the manor of *Dale*, yet he shall hold it discharged.
 (a) But where a man having debauched a young woman, and intending afterwards to put a trick on her, made a settlement on her of 30*l.* a year for life, out of an estate he had nothing to do with; yet the court of Exchequer decreed him to make it good out of an estate he had of his own. *Abt. Eq.* 87.

21 E. 4. 43. A corody uncertain cannot be granted over, because of the prejudice that may accrue thereby to the original grantor; but a corody certain may.
 2 Roll. Abr. 45.

21 E. 4. 84. So, a common *sans* number in fee may be granted over, but a common for (b) life or years *sans* number cannot be granted over, because of the prejudice it may be to the tenant of the land *.
 2 Roll. Abr. 46. (b) That a lessee at will cannot grant over his term. 22 E. 4. 6. 2 Roll. Abr. 46. — * *Sed qu.*

2 Roll. Abr. 46. If the king grant a warren to *J. S.* and his heirs in his manor, the grantee may grant the manor with the warren over to another in fee, because this liberty *inheret seio & solum sequitur*.

2 Roll. Abr. 46. So, if the king grant to another and his heirs, a fair or market in certain manors or towns, the grantee may grant over the manors or towns, with the fair or market. *Dubitat.*

Poph. 87. If a rent be granted in tail, the grantee cannot grant it over while it continues a rent, because, as such, it may be entailed within the statute *de donis*; but if the grantee bring his writ of annuity, it is no longer within the statute, because then it is become a charge merely personal, without any relation to the land out of which it was at first granted, and therefore is become a fee-simple conditional, as such a gift of lands had been before the statute; and therefore the annuity not being within the statute may be aliened or granted over.

9 H. 6. 13. The grantee of a rent-charge in fee may grant over any part of it, though it hath been objected to these kind of grants or divisions of rent-charges, that thereby the tenant is exposed to several suits and distresses for a thing, which in its original creation was entire and recoverable upon one avowry; but the answer to this is, that it is the tenant's own choice, whether he will submit himself to that inconvenience, or not, because the grantee, before the 4 & 5 Ann. c. 16. § 9. could not take any benefit of the grant by distress, without the consent or attornment of the tenant, nor by assize, without he obtains seisin of it from the tenant; besides, since the law allowed of such sort of grants, and thereby established such sort of property, it would have been unreasonable and severe to hinder the proprietor to make a proper distribution of it for the promotion of his children, or to provide for the contingencies of his family, which were in his view.

3. Where a bare Right or Possibility may be granted or assigned over.

If there be a devise of a *term* to *A.* for life, remainder to *B.*, *B.* cannot, in the life-time of *A.*, assign or grant over his interest, because he has but a bare possibility, for *A.* may outlive the number of years.

Dyer, 116.
4 Co. 66.
10 Co. 47. b.
Raym. 146.
Sid. 188.
& vide

Chan. Cafes, 8. 11. where it is said, that the trust of a possibility in the remainder of a term is disposable over, but the possibility in interest in the reversion of a term is not assignable, & vide 2 Vern. 563. and tit. *Assignment*.

If a lease be made to baron and feme for their lives, the remainder to the executors of the survivor of them; the husband cannot grant over the term, being but a possibility; for it is uncertain which of them shall be the survivor.

Co. Lit. 46.
2 Roll.
Abr. 48.
So, if one
devise a
term to

baron and feme for one and twenty years, remainder to the survivor of them; neither baron nor feme, during their joint lives, may grant this remainder over. Raym. 146. ——— [Sed qu. if it is granted over by husband and wife, and the husband survive, shall not the grant be good against him?]

If a church is void, the void turn is not grantable by any common person, for it is a mere spiritual thing, and annexed to the person of him who is patron; and during the time of the vacation it is a thing in right, power, and authority, a thing in action, and in effect the fruit and execution of the advowson, and not the advowson itself; but (a) whilst a church is void, the next avoidance or avoidances that shall happen, or the inheritance of the advowson, may be granted away.

Dyer, 129.
b. 282.
Leon. 167.
Cro. Eliz.
173.
And. 15.
(a) Owen,
131.

If a man acknowledges a statute in 2000 *l.* to *A.* and afterwards leases the land for twenty-one years to another, and afterwards leases the same lands to another for ninety years, to commence immediately, and the land is extended upon the statute, at 53 *l.* *per ann.*; the lessee for ninety years may, during the extent, grant over the term, although the extent be till the damages and costs are levied, which may not happen till after the expiration of the ninety years; for the extent is but in nature of a lease, and by a reasonable construction will end before the term of ninety years.

2 Roll. Abr.
48. Cadec
and Oliver.

If a man grant a rent-charge with a clause of distress, and that if the distress be replevied, that the grantee may enter and hold till satisfaction, the grantee may grant over the rent with this penalty, although the penalty is but a possibility; for being annexed to the rent, it may well pass together with the rent.

2 Roll. Abr.
48, 49.

If a man make a lease to *B.* for forty years, and the lessor covenant, that upon his being allowed to view the premises, and finding them in sufficient repair at the expiration of the forty years, the lessee shall hold them for forty years longer; and the lessee, during the first forty years, grant to *J. S.* *totum interestesse, terminum & terminos quos tunc habuit in tenementis illis*; this being but a mere possibility cannot be granted or assigned over.

Moor, 27.
pl. 88.
Skerne's
case, by
three judges
against one.

If a man grants 200 faggots of wood to be taken out of all his lands, or 20s. in lieu thereof, out of his said lands, with a clause of distress, at the election of the grantee to have the one or the other;

2 Roll.
Abr. 47.
Southwell
and Waide,
adjudged.

other; in this case the grantee may, without any election, grant over the faggots, because he had a present interest in them; but the 20s. being given in lieu thereof cannot be granted over before election.

Moor, 691. If a man seised of divers woods bargains and sells 300 cords of wood to *B.* and his assigns, to be taken by the appointment of the bargainor; by this bargain and sale a present interest is vested in *B.* which he may grant over before any appointment by the bargainor.
 pl. 955-
 Maynard
 and Bassett,
 adjudged.
 2 Roll. Abr.
 47. and
 5 Co. 24. b. S. C. cited.

Hob. 132. A man may grant that which he hath *potentially*, though not *actually*; as if a lessor covenants, that it shall be lawful for the lessee, at the expiration of the lease, to carry away the corn growing on the premises, although by possibility there may be no corn growing at the expiration of the lease; yet the grant is good, for the grantor had such a power in him, and the property shall pass as soon as the corn is extant.
 Grantham
 and Hawley,
 adjudged.
 2 Roll. Abr.
 47, S. C.
 cited.

Hob. 132. So, if *A.* leases land to *B.* for years, and grants that he shall have the natural fruit of the soil, as grass, which renews yearly, which shall be on the land at the end of the term; this grant is good, and passes the property to the grantee.
 2 Roll.
 Abr. 48.

Hob. 132. So, a person may grant to another all the tithe wool which he shall have such a year, and the grant is good in its creation, though it may happen that he had no tithe wool in that year.
 2 Roll.
 Abr. 48.

Hob. 132. But a man cannot grant all the wool that shall grow upon his sheep that he shall buy afterwards; for there he hath it not either actually or potentially.
 2 Roll.
 Abr. 48.

4: What Seisin or Possession in the Grantor will enable him to grant it over.

36 Aff. 3. The grantee of a common may grant it over before he hath any seisin thereof by the mouths of his cattle, for the freehold is in him by the grant.
 2 Roll. Abr.
 47. S. C.

36 Aff. 3. So, the grantee of an advowson may grant it over before he has presented to it; for he can have no seisin of it before it becomes void, and by the grant itself he is seised of the freehold, which he may grant over.
 2 Roll. Abr.
 47. S. C.

2 Roll. So the grantee of a rent may grant it over before any seisin of the rent.
 Abr. 47.

2 Roll. If a common be granted to husband and wife, and to the heirs of the husband, after the death of the husband, his heir may grant over the remainder, for the estate was vested in him.
 Abr. 47.

Co. Lit. Lessee for years may, before entry, grant or assign over his interest to another; for the lessor having done all that is requisite on his part to divest him of the possession, and pass it over to the lessee, hath thereby transferred such an interest to the lessee as he may at any time reduce into possession by an actual entry, as well after the death of the lessor as before, and such an interest as will go to his executors, and, consequently, may be granted or assigned over before entry.
 46. b.

If *A.* makes a lease of lands to *B.* for life, remainder to his executors for years; in this case the term vests in *B.* so that he can grant it over; for as an heir represents his ancestor as to an inheritance, so an executor represents his testator as to a chattel.

Co. Lit. 54.
2 Roll.
Abr. 47.

5. Where the Grantor's Right, being joined with a Trust or Confidence, is incapable of being granted or assigned over.

A personal trust, which one man reposes in another, cannot be assigned over, however able such assignee may be to execute it.

Perk. § 99.
—That a trustee cannot assign over his trust. 4 Inst. 85.

Therefore if a man grant unto another to be his carver, or sewer, or chamberlain, &c. these cannot be granted over.

Perk. § 101.
But for this vide head of Officers.

A guardian in socage may grant the wardship over to another, but such grant shall not be effectual after the death of the grantor, because by the law of nature such guardianship belongs to the next of kin.

2 Roll. Abr. 46.; but for this vide Vaugh. 180.

If a man gives his horse to another to go to *York*, he must go with him himself, and not give him to another to go there.

2 Roll. Abr. 46.

(E) What Ceremony is requisite to the Perfection of a Grant: And herein of the Necessity of a Deed.

Incorporeal inheritances, which lie in (a) grant, cannot pass from one to another without deed, because of them no (b) possession can be delivered; and they are not like corporeal inheritances which pass by livery; and therefore he that claims them must (c) shew a grant of them, which he cannot do without deed.

2 Roll. Abr. 62. Co. Lit. 159. a. (a) Such as a reversion or remainder. 2 Roll. Abr. 62.

So, of a rent-service or rent-charge. 2 Roll. Abr. 62.—So, of a hundred in gross. 11 H. 4. 89. b. —So, of a corody, common. 12 H. 4. 17.—So, of the profits of a mill. 18 E. 3. 56. b. (b) And therefore a horse may be granted without deed. 42 E. 3. 23. b. Roll. Abr. 62.—So, trees growing may be granted without deed. 2 Roll. Abr. 62.—So, a licence to hunt in another's chase may be granted without deed. 2 Roll. Abr. 62. (c) That where a jury find that a thing did pass, it shall be intended that there was a deed. Godb. 273, 4.

An advowson, or the next avoidance to a church, will not pass without deed; but if a feoffment be made of a manor, to which an advowson is appendant, the same will pass without deed.

2 Roll. Abr. 62. Cro. Eliz. 163.

So, if *A.* be seised in fee of land, to which a common for cattle levant and couchant on the land is appurtenant by grant made by deed within memory, and he make a feoffment of the land without deed, the common shall pass as appurtenant to the land, although it could not be created without deed.

2 Roll. Abr. 63. Sacheverell and Porter.

But if *A.* seised in fee of Black-acre and White-acre, grants Black-acre to *C.* with common for his cattle levant and couchant on White-acre, this grant is not good without deed.

2 Roll. Abr. 63. Tanner and Hobbs.

If the king grant to *J. S.* the manor of *D.* and that he shall have *tot. talia tanta & eadem privilegia & libertates* in the said manor,

2 Roll. Abr. 62.

nor, which such an abbot had before; and the abbot had in the said manor *bona & catalla filonum, &c.* and afterwards *J. S.* make a feoffment of the said manor to *J. D.* in fee with the appurtenances without deed; this will not pass those liberties, the feoffment being without deed.

2 Roll. A parson cannot grant his tithes over to a stranger for life or
Abr. 63. (a) years, because they lie merely in grant.
(a) Not
for a single year.

2 Roll. But a parson may lease his rectory for years by word without
Abr. 63. deed, by which the tithes will pass as annexed to the rectory.
But see
29 Car. 2. c. 3.

2 Roll. Also a parson may by parol lease to a parishioner his own tithes
Abr. 63. for a year, years, or for life, for a valuable consideration, and the
(b) And if parishioner shall have them by way of (b) retainer; for the grant
the lease be made to the being for a valuable consideration is but in nature of a composition
parishioner between the parson and parishioner.
and his assigns, the assignee of the land shall take advantage of it. 2 Roll. Abr. 63.

2 Roll. If *A.* seised of land in fee grant the pasture of the land to *B.*
Abr. 63, 4. for years, and *B.* license *C.* to put in his cattle, this lease of the
Mountjoy pasture is good without deed, and so is the licence also; for this
and Terdrou. is a lease of the land to pasture, and not like common of pasture,
which cannot be granted without deed.

Co. Lit. 85. The wardship of the body might be granted without deed, be-
2 Roll. cause it was an original chattel, *i. e.* a new interest in a thing
Abr. 62. wherein no one had an estate before.

Co. Lit. 85. But the wardship of an advowson, &c. was not grantable
without deed, because it was not an original chattel, but was
derived out of the inheritance of a thing lying in grant.

Co. Lit. 85. A lease for years, made by a corporation aggregate, might at
(c) That a law be assigned without deed, though it could not be made
corporation sole, such as (c) without deed; for though such corporation cannot make an
a bishop, estate without deed, yet an estate, when made by them, has the
&c., may same properties with those of the like nature made by others.
take a thing without deed, as a natural person may; but a corporation aggregate, such as a dean and chapter,
mayor and commonalty, &c., cannot take any thing without deed. Co. Lit. 94. b. 2 Roll. Abr. 61.

(F) What Words are sufficient to create a good Grant.

2 Roll.
Abr. 56.

HERE it may be observed, that in many cases, without express words, the law creates a good grant; because it is the design of the law to render all contracts binding and effectual so far as the intention of the parties may be gathered from the deed, and such interpretation is made strongest against the grantor, because he is presumed to receive a valuable consideration for what he parts with.

Heb 132.

2 Roll.
Abr. 66;
C. cited.

As if a lessor grant to the lessee by these words, *that at the end of the term it shall be lawful for him to take the corn growing to his own*

on use; this, from the intention of the parties, and common use of such words, amounts to a good grant, and transfers the property to the lessee; as a lease without impeachment of waste gives the lessee a property in the trees.

So, if a man by indenture demises to *J. S.* the manor of *D.* and bargains and sells to him all the woods and trees, &c. on the said manor, to be felled and carried away at his pleasure, *habendum* the said manor for life, this is an absolute sale of the woods and trees; for the intention of the grantor appears by the distinct clause in the premises, and leaving the woods and trees out in the *habendum*.

2 Roll.
Abr. 56.
Rawles and
Mason, &
vide Moor,
831. pl.
117.

If a man obliges himself to *J. S.* in an annual rent of 10*l.* *per-cipendum annuatim de manerio de D.* and bindeth the said manor, and all the chattels therein to a distress, this amounts to a good grant of the rent, and *J. S.* may distrain for it.

2 Roll.
Abr. 424.

If *A.* grants and agrees with *B.* his heirs and assigns, that it shall be lawful for them at all times afterwards to have and use a way by and through a close of *A.*'s, this amounts to a good grant of the way, and not a covenant only for the enjoyment of it.

3 Lev. 305.
Holmes and
Seller.

The words *dedi* & *concessi* are general words, and may amount to a grant, feoffment, gift, release, confirmation, surrender, &c.

Co.Lit. 301.
2 Saund. 96,
7. S. P.

cited; and that though the jury find *quod concessit*, yet the court may adjudge a release according to the operation it has in law.

But a release, confirmation, or surrender, cannot amount to a grant, nor a surrender to a confirmation or release, for these are peculiar conveyances destined to a special end.

Co.Lit. 302.
& *vide*
Lit. Rep.
200. That
made use of.

in grants of things which lie in grant, there are essential words which must be

(G) Where a Thing shall be said to pass by Grant or some other Conveyance.

IF a feoffment be made of a manor in lease for years, and livery be made without ouster of the lessee, by which the feoffment is void, yet if the lessee attorn, this shall be good as a grant of the reversion*.

Moor, 496.
For this *vide*
2 Roll. Abr.
56. and tit.
Feoffment.

* By 4 & 5 Ann. c. 16. § 9. grants are good without attornment.

If *A.* by indenture enrolled bargains and sells lands to *B.* and his heirs, with a way over other of the lands of *A.*, this is void as to the way, for nothing but an use passes by the deed; and there can be no use of a thing not *in esse*, as a way, common, &c. before they are created.

Cro. Jac.
189.
Beaudley
and Brooke.

A man demises, bargains, and sells a manor, part in demesne and part in tenants hands for seventeen years; the party may choose either to take it by way of lease at common law, and then the tenants must attorn; or by way of bargain and sale without attornment; and this agrees with the policy of the common law, to take every man's grant, so as to pass such an interest as shall be most

2 Co. 35.
Hayward's
case.

advantageous for the grantee; and since in this case the words allow a double way of taking it, the grantee shall be judge which is most beneficial.

Co. Lit.
147.

If *A.* bargains and sells land to *B.* by indenture, and before enrolment they both joint in a grant of a rent-charge to *C.* this after the enrolment shall be construed the grant of *B.* and the confirmation of *A.*, because when the bargain and sale is enrolled, it has the effect of a deed enrolled from the making thereof, and therefore it must be the grant of *B.* who had the land at the time of the grant made; but if the deed had never been enrolled, then it should have been the grant of *A.* and confirmation of *B.*, because the land never passed from *A.* the deed being ineffectual and void without enrolment.

Plow. 140.
Co. 76.
6 Co. 15. a.

If tenant for life and he in reversion join in a conveyance without deed, this to avoid a forfeiture shall be construed a surrender of the estate for life, and the conveyance of him in reversion; for it cannot be a grant or confirmation of him in reversion for want of a deed.

Co. 76.
Plow. 140.

But if tenant for life and he in reversion join in a feoffment by deed, then each passes only his own estate; the tenant for life the freehold in possession, and he in reversion his reversion; and this cannot be a forfeiture, because he in reversion joined in a proper conveyance to transfer his reversion, and having passed it to another, has no interest left to entitle him to take advantage of the forfeiture.

(H) Where Grants shall be said to be good, or void, for Incertainty: And herein,

1. What shall be a sufficient Description of the Thing granted, notwithstanding any Misrecital thereof.

Hob. 229.

THE very matter and substance of every grant being nothing else, as my Lord *Hobart* says, but a declaration of the owner's will to transfer a thing to another; if by any words his intention appears to pass the thing, a slight mistake or error in the description will not vitiate the grant.

Cro. Car.
548.
2 Mod. 3, 4.
cited. Moor,
881. S. P.
replied.

As where the *subchanter*, and *vicars choral* of *Litchfield*, made a grant to *Humphrey Peto* of 78 acres of glebe, and of their tithes predial and personal, and also of the tithe of the glebe, all which late were in the occupation of *Margaret Peto*, which was not true; yet the grant was adjudged good, for the words *all which* are not words of restriction, unless when the clause is general, and the sentence entire, but not when it is distinct.

2 Mod. 3.

But where the thing is not granted by an express name, there if a falsity is in the description of that thing, the grant is void; as if *A.* grant lands lately let to *D.* in such a parish, and the lands were not let to *D.* and were also in another parish, the grant is void, because the lands are not particularly named.

If

If *A.* grants and confirms to *B.* a rent of 5 *l.* to be taken out of his lands, which rent *B.* has of the grant of his father; though *B.* never had any such rent from his father, yet this grant of *A.*'s shall be good to create a rent-charge in *B.*, for it is evidently the intention of *A.* that *B.* shall have a rent of 5 *l.* out of his land; and a mistake or error in the description of the thing (*a*) referred to, shall not render the true design of the contract ineffectual and void.

Descent from his father in *D.*, the land which he hath from his mother does not pass. 2 Roll. Abr. 50.

If a man make a lease of eight tenements in *D.* by several leases, and afterwards by deed, reciting seven of the said leases, grant the reversion to *J. S.* with all lands, houses, and buildings in *D.* and the grantor have only these eight tenements in *D.*, the reversion of the eighth tenement not recited shall pass, for the words *all lands*, &c. cannot otherwise be satisfied. 2 Roll. Abr. 49. Hagget and Giles.

A bishop grants all his farms and hereditaments of *Westdown* in *Westdown*, in the county of *Somerset*; the bishop has a rectory which extends itself into the county of *Devon*; it was holden, that by force of the word *hereditament* the rectory passed, (*b*) but for so much only as lay in the county of *Somerset*, for as to that in *Devon* it was void for incertainty. Moor, 176. pl. 310. (*b*) If a man grants his manor of *D.* in the county of *M.*, and the manor extends itself into another county, no more passes than what lies in the county of *M.* 2 Roll. Abr. 50.

If a man hath lands in *D.* and *S.*, part of which lands his father had by purchase, and part by descent, and he grants *omnia terras & tenementa in D. & S. & modo in tenurâ J. S. &c. vel aliquorum aliorum, & que G. Pater meus perquisivit de J. D. & aliis*, the lands which his father held by purchase only shall pass. 2 Roll. Abr. 51.

If a man lease his lands by a certain name, as *Blackacre* in the parish *de Maria Loades in civitate Glocester*, the land lying in *Maria Loades* shall pass, although it be not situated in the city of *Glocester*, for there was a sufficient certainty before expressed. 2 Roll. Abr. 52. Robinson v. Button.

So, if the lord license his copyholder for life to lease *Blackacre* in the tenure of *J. S.* for five years, and *Blackacre* is not in the tenure of *J. S.* but of the copyholder himself; yet this amounts to a good licence, for the lands being particularly named, reduces it to a sufficient certainty. 2 Roll. Abr. 52. Wollifson and Bambridge.

If a man grant all his land called *D.* in the tenure, occupation, or possession of *J. S.*, and *J. S.* have part of the lands in *D.* by lease, and as to the other part he only depasture his cattle there, yet all shall pass by the grant; for whether his occupation be by right or wrong is not material, the words being made use of to describe the thing granted. Co. Lit. 4. 2 Roll. Abr. 54.

If a manor consist of copyhold tenants only, and there are no freehold tenants, without which in strictness there can be no manor, yet this being known by the name of a manor will pass by that name. 2 Roll. Abr. 45. 6 Co. 67.

A. made a lease for years, *habend' a festo Purificationis*, and after by deed, reciting that he had made a lease to commence *a festo Annun-* Hob. 121. Withes and Casson.

Annunciationis, granted the reversion to another; the grant was holden good; for that the misrecital of the particular estate was not material so long as he had a reversion in him.

2 Roll.
Abr. 44.
Miller and
Manwaring.

* *A.* seised of the manor of *B.* in right of his wife, makes a lease thereof for years, which upon the death of the husband and wife becomes void, and notwithstanding the lessee continues in possession; and the heir of the wife, to whom the land descended, reciting the said lease grants that *J. S.* after the forfeiture, expiration, or other determination of the said lease, shall hold and enjoy the said manor, &c. for sixty years; this grant is void, and shall not take effect *in presenti*, or at the expiration of the said recited term.

Bendl. pl. 72.
Andr. 3.
Dyer, 116.
pl. 70.
Plow. 148.
a. Roll.
Abr. 849.
Cro. Car.
399. Jon.
355. Co.
Lit. 46. b.
Lev. 77.
Keb. 360.
2 Leon. 11.
pl. 17.
Vaugh. 73.
2 Lev. 242.
Lev. 234.
Sid. 460.
2 Keb. 322.
Vent. 83.

But as to this matter, it seems by the better authority of the books, that if *A.* reciting that *B.* hath a lease for years of such lands, demises the same lands to *C.* for years, to begin after the end or determination of the said lease to *B.* where in truth *B.* hath not any lease at all of those lands, the lease to *C.* shall begin presently, for in judgment of law a void limitation, and no limitation, is all one; so, if he recites a lease, which in construction of law appears after to be void, or misrecites a good lease in a point material, *habend'* from the end of the said lease, this new lease shall begin presently; though where the first lease is good in law, and only misrecited in a point material, the new lease can begin presently only in enumeration of years, not in interest, till the end of the first lease; for in these cases, the commencement of this new lease being referred to a thing which is not, cannot be any ways ascertained or governed thereby, and then it is as if no such recital had been, which would have left the lease to begin presently, as the strongest construction against the lessor, since there is nothing now to ascertain or determine its beginning at any other time.

2 Roll.
Abr. 55.
Halfwell
and Ayie-
worth.

King *H. 8.* in the 31st year of his reign leased lands to one for twenty-one years, and after granted the reversion to a bishop, who reciting all the lands contained in the letters patent, and the land itself before leased by name, and reciting the letters patent thus; That whereas *H. 8.* by his letters patent dated 20 *H. 8.* where in truth they were dated 31 *H. 8.* and also misreciting the day of the date, grants all the lands, tenements, &c. to the first lessee for a certain number of years, *post expirationem hujusmodi literarum patentium*; in this case, it seems that the date being mistaken, and the commencement of the new lease referred to the expiration of the said letters patent, when in truth there were no such letters patent as were recited, the second lease shall begin presently, and so by acceptance thereof will amount to a surrender of the first; *aliter* it would have been, if the second lease had been limited to begin after the end of the first term generally,

2. Where a Defect in the Description may be aided by Relation to a Thing certain.

If a grant be made of such liberties as such a town enjoys, the grant is good, being capable of being reduced to a certainty; for when the act of disposal relates to another thing, that thing becomes in a manner part of the disposition; and the standard referred to being certain, the grant by relation thereto becomes certain, according to the common maxim, *id certum est quod certum reddi potest*. Hob. 174. Godb. 245. 2 Roll. Abr. 49.

But if a man grant to another so many of his trees as may be reasonably spared, this grant is void, for there is no standard to reduce it to a certainty. Moor, 880. Hob. 168. Dav. 36.

If one makes a lease for years to another for so many years as J. S. shall name, this at the beginning is uncertain; but when J. S. hath named the years, this ascertains the commencement and continuance of the lease accordingly: but if the lease had been made for so many years as the executors of the lessor should name, this could not be made good by any nomination, because to every lease there ought to be a lessor and lessee; and here the nomination, which ascertains the commencement of the lease, not being appointed till after the death of the lessor, makes the lease defective in one of the main parts of it, viz. the want of a lessor, and therefore of consequence must be void; which is also the reason, that in the first case the nomination ought to be made in the life-time of the lessor, and not by J. S. after his death, for then it will be void. 2 Leon. 86. Godb. 25. Co. Lit. 45. b. Co. 155. 6 Co. 35. Plow. 6. b. 273. b. Lane, 62. 102.

(a) If A. lets lands to B. for so many years as B. hath in the manor of D. and B. hath then a term for ten years in that manor, this makes A's lease to him good, and fixes the measure and continuance thereof, so that B. shall have the lands demised for ten years. So (b) a lease to one during the minority of J. S., who is then ten years of age, is a good lease for eleven years, if J. S. so long live; for if he dies sooner, that determines the lease, since nothing appears to extend it beyond his life, and his minority ceases at his death. (a) Co. Lit. 45. b. 6 Co. 35. (b) Plow. 273. 3 Co. 19. b.

But if a woman be *enseint* with a son, and a lease be made till such issue *in ventre sa mere* shall come to full age, this is a lease only at will; for it is uncertain when or whether the son will ever be born, and consequently the beginning, continuance and ending of this lease is uncertain; and therefore it cannot be said to be any lease for years, since it is to begin presently as a lease; and yet nothing appears in the deed itself, nor is there such a reference to any collateral circumstance, as may then measure the continuance thereof. 6 Co. 35. b.

3. Where by an Election given to the Grantee, he may reduce an uncertain Grant to a Certainty.

If A. seised of a great waste, grants the moiety of a yard-land lying in the waste, without ascertaining what part, or the special name of the land, or how bounded, this may be reduced to a certainty. Leon. 30. Noy, 27. Co. 86.

tainty by the election of the grantee ; but it is otherwise in the case of the king's grant, for there can be no election in that case, and therefore the grant is void for uncertainty.

So, if a man grant twenty acres parcel of his manor, without any other description of them, yet the grant is not void, for an acre is a thing certain, and the situation may be reduced to a certainty by the election of the (a) grantee.

Keilw. 84.

2 Co. 36.

(a) That

the election

must be

made in the

life-time of

Hob. 174.

the parties, and cannot be made by the heir or executor. Co. Lit. 145. a. 2 Co. 37. a.

Leon. 254.

2 Co. 36.

Keilw. 84.

But if a man sell 20*l.* worth of his land, parcel of a manor, this is void, it being neither certain in itself, nor reducible to any certainty, for no man is made judge of the value.

5 Co. 24.

Palmer's

case. Cro.

Eliz. 819.

Moor, 691.

Jon. 276.

S. C.

Hob. 179.

If a man grant 600 cords of wood out of a large wood, the grantee hath election to take them, when, and in what part of the wood he pleases, without any appointment of the grantor, and consequently may assign his interest in them to a third person, and he shall have the like election.

Like point.

5 Co. 24. in

Palmer's

case.

But if one grant to me 1000 cords of wood, to be taken at my election, and the grantor or a stranger cut down part of the wood, I can take no part of that which is cut down, but must supply myself out of the residue still remaining.

Vent. 271.

Mottaram

and Joly.

2 Lev. 142.

S. C. ad-

judged.

But if *A.* covenant with *B.*, that he shall have twenty of the best trees in the wood of *A.* to be taken at the election of *B.* within such a time, it is a breach of the covenant in *A.* to cut down any of the trees within that time, because the latitude of election which *B.* had is thereby abridged.

2 Roll.

Abr. 47.

Southwell

and Wade.

If a man grant to another 200 faggots of wood out of all his lands, or 20*s.* in lieu thereof out of his said lands, *habendum* the 200 faggots, or 20*s.* to him and his heirs, with clause of distress for the one or the other, at the election of the grantee ; in this case the grantee hath an interest vested in him in the faggots before any election made by him ; but as to the 20*s.* being given in lieu thereof, he hath no interest till he hath made his election.

Co. Lit.

45. b.

Roll. Abr.

849.

If *A.* seized of lands grant to *B.*, that when *B.* pays 20*s.* that thenceforth he shall have and occupy the lands for twenty-one years, and after *B.* pay the twenty shillings, this is become a good lease for twenty-one years from the time of such payment made ; for though the commencement of it was contingent and uncertain, and depended upon *B.*'s election to pay the twenty shillings ; yet after he hath paid them, this takes off all uncertainty, and fixes the commencement and continuance of the lease.

(I) How Grants are to be expounded: And herein,

1. How to be construed where there appears a Repugnancy in the Words.

GRANTS are to be construed according to the intention of the parties; and if there appears any doubt or repugnancy in the words, such (a) construction is to be made as is most strong against the grantor, because he is presumed to have received a valuable consideration for what he parts with.

operate according to the intention of the parties, if by law they may: and if they cannot operate in one form, they shall operate in that which by law shall effectuate the intention. Cowp. 600. For the judges have more consideration of the substance, namely, the passing of the estate, than of the shadow, namely, the manner of passing it. 3 Lev. 372. Hence, a deed made to one purpose, may enure to another; if meant for a release, it may amount to a grant of the reversion; or *e converso*. Touchst. 82. Goodtitle v. Bailey, Cowp. 597.; so, if meant for a release, Roe v. Tranmer, 2 Wils. 75., or grant, Osman v. Sheafe, 3 Lev. 370., it may operate as a covenant to stand seised. A conveyance by lease and release, having the word "grant" in it, may take effect as a grant and assignment, and pass a leasehold interest. Marshall v. Frank, Gilb. Eq. Rep. 143. Pr. Ch. 480. Doe v. Williams, 1 H. Bl. 25. And a deed intended as an appointment to uses may, having the words "limit and appoint" in it, operate as a grant so as to pass a reversion. It is not necessary that the word "grant" should be used in a grant, so long as the intention to grant be manifested in the deed. Shove v. Pincke, 5 Term Rep. 128. But in expounding a grant according to the *intent*, it must be done *according to the intent at the time of the grant*; as, if I grant an annuity to J. S. until he be promoted to a competent benefice, and at the time of the grant he is but a mean person, and afterwards is made an archdeacon, yet if I offer him a competent benefice at the time of the grant, the annuity ceaseth. Cro. El. 35.] (a) That the word *grant* implies a warranty. Cro. Jac. 233, 4. — That in deeds, subsequent clauses, which are general, shall be governed by precedent clauses, which are more particular. 4 Mod. 69. — That words of a known signification, but so placed in the context of a deed that they make it repugnant and senseless, are to be rejected equally with words of no known signification. Vaugh. 176.

Therefore if a thing be granted generally, and there come a *piz.* which destroys the grant, it is void, being repugnant to the thing first granted. Moor, 880.

As if there be a demise of a parsonage with the lands and woods, Moor, 881. except the woods; this exception is void; for the woods being specially granted in the premises cannot be restrained afterwards; *secus* if the woods had not been specially granted.

So if a lease for years be made to a man and his assigns, provided that he shall not assign; this proviso is void, being repugnant to the premises, though it would be good, had the word *assigns* been left out*. Moor, 811. * But a proviso, that he should not assign without licence of the lessor, had been good.

If a man grant a rent out of his land, with clause of distress, and by a proviso in the deed, or by deed of defeasance, provide that the grant, nor any thing therein contained, shall be construed to extend to charge his person by writ of annuity; in this case the person of the grantor is not chargeable, because the charge upon the person arising only from the manner of construing grants, which for the consideration given ought to be extended as far as the words will bear against the grantor, there can be no room for such construction, when by the express words of the grant the person of the grantor is not charged; for no implication shall be admitted to overthrow an express clause in the deed. Lit. § 220. Poph. 87. 6 Co. 87. 2.

But

Co. Lit.
146. a.

But if the proviso had been also, that the grant, nor any thing therein contained, should charge the land, that proviso had been void as repugnant to the grant.

Co. Lit. 146.
6 Co. 41.
8 Co. 65. b.

So, if a man grant a rent-charge out of the manor of *Dale*, in which the grantor has no interest, with a proviso that the grant shall not charge his person; this proviso is void, because the grantor having nothing in the manor of *Dale* could not by any act of his charge it; and consequently the grantee having no remedy for his annuity but against the person of the grantor, the proviso to exempt his person is void, as rendering the whole grant ineffectual; and if in this case the grantor had been seised of the manor, and had granted a rent-charge out of it *for the life* of the grantee, with a proviso that the grant should not charge his person; though the grantee himself could have no remedy but by distress, because that remedy being open to him, the proviso is to exonerate the person; yet upon the death of the grantee his executor may have an action of debt against the grantor for the arrears, because the executor has no other remedy for the recovery of them; for he cannot distrain after the grant is determined, and therefore the proviso to exempt the person is void against the executor, as rendering the grant useless and ineffectual.

24 H. 8. 13.
bro. tit.
Leases, 13.
22.

If one makes a lease for ten years at the will of the lessor; this is a good lease for ten years certain, and the last words are void for repugnancy. So, if one lets lands at will for a year *et sic de anno in annum*; this is a lease only at will by the first words, and the last words being repugnant shall not control them, or add any more certainty to its continuance.

Moor, 880.

But if the *viz.* or proviso be only explanatory, and not repugnant to the grant, it will be good; as if a lease be made of three manors, rendering 10*l.* rent, *viz.* 5*l.* out of one, and 5*l.* out of another; this is good, and the third shall be discharged.

Moor, 880.

So, in case of a feoffment of two acres, *habendum* the one in fee, and the other in tail; the *habendum* only explains the manner of taking, but does not restrain the gift.

Moor, 880.

So, if an advowson be granted, *viz.* to present every second turn; this is good, the *viz.* being only explanatory.

Co. Lit.
183. b.

And note as a general rule, that where it is impossible the grant should take effect according to the letter, there the law shall make such construction as that the gift by possibility may take effect.

Athrington
v. Bishop of
Chester,
1 H. Bl.
418.

[Where the grant of a rectory from the crown contained an exception of all advowsons of the rectories, vicarages, and churches belonging to the premises, it was holden, that a perpetual curacy belonging to the rectory was not included in the exception, but passed by the grant; for a contrary construction would have severed the nomination of the curate from the fund out of which he was to be supported; would have made it questionable who was to maintain him, and left the ecclesiastical court destitute of means to compel such maintenance by sequestering the profits of the living.]

2. Where the Premises differ from the *Habendum*, and therein how far the *Habendum* may enlarge or abridge the Grant in the Premises.

The office of the premises of the deed is to name the grantor and grantee, and the thing to be granted or conveyed; and of this it must be observed as regularly true; 1st, That no person not named in the premises of the deed can take any thing by the deed, though he be afterwards named in the *habendum*, because it is the premises of the deed that make the gift, and therefore when the lands, &c. are given to one in the premises, the *habendum* cannot give any share of them to (a) another, because that would be to retract the gift already made, and consequently to make the deed contrary and repugnant in itself.

Co. Lit. 6. But for this *vide tit. Feoffment*, letter (C). (a) But a man not named in the premises may take an estate in remainder by limitation

in the *habendum*. 2 Rol. Abr. 68. Hob. 313. Cro. Jac. 564. [In 3 Leon. 60, it is said that the *habendum* shall never introduce one who is a stranger to the premises to take as grantee, but he may take by way of remainder.]

2^{dly}, That the *habendum* cannot pass any thing that is not expressly mentioned or contained by implication in the premises of the deed; because the premises being part of the deed by which the thing is granted, and, consequently, that make the gift; it follows, that the *habendum*, which only limits the certainty and extent of the estate in the thing given, cannot increase or multiply the gift; because it were absurd to say that the grantee should hold a thing which was never given to him.

2 Roll. Abr. 65.

If a termor grant a term of 1000 years to the grantee, his executors, administrators, and assigns, *habendum* after the death of the grantor and his wife, for the residue of the term of 1000 years, in this case the *habendum* being repugnant to the premises is void, and the grantee shall have the term presently.

Salk. 346.

3. How the Words of a Grant are to be construed as to the Things intended to be granted.

If a prebendary, who has an advowson annexed to his prebend, make a lease for years of several parcels thereof, together with all commodities, emoluments, profits, and advantages to the prebend belonging, these general words will not pass the advowson, for they signify things (b) gainful, and words in grants shall be construed according to a reasonable and easy sense, and not strained to things unlikely or unusual.

Hob. 304. (b) So, an appropriation will not pass by the name of an advowson. 44 E. 3. 33. And for this reason it was

holden by two judges against two, that if a prebendary having a peculiar jurisdiction make a lease of his prebend, with all profits, commodities, advantages, &c. thereto belonging, the ecclesiastical jurisdiction did not thereby pass to the lessee, so that he might make a commissary, being a thing annexed to the spiritual person, and not to the corps of the prebend. Lev. 125. Keb. 538. 639. — Yet an advowson will be contained under the name of a tenement, and therefore a licence to purchase lands and tenements in mortmain extends to advowsons. Dyer, 350. — So, advowsons pass by the name of all hereditaments lying where the church lieth. Dyer, 322. — That the word *tenement* passes any thing whereof a man may be seised *ut de libero tenemento*; *hereditament* any thing wherein a man may have an inheritance. Co. Lit. 6. a. [Touchst. 91. 3 Atk. 82. Therefore an heir-loom, though neither land nor tenement, but a mere moveable, yet being inheritable, is comprized under the general word *hereditament*; and a condition, the benefit of which may descend to a man from his ancestor, is also an hereditament. 3 Co. 2.]

So,

Hob. 304. So, if a man grant all his woods and trees, apple trees will not pass.

Co. Lit. 4. b. My Lord *Coke* says, that by a grant of (a) *vestura terræ*, the underwood and sweepage pass, but not the soil, timber-trees or mines; nor do these pass by a grant of the herbage, though livery and seisin be made.

vestura terræ with livery passes the soil, and that the grant of *prima vestura* for no certain time passes the first cutting only; but that from such a day to such a day, it passes the soil. Vent. 393. But see Hargr. note 1. Co. Lit. 4. b.

Co. Lit. 4. A grant of *separalis piscaria* passes neither water nor soil; but Dav. 55. i a grant of the water passes both the water and piscary, but not the but see foil.

2 Salk. 637. Contr. and note 2. Co. Litt. 4. b.

Co. Lit. 5. But a grant of *stagnum* or *gurgis* passes both water and soil. Vaugh. 108.

Co. Lit. 5. General words, as honour, isle, castle, will pass things compound; as honour or castle will pass divers manors or things simple of different natures; as fearm or farm will pass houses, lands, tenements, a ploughland, or so much as one plough can till; an oxgang, or so much as one ox can till, may pass arable, meadow, pasture, and wood, &c. necessary for such tillage.

Co. Lit. 5. A grant of a grange passes a barn or stable with its curtilage.

Co. Lit. 5. So, a grant of a house passes the house, orchard, and curtilage.

Co. Lit. 5. So, if a man grant a forest, warren, chase or vivary, by these words both the ground and privilege pass.

(b) Co. A grant of a (b) boillery of salt passes the soil; by the grant of Lit. 4. *Ovile* a sheep-cot, and not a sheep-walk passes. 2 Roll.

Abr. 2. Godb. 273.

29 Aff. 9. If a man grant all his lands and tenements, by these words a

2 Roll. (c) common in gross doth not pass.

Abr. 57. (c) But by the grant of a tenement a reversion passes. 37 H. 6. 5. That by a grant of all a man's lands and hereditaments, copyholds will not pass. Owen, 37. — But if a man grants all his lands and tenements in *D.*, a lease for years passes. Plow. 424. cont. Bro. tit. *Grant*, 155. & vide Godb. 183. S. P. but no resolution. — So, if a man grant all his lands and tenements in *D.*, a rent-charge which he has issuing out of lands there passes. 2 Rol. Abr. 57.

2 Roll. Abr. By a grant of land the houses and buildings thereupon pass. 57. Palm. 320.

Moor, 6. If *A.* demise lands, and grant that the lessee shall have house- Pl. 23. bote in other lands of the lessor not demised, the lessee may, besides those granted, take house-bote, &c. on the demised premises.

3 Leon. 19. If lessee for years of the pawnage of a park grants all his goods and chattels, moveables and immoveables within the said park, by these words the pawnage passes.

Cro. Eliz. 633. If a person grant an acre called *Two Acres*, an acre only passes.

18 E. 4. 16. If a man grants (d) *omnia bona sua*, trees growing do not pass; 2 Roll. otherwise, if they had been cut down at the time of the grant.

Abr. 58. (d) So, of a grant *de omnibus averiis suis*, deer will not pass. 2 Rol. Abr. 57.

11 Co. 50. If a man lease lands for life, excepting the trees growing, and Liford's case. afterward he grant the reversion to another, by the grant of the reversion the trees pass, for they are annexed thereto.

If a man grant all his chattels, a term which he hath in extent 11 H. 6. 7. on a statute-merchant passés; for this is but a chattel.

If a man grant all his (a) goods and chattels, an obligation in which *J. S.* is bound to him passés hereby, and by these words he hath an interest in the parchment or paper, although the debt itself being a chose in action cannot be granted or assigned over (b). these words will not carry debts due to the testator. Dyer 59. b. pl. 15. (b) But see tit. *Assignment*.
Dyer, 25.
2 Roll.
Abr. 58.
(a) That a devise by

If a man grant *omnia bona & catalla sua*, a term for years which he hath in right of his wife hereby passés.
9 H. 6. 52.
b. 2 Roll.
Abr. 58.

So, if a man grants *omnia bona & catalla sua*, the goods which he hath as executor shall pass, as well as his own proper goods.
For this vide 2 Roll.
Abr. 58.

Noy, 106. 4 Leon. 22. 1 Leon. 263.

A grant of *bona & catalla felonum* will not carry the goods of a *felo de se*.
Sid. 420.
Vent. 32.
Saund. 274.

4. Where a Thing shall be said to pass as appendant, appurtenant, or incident.

It seems agreed, that several things will pass as appendant or appurtenant to the principal thing granted, without any express mention of them; as if a (c) man grant a manor to which an advowson is appendant or villain regardant, without saying *cum pertinentiis*, yet these pass as (d) appendant or appurtenant to the manor.
10 Co. 64.
Whistler's case,
2 Roll.
Abr. 60.
Gouldf. 42.
Style, 78.
Co. Lit.

307. a. (c) But this must be understood of a grant by a common person; for if the king grants such a manor, or grants a manor *cum pertinentiis*, yet the advowson does not pass. Plow. 251. 10 Co. 64. [See Hargr. note 2 Co. Litt. 12. b. 13th Edit.] (d) Here note, as regularly true, that nothing can be appendant or appurtenant, unless it agree in quality and nature to the thing whereunto it is appendant or appurtenant; as a thing corporeal cannot properly be appendant to a thing corporeal, nor a thing incorporeal to a thing incorporeal; but things incorporeal which lie in grant, as advowsons, villains, commons, and the like, may be appendant to things corporeal, as a manor-house or lands; or things corporeal to things incorporeal, as lands to an office; also they must agree in nature and quality; for a common of turbary or of estovers cannot be appendant or appurtenant to land; but to a house to be spent there; nor a leet that is temporal, to a church or chapel which is ecclesiastical; neither can a nobleman, esquire, &c. claim a seat in a church by prescription, as appendant or belonging to land, but to a house, because such a seat belongeth to the house in respect of the inheritance thereof. Co. Lit. 121. b. 122. a. — Also, the thing to which another is appendant must be of perpetual subsistence; and therefore an advowson which is said to be appendant to a manor, is in truth appendant to the demesnes of the manor, which are of perpetual subsistence and continuance, and not to rents or services, which are subject to extinguishment and destruction. Co. Lit. 122. a.

So, if a man at this day grant to a man and his heirs common in such a moor for his beasts *levant* and *couchant* upon his manor, or if he grant to another common of estovers or turbary in fee-simple, to be burnt or spent within his manor; by these grants those commons are appurtenant to the manor, and shall pass by the grant thereof.
Co. Lit.
121. a.

So, if *A.*, seised of 100 acres of land to which a common for cattle *levant* and *couchant* is appurtenant, by grant made thereof within time of memory, grant ten of the said acres only, without saying *cum pertinentiis*; yet a proportionable common for the cattle *levant* and *couchant* on these ten acres shall pass; for being a common appurtenant, it is in its nature apportionable.
2 Roll.
Abr. 60, 61.
Sacheve el and Porter.

Savil. 103.
Long v.
Bishop of
Gloucester.

But if *A.* grant the third part of a manor to which an advowson is appendant, though he adds *cum pertinentiis*, yet the advowson does not pass unless it be expressly mentioned.

Moor, 24.
pl. 82. per
Dyer and
Weston,
contrary to
Brown; but
Weston
held, that
the garden

By a grant of a messuage *sive tenementum*, only the house and circuit thereof passes, but not the garden, for these are distinct; for in a *præcipe quod reddat* the demand must be *de uno messuagio & uno giardino*, and the word *tenement*, as here used, is only synonymous to the word *messuage*; but had it been a grant of a messuage and tenement, it might be otherwise.

the garden would pass by the name of messuage, with an averment, that they were occupied together.

Vaugh. 178.

Where a house or land belongs to an office, or a chamber to a corody, the office or corody being granted by deed, the houses and land follow as incident or belonging to it without livery, because the office is the principal, and the land but appertaining to it.

Vaugh. 199.

If a man grant his saddle with all things thereunto belonging, stirrups, girths, and the like do pass; so, if a man grant his viol, the strings and bow will pass.

Moor, 682.
Browne and
Nichols.

By a grant of a house *cum pertinentiis*, a conduit which conveys water to the houses passes, and the owner may, without alleging a prescription or grant, enter upon the soil of another to repair it; but this must be done in convenient time.

Sid. 211.

Lev. 131.

Keb. 736.

S. C.

Archer and
Bennet.

It was found by special verdict, that *A.* was seised of a mill in fee, and that he built a kiln at the end of the close wherein the mill stood, and then granted the mill *cum pertinentiis*; and if the kiln passed was the question; and the court held clearly, that if it had been found in the special verdict, that the kiln had been necessary to the mill, that then it should pass by a grant of the mill; so, if it were erected for the use of the mill, as sluices, though never so far off; so a dove-house to a dwelling-house; but as it was here barely found, there was no colour to adjudge it to pass.

Saund. 322.

If a man grants to another the use of a pump, the grantee as incident to the grant may enter on the ground of the grantor to repair it; for this privilege is given to him as incident to the grant.

Saund. 323.

So, if a man license another to lay pipes of lead on his ground to convey water to his cistern, although the ground is not hereby granted, yet the grantee may enter thereon to repair the pipes.

Hob. 234.
2 Roll.
Abr. 60.

If a man grant the fish in his water, the grantee may fish with-in, but he cannot cut the banks.

Hob. 234.
2 Roll.
Abr. 60.

So, if a man grant or reserve wood, it implies a liberty to take and carry it away.

5. What Estate or Interest shall be said to be granted.

1 Salk. 346.

It is holden by Chief Justice *Holt*, that if a termor grants the land, the grantee is but tenant at will; for it does not appear that the

the grantor meant to pass his whole interest, and this is enough to satisfy the grant.

Also, it was adjudged in *B. R.* that if a termor for 1000 years, by deed reciting the original lease of the lands, grants the said lands, together with the said (a) recited lease, to the grantee, his executors, administrators, and assigns, and all writings relating to the premises, *habendum* to the grantee, his executors, &c. after the death of the grantor and his wife, for the residue of the term of 1000 years, that hereby the term does not pass.

Salk. 346.
German
& Uxor. v.
Orchard.
(a) But per
Holt, the
word *lease*
would pass
the term,
but here it

is the recited lease, which can signify nothing but the deed; also he agreed, that if a termor devise the land, all the term passes; for the devisee cannot be tenant at will, because the deviser must die before the devise can take effect, and one cannot be tenant at will to a dead man. Salk. 346.

But this judgment was reversed in the Exchequer-chamber, where it was holden, that by the grant of the lands in the premises to the grantee, his executors, administrators, and assigns, the whole term of 1000 years was transferred; and since by the premises the whole term passed presently, but by the *habendum* not till after the death of the grantor and his wife, they held that *ex consequenti* the *habendum* was repugnant to the premises, and void.

Salk. 346.
adjudged in
the Exche-
quer-cham-
ber, and af-
firmed in the
House of
Lords.

If a man by deed grant a rent-charge, reversion, common, or any thing else which lies in grant, without mentioning any particular estate, the grantee hath an estate for term of his own life, because a man's own act is taken most strongly against himself; and where the words of the deed will bear two senses without injury to any one, the purchaser deserves the most favour, and the construction that most enlarges his interest is to be preferred; besides, being granted to him, it cannot be supposed out of him as long as the same person continues.

Roll. Abr.
245.
Co. Lit.
42. b.
8 Co. 85.

If *A.* grant a rent-charge to *B.* and his heirs, *habendum* to him and his heirs, to the use of him and his heirs for the life of *J. S.* this is only a descendible estate for the life of *J. S.* and not a fee-simple.

Moor, 876.
pl. 1227.
Wilkins v.
Perrat.

If an office be granted to a man to have and enjoy so long as he shall behave himself well in it, the grantee hath an interest for life in the office; for since nothing but his misbehaviour can determine his interest, no man can prefix a shorter time than his life, since it must be his own act, (which the law does not presume to foresee,) which can make his estate of shorter continuance.

Co. Lit.
42. a. Roll.
Abr. 844.
1 Show. 523.
Show. P.
Cafes, 161.
4 Mod. 173.

If the king grants an office at will, and grants a rent to the patentee for his life, for the exercise of his office; this is no absolute estate for life; because the rent being granted on account of the office and in discharge of the duty of the place, whenever his interest in the office ceases, the rent is determined, because it was at first granted for the exercise of the office, which he is no farther concerned in.

Co. Lit.
42. a.

If a man makes a lease for forty years, and grants that the lessee shall have house-bote, fire-bote, and cart-bote, in other lands

Moor, 6.
pl. 23.

lands of the grantor's not demised, though it is not said for how long, yet the grantee shall have such privilege during the continuance of the lease, and such privilege shall go to his executors and assigns.

6. At what Time the Thing granted becomes vested, and when the Grantee must take the same.

2 Roll. If a man grant a thing to be taken yearly, and the grantee neglect to take it for one year, he cannot take double the quantity the next; as if a man grant to another and his heirs 200 (a) faggots of wood, to be taken yearly, and the grantee neglect to take any for the first year, he cannot the next take 400 faggots; for by this means he might destroy all the woods of the grantor.
 Abr. 64. Southwell and Wade. (a) So, if a man grant a common for ten head of cattle yearly, the grantee, if he neglects to feed the common for one year, cannot put on double the number the next. 27 H. 6. 10.

2 Roll. But if the grantor be to render the thing, as if A. grant 200 faggots of wood to be taken yearly out of all his lands, with clause of distress, and the grantor be to cut and make up the faggots and carry them to the house of the grantee; if the grantor neglect to do this for the first or any one year, the grantee shall have double the quantity the next; for in this case the grantor was to do the first act, and shall not have any advantage by his neglect.
 Abr. 65.

7 Co. 28. He who hath the next avoidance of a church, must present to the next that happens after such grant, at his peril.
 Bulst. 26.

Moor, 882. If a man grant all his trees to be taken within five years, the grantee cannot take any after the expiration of the five years; for this is in nature of a condition annexed to the grant; but if the grant be of the trees, with covenants either on the part of the grantor or grantee, that they shall be taken away in five years, there the grantee may take them after the expiration of five years, and the grantor must pursue his remedy by action of covenant.

Moor, 882. So, if a man grant corn growing, and the grantee do not take it away in a reasonable time, by which the grantor receives a prejudice, he may have an action on the case *.
 per Hutton. * So, for not taking away tithes in due time, whereby the occupier of the land is prejudiced.

Guardian.

A GUARDIAN (*a*) is one appointed by the wisdom and policy of the law to take care of a person and his affairs, who by reason of his (*b*) imbecility and want of understanding is incapable of acting for his (*c*) own interest; and it seems that by our (*d*) law his office originally was to instruct the ward in the arts of war, as also those of husbandry and tillage, that when he came of age he might be the better able to perform those services to his lord, whereby he held his own land.

(*a*) For the derivation and several significations of the word *guardian*, vide 2 Inst. 12.
(*b*) And therefore Bracton,

l. 2. c. 38. f. 86. treating thereof, says *de illis, qui minores sunt & infra ætatem, & quos oportet esse sub tutelâ & curâ aliorum, eo quod se ipsos regere non norunt, & quorum quidam debent esse sub custodiâ domini cum terris & tenementis, quæ sunt de feodo eorum, & quidam sub custodiâ parentum & proximorum consanguineorum, ut prædict. est, & quibus dantur custodes aliquando de jure de antiquo feoffamento, & aliquando curatores ab homine.*—So, Fleta, c. 9. f. 4. *Quidam sub custodiâ parentum & proximorum consanguineorum, & illis dantur custodes de jure gentium.* (*c*) And therefore their authority and interest extends only to such things as may be for the benefit and advantage of the infant. Co. Lit. 89. a. [So in the Roman law, the *potestas*, or authority of the tutor, was exercisable only for the benefit of the minor.] (*d*) In the civil law they are called *curators* or *guardians*. Swinb. 194. [The *curators* were not appointed, except in particular cases, till the minor attained the age of puberty. Before that time he was under the care of persons called *tutores*.]

Under this head we shall consider,

(A) The several Kinds of Guardians: And herein,

1. Of the several Kinds of Guardians by the Common Law.
2. Of Guardians by Custom.
3. Of Guardians by Statute.

(B) What Persons may be Guardians.

(C) By what Authority Guardians are appointed: And herein of the proper Jurisdiction in restraining and punishing Abuses by Guardians and others, in Relation to Infants.

(D) Of the Manner of appointing and admitting a Guardian.

(E) At what Time the Authority of a Guardian ceases, and what Acts will determine it.

(F) Of the Guardian's Interest in the Body and Lands of the Ward, and his Remedy for the same.

(G) What Things a Guardian may lawfully do, and will bind the Infant.

(H) Of the Infant's Remedy against his Guardian for Abuses by him.

(I) Of obliging a Guardian to account, and what Allowances he shall have.

(A) The several Kinds of Guardians: And herein,

1. Of the several Kinds of Guardians by the Common Law.

Co. Lit.
88 b.

(a) That

THERE are four (a) kinds of guardians by the common law, viz. guardian in chivalry, socage, nature, and nurture. there is a guardian in chivalry and guardian in socage; and again guardian in chivalry is twofold, guardian *in droit*, that is to say in his own right; and guardian *in fait*; as where the king or lord assigneth over the custody to another: also both these are either guardians by right, or guardians by claim and possession without right: likewise guardian in socage is twofold, viz. guardian by right, who is called *tutor proprius*; and guardian by possession and claim, who is called *tutor alienus*. 2 Inst. 305.

Lit. § 103.

Co. Lit.

74, 75.

2 Inst. 12,

13.

1. As to guardian in chivalry, it is to be observed, that by the common law, if tenant by knights-service had died, his heir male being under the age of twenty-one years, the lord should have the land holden of him till such heir had arrived to that age, because till then he was not intended to be able to do such service; and such lord had likewise the custody of the body of the infant to breed him up and inure him to martial discipline, and was therefore called guardian in chivalry.

Co. Lit. 76.

So, if an heir female were unmarried, and under fourteen at her ancestor's death, the lord was guardian till she arrived to that age; also by *Westm. 2. cap. 22.* the lord should have had the land till she were sixteen, to tender convenient marriage to her; and if the lord died within the two years, the law gave the same interest to his executors and administrators.

Co. Lit.

75. a.

2 Roll.

Abr. 36.

Wardship was due to the lord in respect to the tenure; therefore if the lord had released his feigniory to his ward, or the feigniory had descended to him, he should have been out of ward, for *cessante causa cessat effectus*.

Co. Lit.

78. a.

An heir who had been in ward by reason of a tenure *in capite*, when he came of age, must have sued livery, i.e. to have had the lands delivered to him by the king, the expence of which was half a year's profit of his lands holden; but if the heir had been of age at his ancestor's death, he should have paid for land in possession a year's profit for the king's premier feisin and livery, and for reversions expectant on freeholds half a year's profit, and the king should have had all the mesne profits till tender of livery were made; so if a tender were made, and not duly pursued.

By

By the statute of (a) *Merton, cap. 6.* if the lord disparaged his (b) male ward under fourteen, he should have lost the ward, and the whole profit thereof should have been converted to the ward's benefit; the lord was said to disparage the heir by marrying him to the daughter of a villain, burghers, one attainted of felony, to a bastard or alien, one wanting hand or foot, deformed, paralytick, consumptive, &c.

Co. Lit. 80.
(a) On this statute Littleton holds, that no action could be brought, because none was ever brought.

Q. Lit. § 108. — And the reason hereof, says my Lord Coke in his comment, is *quia periculosum existimandum est, quod bonorum virorum non comprobatur exemplo*; not, says he, that a statute can be antiquated, but it may be expounded by non-use. Co. Lit. 81. b. [See Hargr. note on this passage.] (b) But there never was any forfeiture of the marriage of an heir female. Co. Lit. 82. b.

On the death of guardian by knights-service, the executors should have had the wardship of the heir, for they had it to their own use, and might have granted or assigned it over; and therefore were not at all accountable to the infant when he came of age.

Co. Lit. 90.

But this sort of guardianship being a sort of dominion of masters over servants and vassals, introduced among the *Gothick* nations to breed them to arms; it was deemed a great burden, and therefore is now fallen by the 12 *Car. 2. cap. 24.* by which all tenures by knights-service, and socage *in capite*, are turned into common socage, and discharged of homage, livery, premier seisin, wardship, &c. which were at law incident to such tenures, and *aids pur file marrier* & *pur faire fitz chevalier*.

[See Mr. Hargrave's note on this species of guardianship, Co. Lit. 74. b. n. 11. 13th edit.]

2. By the common law, if tenant in socage die, his heir being under fourteen, whether he be his issue, or cousin male or female, the next of blood to the heir, to whom the inheritance cannot descend (c), shall be guardian of his body and land till his age of fourteen; and although the nature of socage tenure be in some measure changed from what it originally was, yet it is still called socage tenure, and the guardian in socage is still only where lands of that kind (as most of the lands in *England* now are) descend to the heir within age; and though the heir after fourteen may choose his own guardian, who shall continue till he is twenty-one, yet, as well the guardian before fourteen, as he, whom the infant shall think fit to choose after fourteen, are both of the same nature, and have the same office and employment assigned to them by the law, without any intervention or direction of the infant himself; for they were therefore appointed, because the infant, in regard of his minority, was supposed incapable of managing himself and his estate, and consequently, they derive their authority not from the infant, but from the law; and that is the reason they transact all affairs in their own name, and not in the name of the infant, as they would be obliged to do, if their authority were derived from him.

Co. Lit. 87.

[(c) See 1 P. Wms. 260. 9 Mod. 142. Hargr. Co. Lit. 87. b. n. 6.]

Hence the law has invested them not with a bare authority only, but also with an interest till the guardianship ceases; and to prevent their abuse of this authority and interest, the law has made them accountable to the infant, either when he comes to the age of fourteen years, or at any time after, as he thinks fit;

Co. Lit. 90. a.

and therefore, they are not to have any thing to their own use, as the guardian in *chivalry* had.

Co. Lit. 84. 3. Guardian by nature, who is the father or mother; and here
9 E. 4. 53. we must observe, that by the common law every father hath
27 Aff. pl. (a) right of guardianship of the body of his son and (b) heir until
73. 33 H. 6. he attain to the age of (c) twenty-one years.
55. Rast.
Ent. 263.

(a) The father being guardian in socage shall account with the son for the profits; for otherwise it would be more for the son's advantage to have another for his guardian, than his father. Co. Lit. 88. — And the true reason of guardianship is not with respect to the benefit of the lord by tenure, but with respect to the good education of the infant. Carth. 386. — But where the father had the custody of the body of his heir apparent, in respect of his natural right, he should render no account to the heir; for what the father might receive on such account, would otherwise have belonged not to the heir, but to the guardian in knights service. Co. Lit. 88. (b) The true reason why, by the law of England, the father hath not the guardianship of his younger children, is, because by our law the younger children cannot inherit any thing from their father. Carth. 386. per Holt, C. J. (c) That the guardianship of the father, which is a guardianship by nature, continues till the son and heir apparent attain to the age of twenty-one years, but that is with respect to the body only. Carth. 386. per Holt.

3 Co. 37. And therefore, when tenures in knights-service were in being,
Ratcliffe's case, Co. Lit. 75. 84. the guardian in chivalry could not have the custody of the body
Dyer, 189. of the heir as long as his father was living; but all, which such
Vaugh. 180. guardian could have, was the custody of the lands which were
(d) And descended to the infant from his mother or other collateral ances-
therefore the writ de away his son and heir *quare filium & heredem rapuit*, though he
cust. filii was not in propriety of speech counted the (d) guardian.
terre & heredis did not lie, because the father was not complete guardian. Fitz. tit. *Garde*, 32.

Lit. § 114. But neither the mother, nor any collateral ancestor could have
Co. Lit. 84. have had the custody of their heir apparent before the lord; for
[See Mr. though they may have an action of trespass *quare consanguineum &*
Hargr. Co. *heredem rapuit*, yet they can have it only against a stranger, and
Lit. 74. b. not against guardian in chivalry.
n. 12.]

Co. Lit. 88. 4. Guardian by nurture, who hath only the care of the person
[As to and education of the infant, and hath nothing to do with his
guardian- lands merely in virtue of his office; for such guardian may be,
ship by nur- though the infant hath no lands at all, which a guardian in socage
ture, Mr. cannot.
Hargrave observes,
that it only occurs where the infant is without any other guardian; and none can have it except the father or mother. 8 E. 4. 7. b. Br. Guard. 7. 3 Co. 38. It extends no farther than the custody and government of the infant's person, and determines at fourteen, in the case both of males and females. Lord Chief Baron Comyns indeed refers to Fleta, as if, according to that ancient book, grandfathers and great grandfathers might be guardians by nurture; 3 Com. Dig. 421. ; but the passage cited doth not point at this species of guardian, it describing the *patria potestas* in general, and being apparently borrowed from the text of the Roman law; nor will it bear the least application to guardianship, as our own law regulates it. Hargr. note 13. Co. Lit. 119. b.]

2. Of Guardians by Custom.

But for this By the custom of the city of London, the custody and guardian-
wide tit ship of orphans, under age, unmarried, belongs to the city.
Customs of
London, letter (B).

Lamb. 611, By the custom of Kent, where any tenant died, his heir within
612. 624, 5. age, the lord of the manor might and did commit the guardianship
to the next relation in the court of justice, within whose jurisdic-
tion

tion the land was ; but the lord was bound on all occasions to call him to an account ; and if he did not see that the accounts were fair, the lord himself was bound to answer it. This province the chancellor hath taken from inferior courts since the conquest, only in *Kent*, where these customs are continued ; but the custom is not used even in *Kent* at this day, because the lords in giving tutors do it at their own peril in the account ; and therefore every man thinks it dangerous to intermeddle.

This guardian appointed by the lord is to have the same allowance, and no other, with the guardian in socage at common law, and is subject, as has been said, to the account of the heir for his receipts, and to the distress of the lord for the same cause. Lamb. 624.

If copyhold lands descend to an infant within the age of fourteen years, the next of kin, to whom the lands cannot descend, shall be guardian both of the infant's land and estate, if by the custom of a manor the guardianship does not belong to another. 2 Roll.
Abr. 40.
2 Lutw.
1188. S. P.
said to be resolved.

And therefore if a copyhold descend to a lunatick, or an infant within the age of fourteen, the lord, without a special custom for that purpose, hath no power of appointing a guardian. Hob. 215.
Hut. 16, 17.
2 Lutw.
1188.

3. Of Guardians by Statute.

By the common law, no person could appoint (a) a guardian, because the law had appointed one, whether the father was tenant by knights-service or in socage. 3 Co. 37.
3 Inst. 62.
(a) But by common

law, tenant in socage of age might have disposed of his land by deed, or last will, in trust for his heir ; but not the custody and tuition of his heir, for the law gave that to the next of kin to whom the land could not descend. *Vaugh. 178.*

The first statute, that gave the father a power of appointing, was the 4 & 5 *P. & M. cap. 8.* which provides under severe penalties, such as fine and imprisonment for years, "That nobody shall take away any maid or woman-child unmarried, being within the age of sixteen years, out of or from the possession, custody or governance, and against the will of the father of such maid or woman-child, or of such person or persons to whom the father of such maid or woman-child by his last will and testament, or by any other act in his life-time, hath or shall appoint, assign, bequeath, give, or grant the order, keeping, education and governance of such maid or woman-child." Sid. Rep. 362.

In the construction of this statute it hath been holden, that if two persons are appointed guardians by authority of this statute, and one of them dies, the guardianship will not survive, because the statute gives an authority to a special purpose, and makes the ravisher criminal within the words of it ; and being a penal law ought to be construed strictly. Poph. 204.

The 12 *Car. 2. cap. 24.* enacts, "That where any person hath or shall have any child or children under the age of twenty-one years, and not married at the time of his death, it shall and may be lawful to and for the father of such child or children, whether born at the time of the decease of the father, or at that

[(a) Other persons are also disabled. See the 9 & 10 W. c. 32., and the statutes relative to the qualifications of officers. See also Swinb. part 3. § 10.]

“ time *in ventre sa mere*, or whether such father be within the age
 “ of one and twenty years, or of full age, by his deed executed in
 “ his life-time, or by his last will and testament in writing, in the
 “ presence of two or more credible witnesses, to dispose of the
 “ custody and tuition of such child or children, for and during
 “ such time as he or they shall respectively remain under the age
 “ of twenty-one years, or any lesser time, to any person or persons
 “ in possession or remainder, other than popish recusants (a); and
 “ such disposition of the custody of such child or children, shall
 “ be good and effectual against all and every person or persons
 “ claiming the custody or tuition of such child or children as
 “ guardian in focage, or otherwise; and such person or persons to
 “ whom the custody of such child or children hath been or shall
 “ be disposed or devised as aforesaid, shall and may maintain an
 “ action of ravishment of ward or trespass against any person or
 “ persons which shall wrongfully take away or detain such child
 “ or children, for the recovery of such child or children, and shall
 “ and may recover damages for the same in the said action, for
 “ the use and benefit of such child or children.

“ And such person or persons, to whom the custody of such
 “ child or children hath been or shall be so disposed or devised,
 “ shall and may take into his or their custody, to the use of such
 “ child or children, the profits of all lands, tenements and here-
 “ ditaments of such child or children, and also the custody, tuition,
 “ and management of the goods and chattels and personal estate
 “ of such child or children till their respective age of one and
 “ twenty years, or any lesser time, according to such disposition
 “ aforesaid, and may bring such action or actions in relation there-
 “ to, as by law a guardian in common focage might do.”

In the construction of this statute the following opinions have been holden :

Vaugh. 179.
2 Will. 129.

1. That a testamentary guardian, or one formed according to this statute, comes *in loco parentis*, and is the same in office and interest with a guardian in focage, and differs only as to the *modus habendi*, or in a few particular circumstances; as first, that the guardianship may be holden for a longer time, *viz.* till the heir attains the age of twenty-one, where before it was but to fourteen: Secondly, it may be by other persons holden; for before it was, the next of kindred not inheritable could have it; now, who the father names shall have it.

Vaugh. 178.

[But tho' a testamentary guardian shall have the custody of the infant's real estate, a lease granted by him of such estate is absolutely void. Roe v. Hodgson, 2 Will. 129. 135.]

2. That though neither before nor since this statute a person under age may devise his lands, yet a person under age may, within this act, dispose of the custody of his child, and such disposition draws after it the land, &c. as incident to the custody.

Vaugh. 179.

3. That an infant hath the same remedy against a testamentary guardian, as he had against a guardian in focage, though the statute speaks only of remedies for the guardian,

4. If

4. If the father being of age devise his land to J. S. during the minority of his son and heir, in trust for his heir, and for his maintenance and education until he be of age, this is no devising the custody within this statute, for he might have done this before the statute. Vaugh. 184.

5. If a man devise the custody of his heir apparent to J. S., and mention no time, either during his minority, or for any other time, this is a good devise of the custody within the act, if the heir be *under fourteen* at the death of the father; because by the devise, the *modus habendi custodiam* is changed only as to the person, and left the same as it was as to the time; but if *above fourteen* at the father's death, then the devise of the custody is merely void for the uncertainty; for the act did not intend every heir should be in custody until one-and-twenty, *non ut tandiu, sed ne diutius*; therefore he shall be in this custody but so long as the father appoints; and if he appoint no time, there is no custody. Vaugh. 184, 5.

[6. That as the statute declares the guardianship shall continue till twenty-one, if so prescribed by the father, it shall not be determined sooner even by the marriage of the infant.] Mendez v. Mendez, 3 Atk. 625.

7. That this testamentary guardian hath the custody not only of the lands descended or left by the father, but of all lands and goods any way acquired or purchased by the infant, which the guardian in focage had not. Vaugh. 185, 6.

8. That this guardian cannot assign or transfer the guardianship over to another, neither shall it upon his death go to his executors or administrators; for though it be an interest, yet it is an interest joined with a trust, which the testator might think those persons incapable of executing, though he placed that trust and confidence in the guardian himself; but it seems, that if two or more are made guardians, and one of them dies, the survivor or survivors shall continue guardians, for from the nature of the thing the authority must be joint and several; also, were it otherwise, the more guardians were appointed for the security of the infant, the less secure he would be, because upon the death of any one of them the guardianship would be at an end. Vaugh. 184.
[Mellish v. De Costa, 2 Atk. 15.]

9. That if a person appointed guardian pursuant to this statute, die or refuse to take upon himself the guardianship, the lord chancellor may appoint a proper guardian. Abr. Eq. 260.

10. Also if a person, appointed guardian pursuant to this statute, becomes a lunatick, or is otherwise incapacitated to execute the trust reposed in him; or if he abuses the trust, by doing any thing prejudicial either to the person of the infant, or his estate, it seems, that the court of Chancery may either totally remove him, and appoint another guardian, or else impose such terms on him, by obliging him to give security, &c. as will effectually hinder him from doing any thing prejudicial to the infant; but in what particular instances of this kind a court of equity will interpose, does not seem to be clearly agreed (*a*). Vide 2 Chan. Ca. 237.
3 Chan. Rep. 58.
2 Sid. 424.
Vern. 442.
Abr. Eq. 260, 261.
[1 P. Wms. 704.
1 Vez. 160.
Ex parte Lady Ann Brydges,

H. T. 1791. (*a*) It will not remove a mother on account of her being married to a second husband, even though she be devisee in remainder of the real estate, in case the infant ward should die without issue. *Morgan v. Dillon*, 9 Mod. 135. 3 Br. P. C. 341. *Mellish v. De Costa*, 2 Atk. 15. See too 1 Wooddes. 461.]

3 Lev. 395.
Clench and
Cudmore,
and 2 Lutw.
1181. S. C.

11. That a copyholder is not within this statute to dispose of the custody of his infant heir, because of the meanness of his estate, and the prejudice that would accrue to the lord of the manor; and therefore the lord, or those entitled by the custom, shall have the custody of him.

Rex v.
Corneforth,
2 Str. 1162.
Wald v.
St. Paul,
2 Br. Ch.
Rep. 583.
and Peck-
ham v.
Peckham,
there cited.
(a) Blake v.
Leigh, Ambl. 306.

[12. Though a natural daughter hath been holden to be within the statute of 4 & 5 P. & M. c. 8. yet natural children are not within this statute. But though not within this last statute, the court of Chancery will adopt the nomination of the father, without referring it to a Master, unless some objection be stated to the person named by the father. And though a grandfather (a) cannot appoint a testamentary guardian for his grandson, yet if he leave him an estate upon that condition, and the father do not submit to it, it will work a forfeiture.

Vaugh. 180.
Ex parte
Edwards, 3 Atk. 519.

13. An appointment of a testamentary guardian by a mother is absolutely void.

Ld. Shaftes-
bury v.
Hannam,
Finch's
Rep. 323.
(b) Lecone v. Sheires, 1 Vern. 442.

14. If a father dispose of the custody of an infant by deed, such disposition may be revoked by will. But if there be a covenant in the deed (b), that the father will not revoke it, a court of equity will not set it aside unless the trust be abused.

Swinb. p. 3.
c. 12.

15. As the statute prescribes no particular form of appointment, it is immaterial by what words the guardian is appointed, provided the father's intent be sufficiently apparent.]

Sid. 363.

And note, that both by the 4 & 5 P. & M. c. 8. and by this statute, there are express savings with respect to the city of London and other towns, as to the custody of orphans.

(B) What Persons may be Guardians.

Co. Lit. 88.
2 Mod. 176.

HERE in the first place we must take notice, that there can be no guardian in socage but where lands of that nature descend to the heir.

Co. Lit. 87.

Therefore if a man die seised of a rent-charge, common, or such like inheritances, which lie not in tenure, and dispose not of the custody of his child, the heir may choose his guardian; if he be so young that he can make no choice, it is most fit that his next cousin, to whom the inheritance cannot descend, should have the custody of him, and whoever takes the rent, &c. is chargeable in account; but if he have any socage land, the socage guardian shall take the rent-charges, &c. in his custody.

F. N. B.
143.

So, the wife's heir shall not be in ward during the life of tenant by the curtesy, because by his continuance of his wife's estate the descent to the heir is interrupted.

Co. Lit. 87.
This seems
to have been
the common

By our law the next of blood, to whom the inheritance cannot descend, is entitled to the guardianship; as if the land descend from the father, the mother, or other next cousin of the mother's side.

side, shall be guardian in focage; & *sic e converso*, where lands descend from the mother; but the (a) civil law appoints him to be guardian that is to inherit next, which our law says is *committere ovem lupo*.

law, and is confirmed by 28 E. 1. c. 1.

(a) The

rule in the civil law is, *ubi successione emolumentum, ibi & tutelæ onus esse debet*.

If the younger brother die seised in tail, leaving issue under fourteen, the elder, not the middle brother, shall be his guardian in focage, for in equal degree the law prefers him. Co. Lit. 88.

But, if tenant in tail have no brother or sister, and die, leaving issue under fourteen, the next cousin of the father's or mother's side that first seises the heir shall have the custody of him; for the relation on both sides is equal, and no cause appears wherefore either should be preferred; and he that first takes care of the heir shews himself to be most concerned for his interest. Co. Lit. 88.

But if donees in frank-marriage die, their issue being under fourteen, the next cousin of the part of the donee that was the cause of the gift (being not inheritable to the donor's reversion) shall have the custody. Co. Lit. 88.

A. seised of some lands as heir to his father, and of others as heir to his mother, dies, leaving issue under fourteen; the next cousin of either side, that first seises the body of the heir, shall have the custody of him; and the next cousin of the father's part shall enter into the lands of the mother's part, & *sic e converso*. Co. Lit. 88. b.

If a woman hath issue a son by a former husband, and she marries a second husband, seised of focage land, by whom she has issue another son, and the husband and the wife die, leaving issue the said son under the age of fourteen, his brother of the half blood shall be guardian in focage, (b) as next of kin to whom the inheritance cannot descend. Cro. Eliz. 825.

the half blood shall not be guardian in focage to the younger brother, being heir to the father of borough *English* lands; for the rule is, that no person, who can by any possibility inherit, shall be guardian. Co. Lit. 88.

2 And. 171.
Moor, 635.
2 Jon. 17.
(b) That the elder brother of

If A. be guardian in (c) focage of B. under fourteen, he shall be guardian in focage of another infant, whom B. ought to be guardian of, as being his next cousin *pur cause de gard*, and an action of account lies against him. Co. Lit. 88. b.

(c) But a testamentary guardian, pursuant to

ant to the 12 Car. 2. c. 24. though his ward happens as next of kin to be entitled to the guardianship of another infant, shall not be guardian *pur cause de gard*; for he is neither an hereditament, nor goods, nor chattels of the first infant. Vaugh. 184.

An infant, idiot, lunatick, *non compos*, one blind and dumb, deaf and dumb, or leper removed, cannot be guardian in focage. Co. Lit. 88. b.

(C) By what Authority Guardians are appointed:
And herein of the proper Jurisdiction in restraining
and punishing Abuses by Guardians, and others,
in relation to Infants.

2 Inst. 14.
4 Co. 126.
Beverley's
case, and in
Staundi.
Præ. 37; it
is said, that
the king has
the protec-
tion of all
his subjects,
and of all
their goods, lands, and tenements; and so of such as cannot govern themselves, nor order their lands and tenements, his grace, as father, must take upon him to provide for them, that they themselves and their things may be preserved. (a) Also, it seems, that when tenures were in being, and till the court of wards was erected, the whole jurisdiction of the king's wards, where the lands were holden in chivalry or knights service, was under the jurisdiction of the court of Chancery; so likewise in relation to subjects, this court determined touching the wardships of the body, who was the prior and who was the posterior lord. — And in Palm. 252. it is said, that if a guardian be made by writ out of Chancery, or by the direction of the court, his authority cannot be revoked by the infant, but that that court will make him answer for any act of his to the prejudice of the infant. — [This jurisdiction of the court of Chancery, in the case of infants, Mr. Hargrave conceives to have originated in usurpation, the arguments in general adduced in its support being very weak and insufficient, and its commencement of a very late date. Co. Litt. 128. note 16. But see a very able attempt to rescue it from this aspersions by the learned and spirited annotator on the *Treatise of Equity*. Fonbl. Eq. Tr. 228. note a.]

2 Mod. 177.
1 Eq. Cas.
Abr. 260.
Gilb. Eq.
Rep. 172.
8 Mod. 214.
9 Mod. 116.
135. [Pre.
Ch. 106.
2 Ld. Raym.
1334. 1 P.
Wms. 703.
2 P. Wms.
112. 561.
3 P. Wms.
116. 118. 154. 1 Vern. 442. Cas. Temp. Talb. 58. 1 Stra. 168. 2 Stra. 982. 3 Atk. 305.
(b) A guardian appointed by the court is competent to consent to the marriage of an infant. *Ex parte Birchell*, 3 Atk. 813. But a petition, that a guardian may be assigned, unless to carry on a suit or protect an interest, must be pursuant to the statute. *Ex parte Becher*, 1 Br. Ch. Rep. 556.
(c) It is now settled that an order of maintenance may be made upon a petition without a bill, though a different practice seems to have once prevailed. *Ex parte Grant*, 3 Br. Ch. Rep. 88. *Ex parte Salter*, id. 500. In allowing maintenance the court will attend to the circumstances and state of the family; as, where there is an elder son, and younger children who have no provision, it will allow a more ample maintenance to the guardian of the eldest son, that he may be enabled to maintain the younger children. *Hervey v. Hervey*, 2 P. Wms. 21. *Pierpoint v. Lord Cheney*, 1 P. Wms. 493. *Petre v. Petre*, 3 Atk. 511. *Roach v. Garvan*, 1 Vez. 160. And it will in some cases allow the principal to be broken in upon for the maintenance of the infant. *Barlow v. Grant*, 1 Vern. 255. *Hervey v. Hervey*, 2 P. Wms. 21. (d) If a man marry a ward of the court without consent, he will be committed, though it should appear that he did not know that she was so; *Herbert's case*, 3 P. Wms. 116.; and there must be a proper settlement made on the wife before the contempt can be cleared. *Stevens v. Savage*, 1 Vez. jun. 154.]

[This

[This court will interpose, too, even against that authority and discretion which the father hath in general in the education and management of his child: *à fortiori*, it will interpose against persons who derive their whole authority from the father: and therefore, although it cannot remove a testamentary guardian, or consider his conduct a contempt, unless the infant be a ward of the court (a), yet it may impose such restrictions as will prevent him from prejudicing the interests of the ward (b).]

Potts v. Norton, in note (1) 110 of Mr. Cox's edition of that book. Powell v. Cleaver, 2 Br. Ch. Rep. 499. But qu. if such child should not be a ward of the court? *Ex parte* Warner, 4 Br. Ch. Rep. 101. (a) Goodall v. Harries, 2 P. Wms. 561. (b) Foster v. Denny, 2 Ch. Ca. 237. Roach v. Garvan, 1 Vez. 160.

But it is clear, that the ecclesiastical court hath not any jurisdiction with regard to a guardian in socage, or testamentary guardian; and therefore, where Sir Henry Wood having devised the guardianship of his daughter, by his will in writing, according to the 12 Car. 2. c. 24. to the lady *Chester* his sister; the duchess of *Cleveland*, to whose son this daughter, being about eight years old, was contracted, pretending that Sir Henry Wood by word revoked this disposition of the guardianship, sued in the prerogative court to have this nuncupative codicil proved; the court granted a prohibition; for they are not to prove a will concerning the guardianship of a child, which is a thing of a temporal nature, and of which the courts at *Westminster* are to judge, whether it be pursuant to the statute or not.

courts, and seems warranted, within the province of York, by immemorial custom. 4 Burn's E. L. 102. This claim however hath in modern times been treated as a presumption, and their power hath been confined merely to the appointment of guardians *ad litem*. 3 Burr. 1436. Co. Lit. 88. b. n. 16.]

[When, from a defect of the law, the infant finds himself wholly unprovided with a guardian, he may elect one himself. This may happen, either *before* fourteen, when the infant has no property such as attracts a guardianship by tenure, and the father is dead without having executed his power of appointing a guardian for his child, and there is no mother; or *after* fourteen, when the custody of the guardian by socage terminates, and from the want of the father's appointment there is no other ready to succeed to the trust, and to take care of the infant or his property.]

Duke of Beaufort v. Bertie, 1 P. Wms. 702. Butler v. Freeman, Ambl. 302. Lord Shaftsbury's case, 2 P. Wms. 117., and

Vent. 207. Lady Chester's case. [The right also of appointing guardians of the personal estate, and if there is no other guardian by tenure or otherwise, of the personal estate, is claimed by the ecclesiastical Swinb. 210. 3 Atk. 631.

Co. Lit. 88. b. n. 16.

(D) Of the Manner of appointing and admitting a Guardian.

IT is said, that in Chancery a guardian cannot be otherwise appointed than (c) by bringing the infant into court, or his praying a commission to have a guardian assigned him.

that the court cannot appoint a guardian, unless the heir be in person before them. 2 Leon. Comb. 256. 330, 1.

Abr. Eq. 260. Lloyd and Carew. (c) It is said 189. & vide

Regularly

Uide head of Infancy and Age. Regularly an infant is to sue both at common law and in Chancery, by his *prochein amy* (a) or guardian; but he must always defend by guardian, who is to be (b) admitted by the court. (a) That in an ejectment against an infant, the defendant cannot appear by *prochein amy*, for a guardian and *prochein amy* are distinct, and the suit by *prochein amy* was not before the statute of *Westm.* 1. c. 47. and *Westm.* 2. c. 15., and is given in case of necessity, where an infant is to sue his guardian, or is eloined, or the guardian will not sue for him. Cro. Jac. 640.—But for the difference between a *prochein amy* and guardian *vide* Palm. 296. 2 Inst. 250. 390. (b) For the regularity of such admission *vide* 4 Co. 53. b. 2 Inst. 261. Cro. Jac. 641. Palm. 296. Sid. 173. 342. 446. Mod. 48. Vent. 73. 2 Saund. 94. 2 Keb. 627. Lev. 224. 3 Mod. 236. 2 Vern. 342. Pre. Ch. 376. 8 Mod. 25. Fitzgib. 1. 114. 164. 2 P. Wms. 297. 3 P. Wms. 140. 1 Stra. 114. 304. 445. 2 Stra. 1076. Cowp. 128. Co. Litt. 135. b. n. 1.

Stil. 369. The respective courts, in which the suit is commenced, must assign a (c) proper guardian to the infant; and therefore if an infant is sued, the plaintiff must move to have a proper guardian assigned him.

(c) That the court hath been to allow some of the officers of the court, &c., who by reason of their skill make the best guardians, and *prochein amys* for the advantage of the infant. 2 Inst. 261.—That the court of Chancery may assign one of the six clerks to be guardian to an infant. 2 Chan. Ca. 163.—But if there be a guardian appointed by the father, or *ex provisione legis*, as guardian in socage, who acts accordingly, he only shall be admitted to sue for the infant, unless he hath misdemefined himself. Sid. 424. *per Keling C. J.*—That the court may discharge one guardian and appoint another. Stil. 456.—That a husband can't disavow a guardian made by the court for his wife. Vent. 185.—[A person who is reduced by age or infirmities to a second infancy, may also defend by guardian. Pr. Ch. 429.]

(d) And therefore *prochein amy* must take care of it; for if the bill is dismissed, he may bring must (d) pay the costs thereof. a bill, as *prochein amy* to an infant without his consent, because it is at his peril that he brings it to be answerable for the event. Abr. Eq. 72. *Andrews end Cradock.*

Where a bill is brought against an infant (if in town) he must appear in court, and have a guardian assigned him, by whom he may defend the suit; if in the country, he sues out a commission to assign a guardian, and put in his answer; and whether he pleads, answers, or demurs, still it must be done by his guardian; for if it is the plea, answer, or demurrer of the infant, without doing it by the guardian, it will be irregular.

But where the infant neglects to appear, or to have a guardian assigned, it is a motion of course (he being in contempt to an attachment) to pray for a messenger to bring him into court, and when he is there, the court always assigns him a guardian; but it is (e) doubted, whether this can be done against a peer of the realm who is an infant, and whose person is sacred.

(e) *Uide tit. Privilege.*

(E) At what Time the Authority of a Guardian ceases, and what Acts will determine it.

Lit. § 103.
Co. Litt. 75.
2 Inst. 135.

THE authority of a guardian in chivalry did not determine till the heir, if a male, came to the age of twenty-one years; because it was presumed, that till that age he was not capable of doing knight-service, and attending his lord in the wars: the guardianship of an heir female determined at her age of fourteen

at common law, but by *Westm.* 1. the lord had the wardship till she attained the age of sixteen, to tender her convenable marriage: the authority of a guardian in (a) focage ceases at the age of fourteen, at which age the infant may call his guardian to an account, and may choose a new guardian.

(a) As to the guardianship of the father, see *ante*. That committing

waste is a forfeiture of the father's guardianship. Hard. 69.

If a guardian in focage die, the guardianship shall go to the next of kin of the infant, to whom the inheritance cannot descend, and shall not go to the executors of the guardian, because they can take nothing but what the testator had to his own use; besides, the law gives the guardianship to such persons as are presumed to have most affection for the infant; and therefore will not entrust executors with it, who may happen to be strangers.

Plow. 293.
b. 2 Inft.
260. Co.
Lit. 89. S.P.

If a feme infant, who is in ward, marries, at common law the guardianship is determined, because the husband is immediately on the marriage become her guardian; and it would be inconsistent, that she should at the same time be under the power of another guardian.

2 Inft. 260.
[1 Vez. 91.
Though the court of Chancery cannot appoint a guar-

dian after marriage, yet it will not determine a guardianship, or discharge any order made for a guardian because of marriage. Roach v. Garvan, 1 Vez. 159.]

If a feme guardian in focage marries, the husband becomes guardian in right of his wife; but if she dies, the guardianship ceases as to him, and shall go to the next of kin to the infant.

Plow. 294.
a. Co.
Lit. 89. a.
S. P.

A guardian in focage shall not forfeit his interest by outlawry, or attainder of felony, or treason; because he hath nothing to his own use, but to the use of the heir.

Co. Lit.
88. b.
Godb. 316.

(F) Of the Guardian's Interest in the Body and Lands of the Ward, and his Remedy for the same.

AS the law hath invested guardians not with a bare authority only, but also with an interest till the guardianship ceases, so it hath provided several remedies for guardians against those who violate that interest; and therefore at common law there were remedies both droitual and possessory, to recover the guardianship.

2 Inft. 90.
9 Co. 72.

As at common law there was the writ *de custodia terre &c habendis*, called the writ of right of ward, wherein the guardian recovered the custody of body and lands; but if the ward were married, then the guardian was driven to this action of trespass, *Quare se intrusit maritaggio non satisfact*. But this was remedied by the statute of *Merton, cap. 6.* which provides, that in the writ of right of ward, the plaintiff shall recover the value of the marriage.

2 Inft. 90.

Also at common law, an action of trespass lay for the guardian, which was a possessory action; and in this at common law he could only recover damages for his ward, and not the ward itself; but

2 Inft. 90.
438.
9 Co. 72.
Hussey's

case.

Hob. 94.

(a) And by the equity

of this statute, a writ of ravishment lay for the guardian in focage, as a writ *in consimili casu*. Co. Lit. 89. b. F. N. B. 139. I. — And it seems, that a testamentary guardian may, by 12 Car. 2. c. 24. which gives such guardian the same remedies that a guardian in focage had, have a writ of ravishment of ward. 3 Keb. 446.

5 Keb. 446.

but the statute of (a) *Westm. 2. cap. 35.* gives a writ of ravishment of ward, in which the plaintiff recovered the body of the heir, and not damages only.

If upon a *habeas corpus* an infant be brought into court, and it appear, that the question is touching the right of guardianship, the court cannot deliver the infant to the guardian; for he may have a writ of ravishment of ward.

(G) What Things a Guardian may lawfully do, and will bind the Infant.

Co. Lit.

88, 89.

Lit. § 123,

124.

(b) May avow in his own name.

Vaugh. 18.

Bro. tit.

Gard. 70.

tit. *Garden*,

39.

2 Roll.

Abr. 41.

Briden and

Husley, Cro.

Jac. 55. 98.

Shopland

and Ridler.

FROM the authority and interest, which the policy of the law has invested guardians with, it appears, that a guardian may do several acts which will bind the infant; such as making leases for years, which he may do in his own (b) name, and such lessee may maintain ejectment thereupon.

Therefore if a guardian in focage makes leases for years, to continue beyond the time of his guardianship, such leases seem not to be absolutely void by the infant's coming of age, but only voidable by him, if he thinks fit; for they were not derived barely out of the interest of the guardian, or to be measured thereby, but take effect also by virtue of his authority, which for the time was general and absolute; and therefore all lawful acts done during the continuance of that authority are good, and may subsist after the authority itself by which they were done is determined; and consequently the infant, when he comes of age, may, by acceptance of rent, or other act, if he thinks fit, make such leases good and unavoidable: but a guardian *pur nurture* cannot make any leases for years, either in his own name, or in the name of the infant; for he hath only the care of the person and education of the infant, and hath nothing to do with his lands.

Leon. 158.

322.

4 Leon. 7.

Owen, 45.

56. Willis

and White-

wood.

(c) In Hut-

ton, 105.

this case is

cited, and

there said,

that in

strictness it

could not

amount to a

surrender properly

A. lets lands to *B.* for four years, and dies, and the lands being holden in focage, and the heir under fourteen, the guardian in focage, by indenture, before the first lease is expired, lets the same lands in his own name to *B.* for eight years; and if by this acceptance of a new lease from the guardian in focage the first lease was surrendered, was the question; and it is said to be holden by the court, that it was surrendered; or if it could not be properly called a surrender, for want of a reversion in the guardian in focage, yet they held, that at least the first lease was thereby (c) determined by admittance of the lessor's power to make such present lease, which, if the first should stand in the way, he could not do.

surrender properly so called, but that however it amounted to a determination.

In

In ejectment the case was, that one *A.* devised lands to *B.* his son in tail, with divers remainders over, and makes one *C.* overseer of his will, and willed that he should have the education of his son till he came to twenty-one, and to receive, set, and let for the said *B.* the said lands so given him, and thereof to account to the said *B.*, being allowed his charges, &c. *C.* makes a lease for seven years in his own name, with reservation of rent to himself, and this lease, by computation, was to continue half a year after *B.*'s attaining his full age; and if this lease was good for any part of the term was the question, *C.* being dead, and *B.* not of age? And it was argued to be good for the whole term, or at least during the minority of the son, and only void for so much as exceeded the full age of the son; and that *C.* had an interest in the land, and not a bare authority only; for then all leases must have been made in the name of the infant, and so he might avoid them whenever he thought fit, which the testator never intended to empower him to do: but *Popham*, *Clench*, and *Fenner* held, that as this devise is, *C.* was but a guardian for nurture, and could not make leases at his own will and pleasure, for then he might make them for an hundred years; but here he can only make leases at will; for there is no other time certain appointed, and he is but in the nature of a bailiff, and accountable; and therefore it was adjudged that the lease was void; from which case it appears, that if the authority had been sufficient to enable him to have made leases for years, such leases made by him, during the continuance of that authority, would not have determined therewith, but should have subsisted during the whole term for which they were made; and the infant in such case could not when he came of age have avoided them, as he may leases made by his guardian in socage, if he thinks fit; because the lessee would have been in by the will and devise, not by the guardian *pur nurture*.

Cro. Eliz.
673. 734.
Piggot and
Garnish.

If a woman who is guardian in socage to her son marries again, and her husband and she join in a lease of the infant's lands, this lease upon the death of the husband becomes void; for the interest she had in the lands was in right of the infant, and therefore shall not bind her, as those acts shall in which she joins with her husband in parting with her own possessions.

Plow. 293.
Osborne's
case.

A guardian in socage may grant copyhold estates in his own name, and such grant shall bind the heir, for he is *dominus pro tempore*, and shall take the profits to his own use, though he shall account for them; and he shall keep courts in his own name.

Cro. Jac.
55. 99.
Poph. 127.
Owen, 115.
Godb. 145.

Roll. Abr. 499. 2 Roll. Abr. 42.

Also it hath been resolved, that a guardian in socage may grant copyholds in reversion, according to the custom of the manor, and that such grants shall be good, though they come into possession during the nonage of the infant.

Mich.
8 W. 3. in
C. B. Lade
and Barker.

A guardian or *prochein amy* may make partition in behalf of an infant, and it will bind the infant, if equal; for the guardian is appointed by the law to take care of the inheritance of the infant; and this separation and division of his part from what belongs

2 Roll.
Abr. 256.

longs to another is so far from being a prejudice to the infant, that it is really for his benefit and advantage.

Co. Lit. 17. As the authority and interest of a guardian extend only to such things as may be for the benefit and advantage of the infant, and whereof he may give an account; on this foundation it is holden, that a guardian cannot present to any benefice in right of the heir, because he can make no advantage thereof (for that would be simony); and consequently has nothing therein whereof he can give an account, and therefore the (a) infant himself shall present thereto.

the guardian may present in his name. — But *Parson's Law*, c. 10. f. 76. makes a *quære* hereof, and supposeth that it must be intended of a guardian by knight-service, and not a guardian in focage.

— And in 3 Inst. 156. it is said by my Lord Coke, that the heir shall present of what age soever he be, and not the guardian. [See *acc. Arthington v. Coverley*, 2 Eq. Ca. Abr. 518. Mr. Hargrave observes in his edition of Co. Lit. note 1. 89. a., that though this last case, “may remove all doubts about the legal right of an infant of the most tender age to present, still it remains to be seen whether the want of discretion would induce a court of equity to control the exercise, where a presentation is obtained from the infant without the concurrence of the guardian.”]

42E.3. 130. But yet a presentment made by the guardian in the name of the heir, is a good title to the heir in a *quære impedit*.

Hob. 132. Also a guardian in focage of a manor to which an advowson is appendant, if he be disturbed, shall have a *quære impedit* in his own name, although he can make no advantage thereof.

Carth. 79. If a guardian puts in an answer to a bill in Chancery for an infant, on oath, such answer shall not conclude the infant, nor be (b) read in evidence against him; for the effect of an infant's answer to a bill in Chancery is to no other purpose than to make proper parties, so as to have an opportunity to take depositions, and to examine witnesses to prove the matter in question.

Eq. Rep. 4. 1 P. Wms. 504. 2 P. Wms. 387. 401. 3 P. Wms. 237. [Exceptions cannot be taken to an infant's answer. *Stradwick v. Pargiter*, Bunb. 338. Nor will an infant's not replying to an answer, be an admission of the facts in the answer, as in the case of an adult, for an infant can admit nothing. *Legard v. Sheffield*, 2 Atk. 377.] (b) If an infant put in an answer by guardian, and there be a decree against him, without any day given him to shew cause, such answer shall not be read or admitted as evidence against him when he comes of age; but if a superannuated defendant put in an answer by his guardian, it shall be read against him at any time after, for he is supposed to grow worse, and is not to have a day to shew cause. Abr. Eq. 281. *Leving and Caverley*.

Abr. Equ. An estate having descended to an infant, subject to incumbrances; and the question being, whether a guardian might, without the direction of a court of equity, apply the profits to discharge the incumbrances, or the interest of them, or whether they should not be accounted personal estate, and so the administrator of the infant be entitled to them, if the infant died in his minority; it was holden by the court, that a guardian, without any direction, may pay the interest of any (c) real incumbrance, and the principal of a mortgage; because that is a direct and immediate charge on the land, but not any other real incumbrance.

2 Chan. Ca. 197. and *vide* Chan. Ca. 156. 1 Vern. 436. *infra*.

2 Vern. 606. And therefore where a widow, who was guardian to her son, received the rents and profits of his estate, and paid off debts by specialty, but took assignments of the bonds, the son dying in his minority,

Waters and Ebral.

minority, she brought her bill against the defendant the heir, for a discovery of assets by descent to satisfy the money due by bond, she claiming the profits as administratrix to her son; it was holden by the court, that the guardian was not compellable to apply the profits of the estate of the infant heir to pay off the bond debts.

If a guardian borrows money of *A.* to pay off an incumbrance on the infant's estate, and promises to give *A.* security for his money, but dies before it is done; though *A.*'s money is applied to pay off the incumbrance, yet the court will not decree him satisfaction out of the infant's estate; but if the sum disbursed exceeds the profits of the estate, for so much *A.* shall have an account as for money due to the guardian, and it shall be raised out of the infant's estate.

2 Vern. 480.
Hooper and
Eyles.

A guardian to an infant, having a considerable sum of money in his hands that was raised out of the infant's estate, lays out, with the consent of his grandmother, 3000*l.* in a purchase of lands which lay contiguous to the infant's estate, and takes the purchase in the name of *J. S.* for his benefit, if when he came of age he should agree thereto, and allow that money on account; the infant dying in his minority, it was holden by my Lord Chancellor, *C. B. Atkins*, and *J. Lutwyche*, against the opinion of the Master of the Rolls, that though neither the heir nor administrator of the infant were entitled to the lands, yet the guardian must account for this 3000*l.* to the administrator of the infant; and that it was not in the (a) power of the guardian, without the direction of this court, to turn the personal into real estate, by which it would descend to the heir; and that the objection, that an infant may make a will at seventeen of his personal estate, but not of his real, was not answered.

Vern. 403.
435. Earl
of Win-
chelsea v.
Norcliff.
[(a) Where
the com-
mittee of a
lunatick in-
vested part
of the luna-
tick's per-
sonal estate
in a pur-
chase of
lands made
in the luna-
tick's name;
it was hold-
en, that he
had exceed-
ed his power,

by changing the personal estate into a real, and thereby defeating the next of kin in favour of the heirs at law; and therefore the court decreed, that the purchased lands should be sold, and the money divided amongst the next of kin, according to the statute of distributions. 2 Vern. 192. *Awdley and Awdley*. A guardian cannot change the nature of the ward's estate, unless by some act manifestly for the ward's advantage. *Tullitt v. Tullitt*, Ambl. 370. Therefore, where an estate in mortgage descends to an infant, the guardian must not let the interest run in arrear to increase the personal estate, but should regularly apply the profits of the estate to keep it down. *Jennings v. Looks*, 2 P. Wms. 278.]

A mother, as guardian to her infant son, had out of his personal estate paid off a mortgage; the infant afterwards died, and the estate descended to a remote heir, and then the mother would have had back the money, but the court denied her any relief.

2 Vern. 193.
Zouch and
Lloyd, cited.

(H) Of the Infant's Remedy against his Guardian for Abuses by him.

AT common law, both a prohibition of waste and an action of waste lay against a guardian in chivalry and a guardian in socage, for a voluntary, but not for permissive waste, or waste done by a (b) stranger.

2 Inst. 305.
(b) But if
there be two
jointenants
of a ward,
3 E. 3. 18.

and the one do waste; this is the waste of both, for he is no stranger.

3 Inst. 305.

If a guardian suffereth a stranger to cut down timber trees, or to prostrate any of the houses, and doth not, according to his duty and office as guardian, endeavour to keep and preserve the inheritance of the ward in his custody and keeping, and doth not prohibit and withstand the wrong-doer; this shall be taken in law for his consent, according to the rule, *qui non prohibet quod prohibere potest, assentire videtur*; and if such waste and destruction be done without the knowledge of the guardian, or with such force as he could not withstand, then ought the guardian to cause an assise to be brought against such wrong-doers, by the heir, wherein he shall recover the freehold, and damages for such wrong and disherison.

2 Inst. 305.

And if the heir brings his action of waste within age, the judgment according to the statute of *Glocester*, 6 Ed. 1. cap. 5. shall not only be to recover *locum vastatum*, but the guardian shall lose the whole wardship, and yield to the heir single damages, if the wardship be not sufficient to satisfy the damages.

2 Inst. 305.

If the guardian doth waste, and after assigneth over his interest, an action of waste lieth against the grantor in the *tenet*.

2 Inst. 306.

Also if the waste be committed so near the time of the infant's coming of age, that he could not conveniently bring his action of waste during his minority; yet after the determination of the guardian's interest, he may bring his action of waste, and in such case, as he cannot recover the wardship which is ended, he shall by the statute of *Glocester* recover treble damages.

2 Inst. 413.

By *Westm.* 2. cap. 5. if lessee for years, or guardian alien in fee, the remedy for recovering the freehold shall be by an assise of *novel disseisin*, and both the feoffor and feoffee shall be esteemed disseisors, and the survivor of them shall be liable to this remedy. So, if either happen to die, he that survives may be construed a disseisor, and as such liable to this action.

Not only guardians in chivalry, but in socage, and by nature, come within this law of *Westm.* 2. So also their alienations not only in fee, but in tail, or for life, are within the act.

Bro. Disseisin, 95.

[So jealous are courts of equity of the influence arising from this relation, that they will in general rescind any transaction between guardian and ward. See the cases referred to *supr.* tit. *Fraud*, 306.]

If a guardian accepts of a feoffment from his ward, the ward may bring an assise against him as a disseisor; for the guardian acts contrary to his duty, when he assents to any alienation made by his infant; for it is his duty to protect the inheritance of his ward, and to deliver it up to him at full age, and not to bring it into his own family.

Co. Lit. 57.

b. 271. a.

2 Inst. 134.

[P. 9 Car.

C. B. on the

argument of

the case of

Blundell v.

Eaugh,

commonly

called the Earl of Nottingham's case, Justice Barclay said, that he whom Lord Coke in this case calls an

If a guardian, after the full age of the heir, continues in possession, he is an abator, and an assise of *Mortdancer* lies against him by the heir; but he cannot be deemed a disseisor, because he does not actually oust the heir of his freehold, which is required in a disseisin, but holds him out by an intermediate entry between him and his ancestor, which makes the distinction between an abatement and a disseisin.

Abator,

Abitor, must be taken for a disseisor, as he had actual possession by the possession of the guardian. Lord Nott. MSS.—See Cro. Car. 302. Lit. Rep. 372. 1 Vent. 55. So. Co. Lit. 271. a. n. 2. 13th ed. t.]

If an infant appears by guardian and suffers a recovery, this shall bind him; and one of the reasons hereof is, that if the recovery be to the prejudice of the infant, he has his (a) remedy for it against his guardian, and may reimburse himself out of his pocket, to whom the law had committed the care of him.

Roll. Abr.

731.

But for this vide tit.

Fines and Recoveries.

(a) If a

guardian faint pleads or misleads, the infant hath an action against him. Dyer, 104. b. Mod. 48, 49. A guardian suffered a dowress to recover at law, by not setting up a term which was created for protecting a purchaser, and the infant was relieved in equity. Preced. Chan. 151. 2 Vern. 378. S. C. 1 P. Wms. 137. S. C. 1 Br. P. C. 137.

Mod. 48, 49.

2 Vern. 378. S. C.

(I) Of obliging a Guardian to account, and what Allowance he shall have.

BY the (a) common law, guardians in socage are accountable to the infant, either when he comes to the age of (b) fourteen years, or at any time after, as he thinks fit.

Co. Lit. 87.

(a) At common law, executors

could not have an action of account, nor could any but the king have such an action against them; for matters of account lie so much in privity between the parties, that those who are strangers thereto can neither tell what allowances ought to be made by the one party, or what might be alleged in discharge of the other; but by *Westm.* 2. cap. 23., if the heir make his will, (which it seems to be agreed he may now do at the age of fourteen), his executors shall have an action of account against guardian in socage; and by 25 E. 3. c. 5., executors of executors may have such an action; and by 31 E. 3. c. 11., administrators; and by 4 & 5 Ann. c. 16., an action of account lies against the executors of a guardian, bailiff or receiver. Co. Lit. 87. (b) That an infant may by his *prochein amy* call his guardian to an account even during his minority. 2 Vern. 342. 1 P. Wms. 119. [The court of Chancery will permit a stranger to come in and complain of the guardian and abuse of the infant's estate. *Earl of Pomfret v. Lord Windfor*, 2 Vez. 484.]

But the guardian, on his account, shall have allowance of all reasonable expences; and if he is (c) robbed of the rents and profits of the land without his default or negligence, he shall be discharged thereof upon his account; for he is in the nature of a bailiff or servant to the infant, and undertakes no otherwise than for his diligence and fidelity.

Co. Lit.

89. a.

(c) So, if the infant's estate suffers by thunder, lightning,

and tempest, or other inevitable accidents. 8 Co. 84.

If a man enters as guardian into the lands of an infant, who has no title to be guardian, it is at the (d) election of the infant to make him a disseisor on account of his wrongful entry upon, and actual ouster of, such infant, or else dissemble the wrong, and call him to an account as guardian.

Roll. Abr.

661.

Cro. Car.

221.

(d) If guardian in socage oc-

cupy after the heir attain to the age of fourteen years, he may be charged as bailiff.

2 Inst. 380.

If a man during a person's infancy receives the profits of an infant's estate, and continues to do so for several years after the infant comes of age, before any entry is made on him; yet he shall (e) account for the profits throughout, and not during the infancy only.

Abr. Eq.

280. Yallop and Holworthy.

(e) That if a man intrude upon

an infant, he shall receive the profits but as guardian, and the infant shall have an account against him in Chancery. Vern. 295.

Preced.

Chan. 535.

A receiver to the guardian of an infant, who has had his account allowed him by the guardian, shall not be obliged to account over again to the infant when he comes of age.

2 Chan.

Rep. 67.

Wale and

Buckley.

2 Chan.

Ca. 245.

If a guardian takes a bond for the arrears of rent, he thereby makes it his own debt, and shall be charged with it.

If a guardian to an infant, whose lands are incumbered to the value of 600*l.* buys it off with 100*l.* of the infant's money, he shall not charge the infant with the 600*l.*

Habeas Corpus.

(A) Of the Nature and several Kinds of Writs of *Habeas Corpus*.

(B) Of the *Habeas Corpus ad Subjiciendum*: And herein,

1. What Courts have a Jurisdiction of granting it.
2. To what Place it may be granted.
3. In what Cases it is to be granted, and where it is the proper Remedy.
4. How far the Courts have a discretionary Power in granting or denying it: And therein of the *Habeas Corpus Act*.
5. Of the Manner of suing it out, and the Form of the Writ.
6. To whom it is to be directed.
7. By whom to be returned.
8. Of the Manner of compelling a Return, and the Offence of a false Return.
9. What Matters must be returned together with the Body of the Party.
10. Where the Return shall be said to be sufficient, and to warrant the Commitment.
11. Whether the Party can suggest any Thing contrary to the Return.
12. Whether any Defect in the Return may be amended.
13. What is to be done with the Prisoner at the Return: And therein of bailing, discharging, or remanding him.

(C) Of the *Habeas Corpus ad faciendum & recipiendum*.

(A) Of

(A) Of the Nature and several Kinds of Writs of Habeas Corpus.

WHEREVER a person is restrained of his liberty by being confined in a common gaol, or by a private person, whether it be for a criminal or civil cause, he may regularly by *habeas corpus* have his body and cause removed to some superior jurisdiction, which hath authority to examine the legality of such commitment, and on the return thereof either bail, discharge, or remand the prisoner. Vaugh. 136. Bushell's case. And that it is at this day the most usual remedy to be relieved against a wrongful imprisonment.

The *habeas corpus ad subjiciendum* is that which issues in criminal cases, and is deemed (a) a prerogative writ, which the king may issue to any place, as he has a right to be informed of the state and condition of the prisoner, and for what reasons he is confined. It is also in regard to the subject deemed his writ of (b) right, that is, such an one as he is entitled to (c) *ex debito justitiæ*, and is in nature of a writ of error to examine the legality of the commitment; and therefore commands the day, the caption, and cause of detention to be returned. 2 Inst. 55. 4 Inst. 182. (a) Cro. Jac. 543. 2 Roll. Abr. 69. (b) That it is an ancient and legal writ. Cro. Car. 466. But it is no original writ. Carter, 221. per Vaughan. (c) 4 Inst. 290. * Issued in vacation, and returnable immediately before a judge at his chambers; does not expire by the coming in of the term; but defendant may be brought into court upon the old writ. 1 Bur. 480. 542. 606.

The *habeas corpus ad faciendum & recipiendum* issues (d) only in civil cases, and lies where a person is sued, and in gaol, in some inferior jurisdiction, and is willing to have the cause determined in some superior court, which hath jurisdiction over the matter; in this case the body is to be removed by *habeas corpus*, but the proceedings must be removed by *certiorari*. For this vide infra. (d) If upon this writ a civil action, and also a matter of crime be returned; as if a person be arrested for debt, and also charged with a warrant of a justice of peace for felony; in such case, 1. If it appear to the judge or court, that the arrest for debt, or other civil action, is fraudulent, they may remand him. 2. If it be found real, they may commit him to the King's Bench with his causes, though they are matters of crime; for that court hath consueance as well of the crime as of the civil action; but then in the term the court may take his appearance or bail to the civil action, and remand him, if they see cause, as to the crime to be proceeded on below; but upon the writ *ad faciendum & recipiendum*, there ought not singly a matter of crime to be returned, for that belongs to the *habeas corpus ad subjiciendum*. 2 Hal. Hist. P. C. 145. & vide 6 Mod. 133.

There is likewise a writ of *habeas corpus ad respondendum*, where a person is confined in a gaol for a cause of action accruing within some inferior court; and a third person hath also a cause of action against him; in which case he may have this writ in order to charge him in some superior court; for inferior courts being tied down to causes arising within their own jurisdiction, the party would be without remedy, unless allowed to sue him in another court. (e) But it seems, that regularly a person confined in *B. R.*, cannot be removed to the *C. B.* by this writ, nor *vice versa*; for in these cases there can be no defect of justice, as these courts have (f) consueance as well of local as transitory actions. Dyer, 197. a. 249. pl. 84. 296. 307. Mod. 235. Styl. Praet. Regist. 330. 2 Str. 936. 2 Burr. 1048. (e) If one in the Counter be removed into the King's

Bench by *habeas corpus*, and intending to go over to the Fleet, procure some friend to bring a *habeas corpus* to remove him thither, he shall not be removed thither till he has answered to the cause in *B. R.*, for

for he shall not compel the plaintiff to follow after a prolling defendant; and so *vice versa* of the *Common Pleas*, each court shall retain the defendant where he is first attached, and after he has answered there, he may be carried anywhere. Salk. 350. pl. 1. [Where a defendant charged with process out of *B. R.* is removed before declaration to the Fleet prison, the plaintiff, in order to enable himself to declare against him in *B. R.*, must remove him there by this writ; otherwise his proceeding must be in *C. P.* Maddock v. Fletcher, Barnes, 384. Beasley v. Smith, *id.* 402. If defendant be removed after declaration delivered, the plaintiff may proceed where he hath declared. Ash v. Day, *id.* 384.] (f) And therefore this writ lies not to a county palatine. Salk. 354. pl. 17.—nor to the cinque ports, unless the action be local, so that they cannot have consueance of it. Mod. 20. 3 Mod. 22. 12 Mod. 666. [This writ doth not lie for the plaintiff in an inferior court to remove the body of the defendant into *B. R.* to answer to a new action there for the same debt. Mellome v. Gardner, Cowp. 116. If a defendant is in custody at the suit of the crown, he cannot be turned over on a *habeas corpus* to another prison at the instance of a private person for debt, on an allegation of a pardon by act of parliament, but it must be by suggestion on record, that the crown may traverse it. Rex v. Pawlett, Andr. 274. A prisoner in the Fleet for contempt in the Exchequer in not paying a debt to the crown, may be brought into *B. R.* by *habeas corpus*, and surrendered to the marshal, in discharge of bail in another cause, and cannot be remanded to the Fleet on motion; but a *habeas corpus* must be brought from the Exchequer, which the marshal will return there, and they will remand to the Fleet. So, in civil causes between subject and subject, and in criminal causes at the suit of the crown. Clitty's case, 1 Wils. 248. See too the case of the bail of Poice and Sellers, 1 Str. 641. A *habeas corpus* may be had to bring up an impressed man, or a soldier, in discharge of bail; but as soon as he is surrendered and committed, he will be discharged. Bond v. Isaac, 1 Burr. 339.]

(a) There is also a writ of *habeas corpus ad deliberandum & recipiendum*, which lies (b) to remove a person to the proper place or county, where he committed some criminal offence,

after a judgment; and on this writ the attorney for the plaintiff must indorse the number-roll of the judgment on the back of the writ. Sid. 100. Styl. Regist. 331. [And this writ as well as the *habeas corpus ad respondendum* should be directed to the warden of the Fleet, or keeper of any inferior prison, returnable at a day certain in court. Tidd's Pr. 170, 171.] — *Habeas corpus* upon a *cessi*, where the party is taken, and in execution in the court below. — So, upon an attachment out of Chancery, and a *cepi corpus* returned by the sheriff, the next step is a *habeas corpus*; for the sheriff having executed the command of the writ of attachment by taking the body, he cannot carry him out of the county without the king's writ. — There is also a writ of *habeas corpus ad testificandum*, which is to remove a person in confinement in order to give his testimony in some court of justice; for which *vide* Styl. 119. 126. 230. 3 Keb. 51. Comib. 17. 48. — * *Habeas corpus ad testificandum* lies to remove a prisoner in execution, to be a witness; yet where it appears to be a contrivance, the court will not grant it; as if *A.* convicted of bribery on the oath of *B.*, indicts him for perjury on that very oath. Rex v. Furbage. 3 Bur. 1440. [It was refused to bring up a person who was in the capacity of a common sailor on board a man of war, and not detained there as a prisoner, because there was no affidavit of his having been served with a subpoena, and being willing to attend. Rex v. Roddam, Cowp. 672. — It will not be granted to bring up a prisoner of war; the usual way of obtaining the presence of such a witness, is by order from the secretary of state. Furley v. Newnham, Dougl. 419.] (b) A person committing a crime in *Barbadoes*, and apprehended here, may be sent thither by *habeas corpus* and tried. 3 Keb. 560. 566. 568. Warner's case. — Also, since the *habeas corpus* act, a person committing a criminal offence in *Ireland* being here, may be sent to *Ireland* and tried there, 2 Vent. 314. Col. Lundy's case. 2 Stra. 848. Barnard. K. B. 225. Fitzgib. 111. pl. 12. 14 Vin. Abr. 569. pl. 7. — Also, justices of gaol-delivery may send prisoners by *habeas corpus* to the sheriff of another county, and a precept to the sheriff of that other county to receive them, namely for a felony committed in that county, though that county be out of the circuit of the justice that sends them. 2 Hale's Hist. P. C. 37. That if any *habeas corpus* come to receive a prisoner from another gaol, the gaoler is to take notice of the offence for which he stood committed at the other gaol, and to inform the court, that if he shall happen to be acquitted or have his clergy, he may yet be remanded to the former gaol, if there be cause. Kelynge 4. — And that if any *habeas corpus* come to the gaolers to remove a prisoner, that with the prisoner they also certify the cause for which he stood there committed. Kelynge, 4.

(B) Of the *Habeas Corpus ad Subjiciendum*: And herein,

1. What Courts have Jurisdiction of granting it.

IT is clear, that both by the common law, as also by the statute*, the courts of Chancery and King's Bench have jurisdiction of awarding this writ of *habeas corpus*, and that without any privilege in the person for whom it is awarded; but it seems, that by the common law the court of King's Bench could only have awarded it in term-time, but that the Chancery might have done it as well out as in term, because that court is always open.

If the *habeas corpus* issues out of Chancery, and on the return thereof the Lord Chancellor finds that the party was illegally restrained of his liberty, he may discharge him, or if he finds it doubtful he may bail him; but then it must be to appear in the court of King's Bench, for the Chancellor hath no power to proceed in criminal causes; or the Chancellor may commit the party to the *Fleet*, and in term-time may *propriis manibus* deliver the record into the King's Bench, together with the body; and thereupon the court of King's Bench may proceed to bail, discharge or commit the prisoner.

If the *habeas corpus*, and also a *certiorari*, be granted returnable in Chancery, and the cause and body be returned there, they may be sent into the King's Bench; if the body only be returned with the causes, by *habeas corpus* into the Chancery, and delivered over into the King's Bench, they may proceed to the determination of the return, and either by *procedendo* remand him, or grant a *certiorari* to certify the record also, and thereupon commit or bail the prisoner, as there shall be cause.

But sending an *habeas corpus ad faciendum & recipiendum* by the Chancellor for persons arrested in civil causes, especially being in execution, is neither warrantable by law nor ancient usage, and particularly forbidden by the statute 2 H. 5. stat. 1. cap. 2. as to persons in execution.

There are several strong opinions, that no *habeas corpus ad subjiciendum* could by the common law issue out of the courts of Exchequer or Common Pleas, unless it were in the case of privilege, because these courts are confined to civil causes merely; and therefore unless the party were an attorney, or entitled to the privilege of the court as an officer, &c.; or unless there had been a suit commenced against him in those courts, they could not grant a *habeas corpus ad subjiciendum*, though they might any other writ of *habeas corpus*.

But notwithstanding these opinions, it was holden in *Bussell's* case, that the court of Common Pleas may issue a *habeas corpus ad subjiciendum*, and that if it appeared on the return thereof that the party was imprisoned and detained against law, the court might,

2 Inst. 55;
4 Inst. 190.
1 And. 297.
2 Jon. 13.
14. 17.
* 31 Car. 2.
c. 2.

2 Hal. Hist.
P. C. 147.
2 Hawk.
P. C. c. 15.
§ 81.

2 Hal. Hist.
P. C. 147, 8.

2 Hal. Hist.
P. C. 148.

Dyer, 175.
b. pl. 26.
2 Inst. 55.
3 Leon. 18.
4 Inst. 70.
182. 290.
Mod. 235.
2 Mod. 198.
Vaugh 195.
Carter, 221.
2 Vent. 22.

Vaugh. 155.
and several
precedents
of writs of
habeas corpus
of this

kind out of the court of C. B. [See Wilkes's case, 3 Wils. 172. Wood's case, 2 Bl. Rep. 745. S. C.] though there was no privilege, in the case, discharge him; for that to remand him would be an act of injustice in the court, and contrary to *magna charta*.

2 Hal. Hist. P. C. 144. Also, by the statute of 16 Car. 1. cap. 10. they have an original jurisdiction to bail, discharge, or commit, upon an *habeas corpus* for one committed by the Council-Table, as well as the King's Bench, and that although there be no privilege for the person committed.

2 Jon. 14. 37. Also, by the *habeas corpus* act, 31 Car. 2. cap. 2. any of the said courts in term-time, and any judge of either Bench, or baron of the Exchequer, being of the degree of the coif, in the vacation, may award a *habeas corpus* for any prisoner whatsoever, and on the return thereof discharge him, if it shall clearly appear that the commitment was against law, as being made by one who had no jurisdiction of the cause, or for a matter for which no man ought by law to be punished; or bail him, if it shall be doubtful whether the commitment were legal or not; or remand him, according to the nature and circumstances of the case.

2. To what Places it may be granted.

2 Roll. Abr. 69. Cro. Jac. 543. It hath been already observed, that the writ of *habeas corpus* is a prerogative writ, and that therefore by the common law it lies to any part of the king's dominions; for the king ought to have an account why any of his subjects are imprisoned, and therefore no answer will satisfy the writ, but to return the cause with *paratum habeo corpus*, &c.

Palm. 54. Hence it was holden, that this writ lay to (a) *Calais* at the time it was subject to the king of *England*.
(a) Error of a judgment in the King's Bench in *Ireland*; it was suggested, that the plaintiff was in execution upon the judgment in *Ireland*; and the court seemed to be of opinion, that a *habeas corpus* might be sent thither to remove him, as writs mandatory had been awarded to *Calais*, and now to *Jersey*, *Guernsey*. Vent 357.—[See acc. 2 Burr. 856.] A *habeas corpus* granted to *Jersey*. Sid. 386.

2 Roll. Abr. 69. Wetherley and Wetherley. It hath been holden, that this writ lies to the *marches of Wales*, as it does to all other courts which derive their authority from the king, as all the courts exercising jurisdiction within his dominions do, and that being a prerogative writ it does not come within the rule *brevia domini regis non currunt*, &c., for that must be understood of writs between party and party.

(b) But a *habeas corpus* ad faciendum & recipiendum does not lie to the cinque ports. Sid. 431. (c) Palm. 54. s. 96. *Bourne's case*. Cro. Jac. 543. S. C. adjudged. 2 Roll. Abr. 69. (d) Latch 160. *Jobson's case*. 3 Keb. 279. Also, it hath been adjudged, that (b) this writ lies to the (c) cinque ports, to *Berwick*, although objected to have been part of *Scotland*, and to the (d) county palatine.

Also, by the *habeas corpus* act, 31 Car. 2. cap. 2. par. 11. it is enacted and declared, "That an *habeas corpus*, according to the "intent and true meaning of the act, may be directed and run "into

“ into any county palatine, the cinque ports, or other privileged
 “ places within the kingdom of *England*, dominion of *Wales*, or
 “ town of *Berwick upon Tweed*, and the isles of *Jersey* or *Guernsey*, any law, &c.”

3. In what Cases it is to be granted, and where it is the proper Remedy.

A *habeas corpus* is a writ of right, which the subject may demand, Vaugh. 136.
 and is the most usual remedy by which a man is restored to his liberty, if he hath been against law deprived of it.

By the 31 *Car. 2. cap. 2. par. 9.* it is enacted, “ That if any
 “ subject of this realm shall be committed to any prison, or in
 “ custody of any officer or officers whatsoever, for any criminal
 “ or supposed criminal matter, that the said person shall not be
 “ removed from the said prison and custody into the custody of
 “ any other officer or officers, unless it be by *habeas corpus*, or some
 “ other legal writ; or where the prisoner is delivered to the con-
 “ stable, or other inferior officer, to carry such prisoner to some
 “ common gaol; or where any person is sent by order of any
 “ judge of assize, or justice of the peace, to any common work-
 “ house or house of correction; or where the prisoner is removed
 “ from one prison or place to another within the same county, in
 “ order to a trial or discharge by due course of law; or in case of
 “ sudden fire or infection, or other necessity, upon pain, that he
 “ who makes out, signs or countersigns, or obeys or executes such
 “ warrants, shall forfeit to the party grieved one hundred pounds
 “ for the first offence, two hundred pounds for the second, &c.”

If a party be imprisoned against law, though he is entitled to a *habeas corpus*, yet may he have an action of false imprisonment, in which he shall recover damages in proportion to the injury done him.

Fitz. corpus cum causa, 2. 9 H. 6. 44. a.
 2 Inst. 55. 10 H. 7. 17. 5 Co. 64. March 117. 11 Co. 98. 99.

But it was holden in the case of *Bushel*, who together with the other jurors appointed to try an indictment for a riot between the king and *Pen* and *Mead*, was fined at the *Old Bailey*, because they found a verdict *contra plenam evidentiam & directionem curiæ in materia legis*; and for non-payment of the fine, divers of them being committed to prison, brought their *habeas corpus* in *C. B.*; that though the imprisonment (a) was illegal, yet that no action lay against the commissioners, because they acted as judges; and commissioners of *oyer and terminer* can no more be punished for an erroneous commitment, than they can be for an erroneous judgment; and the highest remedy the party in this case can have is a writ of *habeas corpus*.

Mod. 119. 3 Keb. 322. 358.

(a) Vaugh. 153. 2 Jon. 13. Sid. 273. 2 Bl. Rep. 1145.

If a husband confine his wife, she may have a *habeas corpus*; but the judges on the return of it cannot remove the wife from her husband.

2 Lev. 128.

A motion was made for a *habeas corpus* to the Lord *Leigh*, to have in court the body of his wife; and the case was, the parties were

Lady Leigh's case, Mich. 26 Car. 2. in B. R.

2 Lev. 128.
3 Keb. 433.
S. C.

[(a) Notwithstanding this decision, a doubt having arisen in my Lord Ferrers' case, whether the court of King's Bench could issue an attachment against a peer during the sitting of Parliament, and execute it upon him only for a contempt of their court, the question was moved in the House of Lords, and after some debate, that House resolved, that neither privilege of peerage, nor obedience to a writ of *habeas corpus* directed to him. See Lords Journals, 7 Feb. 1757, 8 Jan. 1757-1 Burr. 631.]

1 Rex v.
Mary Mead,
1 Burr. 542.
2 Rex v.
James Win-
ton, 5 Term
Rep. 89.

4 Inst. 290.

Vern. 24.
Dominus
Rex v.
Sneller;
& vide
Sid. 181.
Keb. 683.

Salk. 359.
pl. 4. per
Holt, C. J.

were married in 1669, and because they were both within age, no settlement was made; in 1671, Lord Leigh persuades his wife to levy a fine of some lands of 900*l. per ann.* whereof she had the inheritance, to him and his heirs; and because she prayed to advise with her friends, he consued her until her mother had petitioned the king and council; and there the matter was referred to three lords of the council; and they made an award, which the Lady Leigh was ready to perform; but the Lord Leigh brought to her an instrument to be sealed, upon which she made the same request as before, that she might advise with her friends, but he refused to permit it, and presently compelled his wife to go with him to his house in the country, where he made her his prisoner; and though by the barbarous usage of her husband she fell sick, yet he would not let her have physicians or servants to attend her, or to be visited by her friends; & *per cur.* a *habeas corpus* was granted, for this is a writ of right, which the subject may demand, and the king ought to have an account of his subject; and though it was objected that here was no affidavit but of such complaint as the Lady Leigh had made in a letter to her mother, yet the *habeas corpus* shall go to put the lady in a condition to make oath of this matter herself, and to exhibit articles against her husband; for here is sufficient matter to compel him to find sureties of the peace, and of his good behaviour also; for this treatment the lady may sue out a divorce *propter sevitiam*: and in a like case between Sir Philip Howard and his wife a *habeas corpus* was granted; and in this case an attachment may be granted against my Lord Leigh, if he refuses obedience to the writ, for being a contempt, a peer has no privilege (a).

of parliament, extended so far as to exempt a peer or lord of parliament from paying obedience to a writ of *habeas corpus* directed to him. See Lords Journals, 7 Feb. 1757, 8 Jan. 1757-1 Burr. 631.]

[A husband is entitled to a *habeas corpus* for his wife; and though it be suggested by affidavit that articles of separation have been executed between them, yet the court will not therefore supersede the writ, or dispense with the production of the party.]

If a person be taken in the manner within a forest killing or chasing deer, &c., and the officer upon tender of sufficient sureties refuse to bail him, he may have a *habeas* out of the courts at *Westminster*, which courts may bail him to appear at the next eyre holden for the forest; and this the rather, because justice-seats are but seldom holden, and the party, without this remedy, might be obliged to continue a long time in confinement.

If a person be excommunicated, and the *significavit* do not express that the cause of excommunication is for any of the offences within the statute 5 *Eliz. cap. 23.* the remedy expressly appointed upon that statute is a *habeas corpus*, and upon the return of it the parties shall be discharged.

If the chief justice of the King's Bench commit one to the marshal by his warrant, he ought not to be brought to the bar by rule, but by *habeas corpus*.

A person

A person convicted of horse-stealing, and in gaol at *St. Albans*, was brought by *habeas corpus* and *certiorari* to *B. R.*, and the court demanded of him what he could say why execution should not be done upon the indictment; and because he could not shew good cause to stay the execution, he was committed to the marshal, who was commanded to do execution, and the next day he was hanged.

If a person be in custody, and also indicted for some offence in the inferior court, there must, beside the *habeas corpus* to remove the body, be a *certiorari* to remove the record; for as the *certiorari* alone removes not the body, so the *habeas corpus* alone removes not the record itself, but only the prisoner with the cause of his commitment; and therefore, although upon the *habeas corpus*, and the return thereof, the court can judge of the sufficiency or insufficiency of the return and commitment, and bail or discharge, or remand the prisoner, as the case appears upon the return; yet they cannot upon the bare return of the *habeas corpus* give any judgment, or proceed upon the record of the indictment, order or judgment, without the record itself be removed by *certiorari*; but the same stands in the same force it did, though the return should be adjudged insufficient, and the party discharged thereupon of his imprisonment; and the court below may issue new process upon the indictment.

But it is otherwise in a *habeas corpus* in civil causes, which suspends the power of the inferior court; so that if they proceed after, their proceedings are *coram non iudice*.*

under a prels-act, who is not in custody, (either as having absconded, or as being promoted to be a corporal,) cannot bring *habeas corpus*; but the court will, on motion, grant a rule to the commissioners for putting the act in execution, to shew cause why he should not be discharged. *Rex v. Dawes, Rex v. Kestel.* 1 Bur. 636. 7.—If the person confined is too weak to be brought into court, they will make a rule that certain persons shall have access to him. 2 Bur. 1099. 1115.—But will not give that liberty unless to persons who have some pretension to demand it. 3 Bur. 1362.

2 Hal. Hist.
210, 211.
Salk. 325.
pl. 13.
Comb. 2.

Salk. 352.
pl. 13.
* A man
impressed

4. How far the Courts have a Discretionary Power in granting or denying it: And therein of the *Habeas Corpus Act*.

Notwithstanding the writ of *habeas corpus* be a writ of right, and what the subject is entitled to, yet the provision of the law herein was in a great measure eluded by the judges being only enabled to award it in term-time, as also by an imagined notion in the judges that they had a discretionary power of granting or refusing it; but especially by the art and contrivance of officers, to whom it was directed, who used great delays in making any return to it.

By the 31 Car. 2. cap. 2. commonly called the *habeas corpus act*, reciting, "That great delays had been used by sheriffs, gaolers, and other officers, to whose custody the king's subjects had been committed for criminal or supposed criminal matters, in making return of writs of *habeas corpus*, by standing out an *alias* and *pluries*, and sometimes more, and by other shifts, to avoid their yielding obedience to such writs, contrary to their duty and the known laws of the land, whereby many subjects have been

4 Inst. 290.
3 Bulf. 27.

* Upon this statute Dr. Burn observes two things: 1 That although the consuable by his own authority, without any

warrant of commitment may "detained in prison in such cases, where by law they were bailable:" carry an offender to gaol; and this was the method of securing prisoners before there were any justices of the peace; yet since the institution of that magistrate it is better that they be carried before him, to be sent by him to gaol by warrant of commitment; otherwise they have a right to be bailed upon this act whatever the offence may be. 2. That the warrant of commitment ought to set forth the cause specially, that is to say, not for treason or felony in general, but treason for *counterfeiting the king's coin*, or felony for *stealing the goods of such an one to such a value*, and the like, that so the court may judge thereupon whether or no the offence is such for which a prisoner ought to be admitted to bail. Burn. 64.—[Admitted in case of felony by Lord Camden, 3 Wils. 158. 11. St. Tr. 304. but it is said in Lord Montague's case 10 Mod. 334. that a commitment for *treason generally* is good. And so it was holden in Sir W. Wyndham's case, 3 Vin. Abr. 530. Str. 2. A commitment for a libel *generally* is good. 3 Wils. 158. 11. St. Tr. 304.]

It is thereupon enacted, "That whensoever any person shall bring any *habeas corpus*, directed unto any person whatsoever, for any person in his custody, and the said writ shall be served on the said officer, or left at the gaol or prison with any of the under-officers, under-keepers, or deputy of the said officers or keepers, that the said officer or officers, his or their under-officers, under-keepers or deputies, shall within three days after such service thereof; (unless the commitment were for treason or felony, plainly and specially expressed in the warrant of commitment) upon payment or tender of the charges of bringing the said prisoner to be ascertained by the judge or court that awarded the same, and indorsed on the said writ, not exceeding 12d. *per mile*, and on security given by his own bond to pay the charges of carrying back the prisoner if he should be remanded, and that he will not make any escape by the way, make return of such a writ, and bring or cause to be brought the body of the party so committed or restrained unto or before the lord chancellor, or the lord keeper, or the judges or barons of the court from which the said writ shall issue, or such other persons before whom the said writ is made returnable, according to the command thereof; and shall then likewise certify the true causes of his detainer or imprisonment, unless the commitment be in a place beyond twenty miles distance, &c. and if beyond the distance of twenty, and not above one hundred miles, then within the space of ten days; and if beyond the distance of one hundred miles, then within the space of twenty days."

And it is further enacted, § 3. "That all such writs shall be marked in this manner, *per stat'um tricesimo primo Caroli secundi regis*, and shall be signed by the person that awards the same; and if any person shall be or stand committed or detained as aforesaid for any crime, unless for treason or felony, plainly expressed in the warrant of commitment, in the vacation-time, it shall be lawful for such person so committed or detained, (other than persons convict or in execution by legal process) or any one on his behalf, to complain to the lord chancellor, or lord keeper, or any justice of either Bench, or baron of the Exchequer, of the degree of the coif; and the said lord chancellor, &c. justice or baron on view of the copy of the warrant of the commitment, or otherwise an oath that it was denied, are authorized and required,

“ quired, on request in writing, by such person, or any in his behalf, attested and subscribed by (a) two witnesses who were present at the delivery of the same, to grant an *habeas corpus* under the seal of the court, whereof he shall be one of the judges, to be directed to the officer in whose custody the party shall be returnable *immediatè* before the said lord chancellor, &c., justice or baron; and on service thereof as aforesaid, the officer, &c., in whose custody the party is, shall, within the times respectively before limited, bring him before the said lord chancellor, justice or baron, before whom the said writ is returnable; and in case of his absence, before any other of them, with the return of such writ, and the true causes of the commitment and detainer; and thereupon, within two days after the party shall be brought before them, the said lord chancellor, justice or baron, before whom the prisoner shall be brought as aforesaid, shall discharge the said prisoner from his imprisonment, taking his recognizance, with one or more sureties, in any sum, according to their discretions, having regard to the quality of the prisoner and nature of the offence, for his appearance in the King’s Bench the term following, or in such other court where the offence is properly cognizable, as the case shall require; and then shall certify the said writ, with the return thereof, and the recognizance into such court, unless it be made appear to the said lord chancellor, &c., that the party so committed is detained upon a legal process, order or warrant, out of some court that hath jurisdiction of criminal matters, or by some warrant signed and sealed with the hand and seal of any of the said justices or barons, or some justice or justices of the peace, for such matters or offences, for the which by law the prisoner is not bailable.”

(a) One witness, with an affidavit that the other is sick, is sufficient. Comb. 6.

But it is provided, § 4. “ That if any person shall have willfully neglected, by the space of two whole terms after his imprisonment, to pray a *habeas corpus* for his enlargement, he shall not have a *habeas corpus* to be granted in vacation-time in pursuance of this act.”

And it is further enacted by the said statute, § 6. “ That no person, who shall be set at large upon any *habeas corpus*, shall be again imprisoned for the same offence by any person whatsoever, other than by the legal order and process of such court, wherein he shall be bound by recognizance to appear, or other court having jurisdiction of the cause, on pain of 500*l*.”

And it is further enacted, § 7. “ That if any person, who shall be committed for treason or felony, plainly and specially expressed in the warrant of commitment, upon his prayer or petition, in open court, the (b) first week of the (c) term, or the first days of the sessions of *oyer and terminer*, or general gaol-delivery, to be brought to his trial, shall not be indicted sometime in the next term, sessions of *oyer and terminer*, or general gaol-delivery, after such commitment, the justices of the said court shall, upon motion in open court, the last day of the term or

(b) Need not enter his prayer the first week, if there be an act of parliament which suspends the *habeas corpus* act, and takes away

“ sessions,

the power
of bailing
for a time.
Salk. 103.
pl. 2.
[For upon
the alarm

" sessions, set at liberty the prisoner upon bail, unless it appear
" upon oath that the witnesses for the king could not be produced
" the same term; and if such prisoner upon his prayer, &c., shall
" not be indicted and tried the second term or sessions, he shall
" be discharged from his imprisonment."

of any dangerous conspiracy against the government; it hath been usual to suspend the operation of this clause of the statute by passing an act to empower his Majesty to detain for a limited time persons committed by the privy-council for high-treason, suspicion of treason, or treasonable practices, who are not to be bailed or tried by any judge or justice of the peace without order from the council, signed by six of the members. See 34 Geo. 3. c. 54.] (c) That to this purpose the grand sessions of *Wales* is in the nature of a term, so that the party entering his prayer there on the want of prosecution for a term, B. R. may bail him. Comb. 6.

Provided, §. 8. " That nothing in this act shall extend to discharge out of prison any person charged in debt, or other action, or with process in any civil cause, but that after he shall be discharged of his imprisonment for such his criminal offence, he shall be kept in custody according to law for such other suit."

(a) And therefore this statute makes the judges liable to an action at the suit of the party grieved in one case only, which is the refusing to award a *habeas corpus*

And it is further enacted, § 10. " That it shall be lawful for any prisoner as aforesaid, to move and obtain his *habeas corpus*, as well out of the Chancery or Exchequer, as the King's Bench or Common Pleas; and if the said lord chancellor, or lord keeper, or any judge or judges, baron or barons, for the time being, of the degree of the coif, of any of the courts aforesaid, in the (c) vacation-time, upon view of the copy of a warrant of commitment or detainer, or on oath made that such copy was denied, shall deny any writ of *habeas corpus* by this act required to be granted, being moved for as aforesaid, they shall severally forfeit to the party grieved the sum of 500*l*."

in vacation-time, but leaves it to their discretion, in all other cases to pursue its directions in the same manner as they ought to execute all other laws, without making them subject to the action of the party, or to any other express penalty or forfeiture. 2 Hawk. P. C. c. 15. § 24.

It is provided, § 18. " That after the assizes proclaimed for that county where the prisoner is detained, no person shall be removed from the common gaol upon any *habeas corpus* granted in pursuance of this act, but upon such *habeas corpus* shall be brought before the judge of assize in open court, who thereupon shall do what to justice shall appertain."

But it is provided, § 19. " That after the assizes are ended, any person detained may have his *habeas corpus*, according to the direction of this act."

10 Mod.

429. * It shall not be allowed to a person committed for high-treason by rule of court. Stra. 142. A person

In the construction of this statute it was holden by two judges, in the absence of one, and contrary to the opinion of the other, that persons committed by rule of court are not entitled to the benefit of this act; and that none are entitled to make their prayer but such as are committed by a warrant of a justice of peace, or secretary of state, and not those committed by rule of court, for that is not within the meaning of the act, which speaks of a commitment by warrant*.

committed for high-treason done in *Scotland*, is not within the act. *Rex v. Mackintosh*. Stra. 308. A person committed to the *Tower* for high-treason, cannot make his prayer at the *Old-Bailey*, to be bailed or tried. *Rex v. Bishop of Rochester*, Fort. 101. — Nor at *Hicks's-Hall*. *Rex v. Ld. North* and

and Grey, M. S. Fort. 103.—It shall not be allowed to a prisoner at war, the subject of a neutral power, taken in the enemies service, into which he was forced when taken prisoner by them in an *English* ship. Rex v. Schiever, 2 Burr. 765.

5. Of the Manner of suing it out, and Form of the Writ.

By the (a) 1 & 2 Ph. & M. cap. 13. § 7. "No writ of *habeas corpus* or *certiorari* shall be granted to remove any prisoner out of any gaol, or to remove any recognizance, except the same writ be (b) signed with the proper hands of the chief justice, or in his absence, of one of the justices of the court, out of which the same writ shall be awarded or made, upon pain that he that writeth any such writs, not being signed as is afore said, do forfeit for every such writ 5 l.

(a) And by the 31 Car. 2. c. 2. *supra*, every *habeas corpus* pursuant to that statute shall be marked in this manner, *per Statutum*

tricesimo primo Caroli Secundi Regis, and shall be signed by the person that awards the same. [And if not signed, it need not be obeyed. Rex v. Roddam, Cowp. 672.]—For the form of the writ vide 2 Inst. 53, 4. (b) *Vide* Salk. 150. pl. 19.

A *habeas corpus* was prayed to the gaoler of the county gaol of Worcester, to remove one Fox into B. R., to assign errors in person, upon the record of his conviction of a *præmunire* for recusancy; but this was not granted till the writ of error was brought into court under seal, and the record certified.

Mich. 26 Car. 2. Fox's case.

Every *habeas corpus ad subjiendum* must in term-time be awarded on motion and leave of the court, but a *habeas corpus ad faciendum & recipiendum* is usually granted without motion, as it relates to a civil affair only.

2 Mod. 306.

So, where debt was brought against husband and wife on an obligation sealed by them both, and both being taken by *capias*, it was moved for an *habeas corpus* to bring them into court, to the intent that the husband only might be committed in custody, and the wife discharged; it was holden by the court, that this *habeas corpus* for removing the bodies might have been for them without motion, but where the party is committed for a crime, there it ought to be on motion.

Lev. 1. Slater and Slater.

6. To whom it is to be directed.

Wherever a person is imprisoned by any person whatsoever, whether he be one concerned in the administration of justice, as a sheriff, gaoler, &c. or a private person, such as a doctor of physick, who confines a person under pretence of curing him of madness, &c. the *habeas corpus* must be directed to him.

Godb. 44.

A *habeas corpus* was directed to the chancellor of Durham, by which he was directed to make a precept to the sheriff to have the body of J. S. with the cause of his commitment, *coram Domino Rege apud Westm.*; the chancellor returned, that he made a precept to the sheriff to have his body before him, with the cause of, &c. who accordingly returned the cause and the body before him, and sets out the cause, & *hac est causa detentionis*; & per Hale, C. J. A *habeas corpus ad faciendum & recipiendum* directed in this manner is good; *secus* of a *habeas corpus ad subjiendum*; for the king may send his writ to whom he pleases, and he must have

Hil. 25 & 26 Car. 2. in B. R. 3 Keb. 279. S. C.

have an answer of his prisoner wherever he be : there is a great deal of difference between a *habeas corpus ad subjiciendum* and other *habeas corpus*; for this is the subject's writ of right, in which case the county palatine hath no privilege. In 31 E. 1. a *habeas corpus ad subjiciendum* was directed to the Bishop of *Durham*, who returned, that he was a count palatine, and therefore was not bound to answer the writ, for which he was fined 4000*l.* *Hill.* 17 Car. 1. a *habeas corpus* was directed to the Bishop of *Durham* to return the body of one *Rickoby*; and resolved, that the writ did well run thither : In this case the writ is directed to the chancellor, to command the sheriff to have his body here ; but he commands him to have the body before himself, which is ill : again, the chancellor doth not return the body to us, for here is no *cujus corpus parat. habeo*; it is not enough for him to say, that the sheriff returned the body to him, but he ought to return it to us here ; we have nothing before us, therefore he must be remanded, for he is brought up without a warrant.

Salk. 350.
pl. 7. *per*
Curiam.
Ld. Raym.
586. 618.

A *habeas corpus* directed in the disjunctive to the sheriff or gaoler is wrong ; but where a man is taken on a warrant of the sheriff, in pursuance of a writ to the sheriff, the *habeas corpus* ought to be directed to the sheriff, for the party is in his custody, and the writ itself must be returned ; otherwise it is where one is committed to the gaoler immediately, as in cases criminal.

7. By whom it is to be returned.

This writ must be returned by the very same person to whom it is directed.

Palsch.
26 Car. 2.
Peck and
Cresset.
* A con-
stable is an
officer with-
in the mean-

A *habeas corpus* was awarded to the sheriff of —, who before the return leaves the office, and a new sheriff is made, who returns *languidus*; this return is not good, but it ought to be returned by them two, the first that he had the body, and had delivered it to the new sheriff, and the new sheriff may then return *languidus* *.

ing of the flat. 31 Car. 2. c. 2., and obliged to give a copy of the warrant of commitment. Stra. 167.
—If an *habeas corpus* is not returned, an attachment, *nisi*, shall go without rule to return. Stra. 915.
—On an *habeas corpus* granted by a judge in vacation, returnable *immediatè*, before himself at his chambers, the party may be brought into court in term, 1 Burr. 460. 542.—Or if on an *habeas corpus* so returnable, the party is brought before him, he may if he judges it advisable, adjourn the return, and direct the party to be brought into court the first day of term. Rex v. Clarke, 1 Burr. 606.—The court will not grant an attachment to accompany an *habeas corpus*. Rex v. E. Ferrers, 1 Burr. 631.—Where it was stated, that the party was a lunatic, confined by her nearest relations, who were applying for a commission of lunacy, the court enlarged the time to return the writ. Rex v. Clarke, 3 Burr. 1362.

8. Of the Manner of compelling a Return, and the Offence of a false Return.

F.N.B. 68.
11 H. 4. 86.
Mod. 195.
2 Lev. 128,
9. 5 Mod.
21. 12 Mod.
666.

[(a) But it
hath been long settled that a return must be made to the *first* writ, else an attachment will issue immediately. Rex v. James Winton, 5 Term Rep. 89.]

The method to compel a return to a *habeas corpus* is by taking out an *alias* and *pluries* (a), which if disobeyed, an attachment issues of course ; also the court may make a rule on the officer to return his writ, and, if disobeyed, the court may proceed against such disobedience in the same manner as they usually do against the disobedience of any other rule.

And

And by the 31 Car. 2. cap. 2. § 2. it is enacted, “ That if any officer, &c. shall neglect or refuse to make returns, as by the act is directed, or to bring the body of the prisoner, according to the command of the writ, or shall not within six hours after demand deliver a true copy of the commitment, &c. he shall forfeit for the first offence 100*l.* for the second offence 200*l.* and be made incapable to hold his office.”

A *habeas corpus* went to the Stannary Court, to which an insufficient return was made, and therefore disallowed; & *per Cur.* the warden of the Stannaries must be amerced, and you may go to the coroners and get it affeered, and estreat it, and an *alias habeas corpus* must go for the insufficiency of the return of the first, and upon that the body and cause must be removed up; if another excuse be returned, we will grant an attachment. Salk. 350. pl. 8.

And as a gaoler, &c. is obliged to bring up the prisoner at the day prefixed by the writ, it is no excuse for not obeying a writ of *habeas corpus ad subjiciendum*, that the prisoner did not tender the fees due to the gaoler; nor yet is the want of such tender an excuse for not obeying a writ of *habeas corpus ad faciendum & recipiendum*; but if the gaoler bring up the prisoner by virtue of such *habeas corpus*, the court will not turn him over till the gaoler be paid all his fees. 2 Jon. 178. March, 89. Keb. 272. 280. 2 Show. 172. pl. 165.

For a false return there is regularly no remedy against the officer, but an (a) action on the case at the suit of the party grieved, and an information or indictment at the suit of the king. 6 Mod. 90. Salk. 349. pl. 5. (a) But no action lies until the return be filed. Salk. 352. pl. 13.

But it has been holden, that if a gaoler return one *languidus* when the party himself brings his *habeas corpus*, and is in good health, an attachment shall issue against him; *secus*, if the *habeas corpus* was brought by another. [2. If any reasonable difference?] Vaugh. 137.

9. What Matters must be returned together with the Body of the Party.

As upon the return of the writ the court is to judge, whether the cause of the commitment and detainer be according to law or against it; so the officer or party, in whose custody the prisoner is, must, according to the command of the writ, certify on the return thereof the day, cause of caption and detainer. Vaugh. 137.

A *habeas corpus* was directed to remove one *J. S.* to which no return was made; then an *alias* was granted, and it was returned *quod traditur in ballium ante adventum istius brevis*; and the truth of the case was, that between the first and second writ the party was bailed; & *per Cur.* after an *habeas corpus* delivered, the party cannot be bailed; and if it happens otherwise, yet the cause of the commitment ought to be returned, though the body cannot be brought into court; and in this case the officer having on the first writ of *habeas corpus* taken 5*l.* to have the body in court, and yet made no return, the court granted an attachment against him. Hil. 25 & 26 Car. 2. in B. R. Salmon v. Slade.

Salk. 349.
Pl. 5.

Where a commitment is in court to a proper officer there present, there is no warrant of commitment; and therefore to a *habeas corpus* he cannot return a warrant *in hæc verba*, but must return the truth of the whole matter, under peril of an action; but if the party be committed to one that is not an officer, there must be a warrant in writing, and where there is one it must be returned; for otherwise it would be in the power of the gaoler to alter the case of the prisoner, and make it either better or worse than it is upon the warrant; and if he may take upon him to return what he will, he makes himself judge; whereas the court ought to judge, and that upon the warrant itself.

Salk. 350.
Pl. 7.

If a person in custody on an *excommunicato capiendo* brings a *habeas corpus*, the writ of *excommunicato capiendo* itself must be returned, as well as the sheriff's warrant for taking him, because the warrant may be wrong when the writ is right; and though the warrant be wrong, yet if the writ is right, the party is rightfully in custody of the sheriff.

Pasch.
18 Car. 2.
Taylor's
case.

* Pleadings,
proceedings,
&c. are now
in *English*,
by virtue of 4

Upon a *habeas corpus* directed to the constable of *Windfor-Castle*, to remove the body of one Mr. *Taylor*, a barrister, at the day of the return of the writ, a foldier brought the prisoner into court, and the writ, and the warrant by which he was committed; but the court held it no manner of return, for it ought to be entered in *Latin* *, and engrossed in due form.

4 Geo. 2. c. 26.

10. Where the Return shall be said to be certain and sufficient to warrant the Commitment.

Vaugh. 137.

It is said in general, that upon the return of the *habeas corpus* the cause of the imprisonment ought to appear as specifically and certainly to the judges, before whom it is returned, as it did to the court or person authorized to commit.

But for this
vide head of
Commitment,
head of Bail
in Criminal
Cases, and
Hal. Hist.
P. C. 584.

For if the commitment be against law, as being made by one who had no jurisdiction of the cause, or for a matter for which by law no man ought to be punished, the court are to discharge him, and therefore the certainty of the commitment ought to appear; and the commitment is liable to the same objection where the cause is so loosely set forth, that the court cannot adjudge whether it were a reasonable ground of imprisonment or not.

Skin. 676.
pl. 2. 12 Co.
150, 1.
Trin. 22
Car. in C.B.
Rudyard's
case.

Rudyard an attorney of *C.B.* being committed to *Newgate* by the lord mayor and Sir *John Robinson*, for refusing to give security for his good behaviour, was brought by *habeas corpus* to the *C. B.* and it was returned as the cause of his commitment, that whereas he had been complained of to the lord mayor and Sir *John Robinson* for several misdemeanours, particularly for inciting his majesty's subjects to the disobedience of his majesty's laws, more particularly of an act of parliament made in the 22d year of his reign, against seditious conventicles; and whereas he had been examined before them for abetting such as abetted seditious conventicles, contrary to the statute 22 Car. 2. cap. 1. and upon his examination they found cause to suspect him, therefore they

they requested sureties of him for his good behaviour, and for refusal committed him. *Wild*, Justice, was of opinion, that by abetting such as frequented seditious conventicles, must be intended abetting them in that particular, and signifies as much as encouraging them to frequent such conventicles, and finding cause to suspect him, &c. (which cannot now be questioned, for the return is admitted) they may well send him to prison, and therefore he ought to be remanded. But *Vaughan*, C. J., *Tyrrell*, and *Archer*, were of a contrary opinion: 1. Because it does not appear but that he might abet the frequenters of conventicles in a way which the law allows, as by soliciting an appeal for them, or the like. 2. To say that he was complained of, or that he was examined, is no proof that he was guilty; and then to say that they had cause to suspect him, is too cautious; for who can tell what they may count a cause of suspicion, and how can that ever be tried? At this rate they would have arbitrary power, upon their own allegation, to commit whom they pleased, whereas they cannot require sureties for any man's behaviour, and consequently not commit for refusal, unless the justices have any thing against him of their own knowledge, or by proofs of witnesses that tend to a breach of the peace. Upon this return *Archer* declared his opinion to be, that he should not be remanded, but give his own recognizance to appear in court the next term, to answer any thing that should be alleged against him; but *Vaughan* and *Tyrrell* were for his absolute discharge; for seeing by the return it did not appear there was any cause for his commitment, they thought they had no reason to require a recognizance of him. Thereupon *Wild* moved that he could not be discharged, there being but two for it. But *Archer* replied, that it had been several times ruled, that where there were three opinions, that was taken to be *per Cur.* which had two of the judges for it: And accordingly *Rudyard* was discharged. *Vaughan* and *Tyrrell* made another objection to the return, *viz.* that they should have expressed the sum in which they required him to give security (which they had not done), for they said that those persons that might be willing to be bound for him in 40*l.* might not be willing to be bound for him in 100*l.* &c. and therefore till he knew the sum he could not know whom to provide. But as to this it was said, that *Rudyard* had absolutely refused to give any security, and therefore it was to no purpose to tell him of the sum; if he had consented to give security, then the justices ought to have told him the sum*.

* A return that the defendant was committed for back-bearing and carrying away a deer, is good after conviction, though it does not say *unlawfully*; but not before conviction. Fort. 272. That before delivery of the writ he had delivered the woman to her husband, and knows not where she is; a good return. Stra. 915. — That at the coming of the writ, defendant was not in the keeper of the prison's custody, a good return. Andr. 281. — That before the coming of the writ, defendant was discharged out of his custody by an order of sessions, without saying what sessions, what order, or that he was discharged

by due course of law; good for the purpose of filing the writ. *Ibid.* A return that the *African* Company had retained the defendant in their service, and sent him to the *Savoy*, till he should embark, is bad; and defendant was discharged, and an information ordered against the colonel and the keeper of the *Savoy*. Stra. 404. — A return that the defendant was committed by an order of two justices of the peace, for that he, being overseer of the poor, had not accounted as by statute directed, and had not accounted before them, bad; he might have accounted before others. Fort. 272. [A return that "he had not at the time of receiving the writ, nor hath he since had the body of *A. B.* detained in his custody, so that he could not have her, &c." is bad. *Rex v. James Winton*, 5 Term Rep. 89. See an observation on the kind of certainty required in these returns, Dougl. 159. — If the power of commitment be at common law, it is not necessary to state it in the return. In *Crosby's case*, 3 Will. 188., 2 Bl. Rep. 754., the power of the Speaker of the House of Commons was not alleged. Dougl. 159. *arguendo*.]

11. Whether the Party can suggest any Thing contrary to the Return.

Cro. Eliz. 821. 5 Co. 71. b. 2 Hawk. P. C. c. 15. § 78. Although it seem to be agreed, that no one can in any case controvert the truth of the return to a *habeas corpus*, or plead or suggest any matter repugnant to it; yet it hath been holden, that a man may confess and avoid such a return by admitting the truth of the matters contained in it, and suggesting others not repugnant, which take off the effect of them.

Pafch. 18 Car. 2. in B. R. Swallow's case, Sid. 287. 2 Keb. 50. 54., &c. Upon a *habeas corpus* it was returned, that *Swallow*, a citizen of *London*, was fined for alderman, and was committed for his fine by the judgment of the court in *London*. *Swallow* alleged, that he was an officer of the mint, and by an ancient charter of privilege granted to the minters or moneyers he ought to be exempted. It was at first doubted whether he might not plead this to the return, it being a matter consistent with it. Upon the statute *W. 2.* it is held the parties may come in and plead, and so upon 5 *Eliz.* but here there is a difference; for he might have pleaded this in the court below, but now that is past, and here is a judgment and execution. Another day *Swallow* brought into court a writ of privilege upon that charter, and the recorder prayed that it might not be allowed against the ancient customs of the city; for if such a way might exempt men, they should have little benefit by fines in such cases: but *per Cur.* the privilege ought to be allowed, for it is very ancient, and it appears he has an office of necessary attendance elsewhere, which makes the privilege reasonable. The king may by his charter exempt from juries, if there be enough besides, much more here; and if there be not sufficient besides, upon shewing that, the privilege ought to be suspended; and *Swallow* may be discharged by this court now as well as he could at first, or as if he had taken upon him the aldermanship. This court is supreme and mandatory in such cases. And he was accordingly discharged.

5 Mod. 322. 454. 2 Jon. 222. Also the court will sometimes examine by affidavit the circumstances of a fact, on which a prisoner brought before them by an *habeas corpus* hath been indicted, in order to inform themselves, on examination of the whole matter, whether it be reasonable to bail him or not: And agreeably hereto (a), where one *Jackson*, who had been indicted for piracy before the sessions of Admiralty on a malicious prosecution, brought his *habeas corpus* in the said court, in order to be discharged or bailed, the court examined the whole circumstances of the fact by affidavits; upon which it appeared that the prosecutor himself, if any one, was guilty, and carried on the present prosecution to screen himself: and thereupon the court, in consideration of the unreasonableness of the prosecution, and the uncertainty of the time when another sessions of Admiralty might be holden, admitted the said *Jackson* to bail, and committed the prosecutor till he should find bail to answer the facts contained in the affidavits.

12. Whether

12. Whether any Defect in the Return may be amended.

It seems that before the return is filed, any defect in form, or the want of an averment of a matter of fact may be amended; but this must be at the peril of the officer, in the same manner as if the return were originally what it is after the amendment.

But after the return is filed it becomes a record of the court, and cannot be amended.

So after a rule to have the return filed; as where a *habeas corpus*, alias *et pluries* was directed to Sir Robert Viner, mayor of London, to have the body of Bridget, daughter and heir of Sir Thomas Hyde, deceased; and upon the *pluries* he returned *quod tempore receptionis hujus brevis nec unquam postea non fuit infra custodiam meam*; and the counsel of the lord mayor expounded this return that she was within the house of the lord mayor, but not detained in custody *prout per breve supponitur*; *et per Cur.* this is an insufficient return; for he ought to say not only *tempore receptionis hujus brevis*, *sed alicujus*, upon a return of a *pluries*. Then a question was, if the return could be amended; for though a rule was made that the return should be filed, yet this was not actually done; but *per Cur.* this is filed by the rule of the court, and after cannot be amended: and this return the court held to be equivocal; for it is well enough known that she is not detained *in ferris*; but though she hath the liberty of the house, if she cannot go out of the house, or not without a keeper, she is within his custody; and the court shall adjudge what sort of custody is intended by the writ.

Mod. 102,
103.

Mod. 102,
103.

Hil. 26 &
27 Car. 2.
in B. R.
Emerton v.
Sir Rob.
Viner,
2 Lev. 128.
3 Keb. 434.
447. S. C.
3 Mod. 164.
S. C. cited.

13. What is to be done with the Prisoner at the Return; and therein of bailing, discharging, or remanding him.

Upon the return of the *habeas corpus* the prisoner is regularly to be discharged, bailed, or remanded; but if it be doubtful which the court ought to do, it is said that the prisoner may be bailed to appear *de die in diem* till the matter is determined.

By the petition of right, or (a) 17 Car. 1. cap. 10. the court must within three days after the (b) return of the *habeas corpus* either discharge, bail, or remand the prisoner. But it seems that a commitment by the court of King's Bench to the *Marshalsea* is remanding, being an imprisonment within the statute.

shall within two days after the return of the *habeas corpus* take order, &c., and bail or remand the prisoner. (b) That is, after the return filed, for before then there is nothing before the court.

5 Mod. 22.
Style, 16.

(a) By the
habeas cor-
pus act, 31
Car. 2. c. 2.
§ 3, the
Lord Chan-
cellor, &c.

Also it hath been ruled, that the court of King's Bench may, after the return of the *habeas corpus* is filed, remand the prisoner to the (c) same gaol from whence he came, and order him to be brought up from time to time, till they shall have determined whether it is proper to bail, discharge, or remand him absolutely.

ed to the Tower.

And though in doubtful cases the court is to bail or discharge the party on the return of the *habeas corpus*; yet if a person be convicted,

Vent. 330.
(c) As was
done in Rob.
Peyton's
case, who
was remand-
ed to the Tower.

Vent. 346.
Salk. 348.
pl. 2.
5 Mod. 19,

20. [Where there is a conviction, the court will not discharge on the warrant of commitment without having the conviction before them. *Rex v. Elwell, Bart.* 2 Str. 794.]

victed, and the conviction on the return of the *habeas corpus* appear only defective in point of form, it is at the election of the court either to discharge the party, or oblige him to bring his writ of error.

3 Keb. 526.
2 Lev. 128.
[In disposing of the party, the court will exercise their discre-

If on the return of the *habeas corpus* it appears that the contest relates to the right of guardianship, though the court will not determine that point, yet will it set the infant at liberty, so as to let him choose where he will go till that matter is determined; or if there be any danger of abuse, will order him into such hands as will take effectual care of him.

tion upon the circumstances of the particular case before them.—A young lady, a minor, who was marriageable, and lived with her guardian, was brought up by a *habeas corpus* taken out by a man who claimed her as his wife: she denied the marriage, and expressed a wish to remain with her guardian, which the court ordered, and hearing that the man had a design to seize her, sent a tipstaff home with her to protect her. *Rex v. Clarkson, 1 Str. 444.* A child so young as to be incapable of exercising any judgment of its own, was delivered by the court into the custody of the legal guardian appointed by the father's will. *Rex v. Johnson, 1 Str. 571.* 2 Ld. Raym. 1334. S. C. On a *habeas corpus* sued out by a father in order to have his son, an infant, who was kept by an aunt, delivered to him, the court having consulted the boy's inclination, and entertaining a bad opinion of the father's design in applying for the custody of the child, refused to give him up to him. *Rex v. Smith, 2 Str. 982.* A young lady of full age having been decoyed from her father in order to be married to a mean person, and brought back by the father's means to his house, a *habeas corpus* was sued out by one of the decoyers; but upon the court being told by the young lady that she was desirous of going back to her father, they said she was at liberty to do so. *Rex v. James Clarke, 1 Burr. 606.* On a *habeas corpus* by the father of a kept mistress, aged eighteen, directed to her keeper, the court discharged her from all restraint, and gave her liberty to go where she pleased. *Rex v. Sir Francis Delaval, 3 Burr. 1434.* On a *habeas corpus* by a husband for his wife, it appeared that articles of separation had been executed between them in consideration of money received by the husband, who had also covenanted not to molest the wife, or any one with whom she might live: the court held this agreement a formal renunciation by the husband of his marital right to seize her, and force her back to live with him, and told the lady that she was at liberty to go where, and to whom she pleased. *Rex v. Mary Mead, 1 Burr. 542.* S. where the wife had fled to her own family for protection from her husband who had used her very ill, and upon her appearance on the return of the writ she swore the peace against him, the court refused to deliver her up to him. *Anne Gregory's case, 4 Burr. 1991.* Where a defendant was brought up from the Admiralty, there charged with embezzling the goods of a ship; on affidavit of a cause of action on a note in B. R., that court took him from the Admiralty, and delivered him into the custody of their marshal, for the cause in the Admiralty court, they said, might as well be followed in an action of trover. *Rutherford v. Scott, 2 Str. 916.* A person committed by a secretary of state to the custody of a messenger on suspicion of high-treason, and kept there two years, was discharged, because the Attorney-General would not undertake to prosecute directly. *Rex v. Fitzgerald, 1 Will. 214.* B. R. cannot remand a person to the custody of a king's messenger, but must commit him to their marshal. *Rex v. Dr. Shebbeare, 1 Burr. 460.* Where a sane person confined by her husband in a mad-house, was brought up, and intended to demand the peace, but had not articles ready stamped, the court permitted her to go away with a friend, he undertaking to produce her. *Rex v. Turlington, 2 Burr. 1115.*—On a *habeas corpus* returnable before the chief justice, a commitment by another judge is good, without amendment of the return. *Merefield v. Hulls, Barnes, 20.*—The Common Pleas cannot commit to the Fleet a prisoner on a justice's warrant, for want of sureties on an indictment of bastardy, or on *excommunicato capiendo* out of Chancery, returnable in B. R., or on an extent out of the Exchequer, but must remand him. But perhaps they might do so, if he were committed only on Exchequer process, on recognizance forfeited at session. *Ex parte Martin, Barnes, 213.*

In the year 1757, the above act of the 31 C. 2. c. 2., came under discussion in both Houses of Parliament, upon the following occasion: A gentleman having been imprisoned before the commissioners under a pressing act passed in the preceding session, and confined in the Savoy, his friends made application for a writ of *habeas corpus*, which produced some hesitation, and difficulty; for, according to the above statute, the privilege relates only to persons committed for criminal, or supposed criminal matters; and this gentleman did not stand in that predicament. Before the question could be determined, he was discharged, in consequence of an application to the Secretary at War; but the nature of the case seeming to point out a defect in the act, a bill for giving a more speedy remedy to the subject, upon the writ of *habeas corpus*, was prepared, and presented to the House of Commons. It imported, that the several provisions made in the above act of 31 Car. 2. for the awarding of writs of *habeas corpus* in cases of commitment, or detainer for any criminal or supposed criminal matter, should in like manner extend to all

(C) Of the *Habeas Corpus ad faciendum & recipiendum*.

THE *habeas corpus ad faciendum & recipiendum* is used only in civil causes, and lies for removing suits out of an inferior to some superior court, at the application of the defendant, who may imagine himself injured by the proceedings of such inferior court. Mod. 235.
2 Mod. 198.

[This writ is commonly called a *habeas corpus cum causa*, and is grantable at all times of common right, whether in term or vacation, without motion in court. 1 Lev. 1.
2 Mod. 306.

By

all cases where any person, not being committed or detained for any criminal or supposed criminal matter, should be confined, or restrained of his or their liberty, under any colour or pretence whatsoever; that upon oath made by such person so confined or restrained, or by any other person on his behalf, of any actual confinement or restraint, and that such confinement or restraint, to the best of the knowledge and belief of the person so applying, was not by virtue of any commitment or detainer for any criminal or supposed criminal matter; an *habeas corpus* directed to the person or persons so confining or restraining the party, should be granted in the same manner as is directed, and under the same penalties as are provided by the said act in the case of persons committed or detained for any criminal or supposed matter; that the person before whom the party should be brought by virtue of an *habeas corpus* granted in the vacation-time under the authority of this act, might and should, within three days after the return made, proceed to examine into the facts contained in such return, and into the cause of such confinement and restraint, and thereupon either discharge, or bail, or remand the party so brought, as the case should require, and as to justice should appertain. The rest of the bill related to the return of the writ in three days, and the penalties upon those who should neglect or refuse to make the return, or to comply with any other clause of this regulation. See the bill, and the arguments for and against it, in the Appendix to Vol. 7. Debrett's Debates, from 1743 to 1774. The bill was soon passed by the Commons; but in the House of Lords, it was thrown out at the second reading, and the judges were ordered to prepare a bill to extend the power of granting writs of *habeas corpus ad subjiciendum* in vacation-time, in cases not within the statute of 31 Car. 2. c. 2., to all the judges of his majesty's courts at Westminster, and to provide for the issuing of process in vacation-time to compel obedience to such writs; and that in preparing such bill they take into consideration, whether in any, and what cases, it may be proper to make provision that the truth of the facts contained in the return to a writ of *habeas corpus* may be controverted by affidavits or traverse, and so far as it shall appear to be proper, that clauses be inserted for that purpose, and that they lay such bill before the House in the beginning of the next session of parliament. The matter, however, was never resumed.

When the above bill was before the Lords, the following questions were proposed to the judges:—1st, Whether in cases not within the act of 31 Car. 2. c. 2. writs of *habeas corpus ad subjiciendum*, by the law as it now stands, ought to issue of course, or upon probable cause verified by affidavit?—2d, Whether in cases not within the said act, such writs of *habeas corpus*, by the law as it now stands, may issue in vacation by fiat from a judge of the court of King's Bench, returnable before himself?—3d, What effect will the several provisions proposed by this bill, as to the awarding, returning, and proceeding upon returns to such writs of *habeas corpus*, have in practice? and how much will the same operate to the benefit or prejudice of the subject?—4th, Whether at the common law, and before the statute of *habeas corpus* in the 31st of King Charles 2. any and which of the judges, could regularly issue a writ of *habeas corpus ad subjiciendum* in time of vacation, in all or in what cases particularly?—5th, Whether the judges at the common law, and before the said statute, were bound to issue such writ of *habeas corpus* in time of vacation, upon the demand of any person under any restraint? or might they refuse to award such writ, if they thought proper?—6th, Whether the judges at the common law, and before the said statute, were bound to make such writs issued in time of vacation returnable immediately? and could they enforce obedience to such writ issued in time of vacation, if the party served therewith should neglect or refuse to obey the same, and by what means?—7th, Whether, if a judge, before the said statute, should have refused to grant the said writ on the demand of any person under any restraint, had the subject any remedy at law, by action or otherwise, against the judge for such refusal?—8th, Whether in case a writ of *habeas corpus ad subjiciendum* at common law be directed to any person returnable immediately, such person may not stand out an *alias* and *pluries habeas corpus*, before due obedience thereto can be regularly enforced by the course of the common law?—9th, Whether the said statute of 31 Car. 2. and the several provisions therein made for the immediate awarding and returning the writ of *habeas corpus*, extend to the case of any compelled against his will, in time of peace, either into the land or sea service,

By the statute of 43 Eliz. c. 5. it is enacted, "That no writ of *habeas corpus*, or other writ to remove any cause depending in an inferior court, having jurisdiction thereof, shall be received or allowed by the judges or officers of such court, but they may proceed therein, as if no such writ were sued forth or delivered; except the said writ be delivered to such judges or officers before the jury have appeared, and one of them is sworn." And by 21 Jac. 1. c. 23. § 21. "no writ of *habeas corpus*, *certiorari*, or other writ, except writs of error, or attaint to stay or remove any cause depending in an inferior court of record having jurisdiction thereof, shall be received or allowed by the judges or officers of such court, but they may proceed therein, &c. except the said writ be delivered to such judges or officers, before issue or demurrer joined in the said cause; so as the same be not joined within six weeks next after the arrest or appearance of the defendant."

This

without any colour of legal authority, or to any case of imprisonment, detainer or restraint whatsoever, except cases of commitment or detainer for criminal, or supposed criminal matters?—10th, Whether, in all cases whatsoever, the judges are so bound by the facts set forth in the return to the writ of *habeas corpus*, that they cannot discharge the person brought up before them, although it should appear most manifestly to the judges, by the clearest and most undoubted proof, that such return is false in fact, and that the person so brought up is restrained of his liberty by the most unwarrantable means, and in direct violation of law and justice?—The third question was waved at the request of the judges. Upon the first question they all delivered their opinions in the very same words, "that in cases not within the act of 31 Car. 2., writs of *habeas corpus ad subjiciendum*, by the law as it now stands, ought not to issue of course, but upon probable cause verified by affidavit."—Mr. Justice Noel, upon the 2d and 4th questions, delivered his opinion, "That at the common law, before the statute 31 Car. 2. no judge could regularly issue a writ of *habeas corpus ad subjiciendum* in vacation; but, by the law as it now stands, upon the practice of the court of King's Bench ever since the said statute, such writs may issue in the vacation by a fiat from a judge of the court of King's Bench, returnable before himself, in cases not within the said act."—Upon the 5th question, "That the judges at the common law, and before the said statute, were not bound to issue such writs of *habeas corpus ad subjiciendum* in vacation, upon the demand of any person under restraint; and might refuse to award such writ, if they thought proper, in the time of vacation."—Upon the 6th question, "That the judges, at the common law, and before the said statute, were not bound to make such writs, so issued in vacation, returnable *immediatè*; and they could not enforce obedience to such writ issued in the vacation, if the party served therewith should neglect or refuse to obey the same."—Upon the 7th question, "That if a judge, before the said statute, should have refused to grant the said writ upon the demand of any person under any restraint, the subject had not any remedy at law, by action or otherwise, against the judge, for such refusal."—Upon the 8th question, "That in case a writ of *habeas corpus* at the common law had been directed to any person returnable *immediatè*, the court always granted an *alias* and *pluries habeas corpus* before due obedience could be enforced; but, since the statute 31 Car. 2. the *alias* and *pluries* have been omitted."—Upon the 9th question, "That the statute 31 Car. 2. and the provisions therein made, for the immediate awarding and returning the writ of *habeas corpus*, do not extend to the case of any man compelled against his will, in time of peace, either into the land or sea service, without any colour of legal authority, nor to any cases of imprisonment, detainer, or restraint, except cases of commitment for criminal or supposed criminal matter."—Upon the 10th question, "That the judges are not in all cases whatsoever so bound by the return to the writ of *habeas corpus*, that they cannot discharge the person brought before them, if it should appear most manifestly to the judges, by the clearest and most undoubted proof, that such return is false in fact, and that the person so brought up is restrained of his liberty by the most unwarrantable means, and in direct violation of law and justice."

Mr. Justice Wilmot, upon the 2d question, delivered his opinion, "That in cases not within the act 31 Car. 2. writs of *habeas corpus ad subjiciendum*, by the law as it now stands, may issue in the vacation by fiat from a judge of the court of King's Bench, returnable before himself."—Upon the 4th question, "That after the restoration, and before the statute 31 Car. 2. the chief justice and other judges of the court of King's Bench did, in fact, issue writs of *habeas corpus ad subjiciendum*, in time of vacation, in criminal cases; and thinks such practice was legal, and warranted by the same principles which now support the practice of issuing writs in vacation in all cases which are not within the 31 Car. 2. but thinks there was no settled regular practice of issuing writs of *habeas corpus ad subjiciendum* in vacation, in any

This last statute, it hath been holden, doth not extend to the case of an interlocutory judgment; and the modern practice is to allow the *habeas corpus* as upon the 43 Eliz. provided it be delivered at any time before the jury are sworn; and so it is where issue is joined within six weeks next after the defendant's arrest or appearance.

Cox v. Hart,
2 Burr. 753.
Bevan v.
Protheke,
id. 1151.
But contr.
Wyatt v.

Markham, Barnes, 221. Hornbuckle v. Eaton, *ibid.*

By § 3. of the last mentioned statute, "If any cause commenced in an inferior court be removed by any writ or process, and afterwards remanded by *procedendo* or other writ, such cause shall never afterwards be removed or stayed before judgment by any writ out of any court whatsoever." By § 4. "If in
" any

any case before the statute 31 Car. 2. at the instance of a person under restraint."—Upon the 5th question, "That the judges, at the common law, and before the said statute, were not, nor are now, bound to issue such writs of *habeas corpus* in time of vacation, upon the demand of any person under restraint; and, if they thought proper, might, and now may, refuse to issue such writs upon the demand of any person under restraint; for he thinks a copy of the commitment must be produced, or there must be some case made, before the judges are, or ever were, bound to grant such writs at the instance of a person under restraint."—Upon the 6th question, "That the judges, at the common law, and before the said statute, were not bound to make writs of *habeas corpus ad subjiciendum* issued in vacation-time returnable *immediatè*; and thinks the judges, in time of vacation, cannot enforce obedience to any writs of *habeas corpus* issued in time of vacation, whether they issue in cases within the 31 Car. 2. or in cases out of that act, if the party served therewith should neglect or refuse to obey the same by any means whatsoever."—Upon the 7th question, "That if a judge, before the said statute, should have refused to grant the said writ upon the demand of any person under restraint, the subject had no remedy at law, by action or otherwise, against the judge for such refusal."—Upon the 8th question, "That in case a writ of *habeas corpus ad subjiciendum* at the common law, and before the statute, had been directed to any person, returnable *immediatè*, such person might have stood out an *alias* and *pluries habeas corpus*, before due obedience thereto could have been regularly enforced by the course of the common law: but the method of proceeding by *alias* and *pluries* in cases out of the act of 31 Car. 2. has been long gone into disuse; and in case a writ of *habeas corpus ad subjiciendum* at the common law be now directed to any person, returnable *immediatè*, he is of opinion, that the court would enforce obedience to such writ by attachment."—Upon the 9th question, "That the said statute of the 31st of King Charles 2. and the several provisions therein made for the immediate awarding and returning the writ of *habeas corpus*, do not extend to the case of any man compelled against his will, in time of peace, either into the land or sea service, without any colour of legal authority; or to any cases of imprisonment, detainer, or restraint whatsoever, except cases of commitment for criminal or supposed criminal matters."—Upon the 10th question, "That in no cases whatsoever, the judges are so bound by the facts set forth in the return to the writ of *habeas corpus*, that they cannot discharge the person brought up before them, if it should appear most manifestly to the judges, by the clearest and most undoubted proof, that such return is false in fact; and that the person so brought up is restrained of his liberty by the most unwarrantable means, and in direct violation of law and justice; but by the clearest and most undoubted proof he means the verdict of a jury, or judgment on demurrer, or otherwise, in an action for a false return: and, in case the facts averred in the return to a writ of *habeas corpus* are sufficient in point of law to justify the restraint, he is of opinion, that the court, or judge before whom such writ is returnable, cannot try the facts averred in such return by affidavits in any proceeding granted upon the return to the writ of *habeas corpus*."

Mr. Justice Bathurst, upon the 2d and 4th questions, delivered his opinion, "That at common law, and before the 31 Car. 2. no judge could regularly issue a writ of *habeas corpus ad subjiciendum*, returnable before himself, in time of vacation, for the purpose of bailing or discharging; but by the law as it now stands, such writ may issue in the vacation, by fiat from a judge of the court of King's Bench."—Upon the 5th question, "That no judge at the common law, and before the said statute, was bound to issue such writ of *habeas corpus ad subjiciendum* in time of vacation, upon the demand of any person under restraint; and the judges might refuse to award such writ, if they thought proper."—Upon the 6th question, "That the judges by the common law, and before the statute, were not bound to make such writ, so issued in time of vacation, returnable *immediatè*; and they could not enforce obedience to such writ issued in time of vacation, if the party served therewith refused to obey the same."—Upon the 7th question, "That the subject had not any remedy, by law or otherwise, against a judge for what he did in his judicial capacity before the statute 31 Car. 2."—Upon the 8th question, "That at common law, the court always granted an *alias* and *pluries habeas corpus* before they enforced obedience by attachment or otherwise; but since the statute of the 31 Car. 2. the practice has been in that respect altered."—Upon the 9th question, "That the words of the statute 31 Car. 2. and of the several provisions therein made for the immediate
awarding

“ any cause not concerning freehold or inheritance, or title of
 “ land, lease, or rent, commenced or depending in any such inferior
 “ court of record, it shall appear or be laid in the declaration, that
 “ the debt, damages, or things demanded do not amount to five
 “ pounds, such cause shall not be stayed or removed by any writ
 “ or writs whatsoever, other than writs of error or attain.”

Armington's case,
 Palm. 403.

But soon after the passing of this statute a method of evading it was devised, by setting up another action for a fictitious demand of 5*l.* or upwards, and then upon the *habeas corpus* both causes were removed. In order to prevent this it was enacted by 12 *Geo. c.* 29. § 3. “ that the judges of such inferior courts as are
 “ described in the statute of *James* may proceed in such causes
 “ as

awarding and returning the writ of *habeas corpus*, do not extend to the case of any man compelled against his will, in time of peace, either into the land or sea service, without any colour of legal authority, or to any cases of imprisonment, detainer, or restraint whatsoever, except cases of commitment for criminal or supposed criminal matter; but in favour of liberty, the judges of the court of King's Bench have, in conformity to that statute, extended the same relief to all cases.”—Upon the 10th question, “ That the judges are not in all cases so bound by the return to the writ of *habeas corpus*, that they cannot discharge the person brought before them, in case it manifestly appears to them that such return is false, and that the person is restrained of his liberty by the most unwarrantable means, and in direct violation of law and justice.”

Mr. Baron *Adams*, upon the 2d question, delivered his opinion, “ That, in cases not within the said act, by the law as it now stands, such writs may issue, in time of vacation, by fiat from a judge of the court of King's Bench, returnable before himself.”—Upon the 4th question, “ That it appears to him, that at the common law, before the restoration, the judges did not issue such writs of *habeas corpus* at the prayer of the subject in time of vacation, but that it began first to be put in practice about that time; yet he cannot say, they could not have done it before, as the same authority which warranted their doing it then, would have warranted it before, had it been thought necessary or expedient.”—Upon the 5th question, “ That the judges at the common law, and before the said statute, while no such practice was as yet settled and established by usage, were not bound to issue such writs of *habeas corpus* in time of vacation, but apprehends that the judges of the court of King's Bench, upon a case properly laid before them, are bound at this day, the practice standing confirmed and established by so long an usage, to issue such writ in the vacation in cases not within the said statute.”—Upon the 6th question, “ That as at the common law, and before the said statute, the judges were not bound to issue such writs of *habeas corpus* in the vacation, so they were not bound to make it returnable *immediate*, nor had any means of enforcing obedience to it.”—Upon the 7th question, “ That if a judge, before the said statute, had refused to grant a writ of *habeas corpus*, the subject had no remedy against the judge for such refusal.”—Upon the 8th question, “ That in no case a single judge could do more than grant an *alias* or *pluries habeas corpus*; but as to writs issued by the court, the court have of late years adopted a practice of granting an attachment to enforce obedience to the first writ.”—Upon the 9th question, “ That the said statute of the 31st of King Charles 2. and the several provisions therein, do not extend to any cases of imprisonment or restraint whatsoever, except cases of criminal or supposed criminal matter.”—Upon the 10th question, “ That if an action was brought for a false return made to an *habeas corpus*, and therein the return should be falsified by judgment upon verdict, demurrer, or otherwise, the judges might thereupon issue an *alias habeas corpus*, and upon that discharge the party; but that, in all cases whatsoever, when the matter comes before the court, singly upon the return made to the *habeas corpus*, if that return contains a sufficient and justifiable cause of restraint, the judges must determine upon the cause as it there appears, and cannot hear any proof in contradiction to it; but are so bound by the facts set forth therein, that though they be false in fact, and the party in truth restrained of his liberty by the most unwarrantable means, and in direct violation of law and justice, they cannot discharge him, but he is driven to his action.”

Mr. Baron *Smythe*, upon the 2d question, delivered his opinion, “ That, in cases not within the said act, such writs of *habeas corpus*, by the law as it now stands, may issue in the vacation, by fiat from a judge of the court of King's Bench, returnable before himself.”—Upon the 4th question, “ That, at the common law, and before the said statute of the 31st of King Charles 2. the judges of the court of King's Bench could issue such writs of *habeas corpus* in time of vacation, where a probable cause was shewn that the person was unjustly imprisoned, or bailable.”—Upon the 5th question, “ That, at the common law, and before the said statute, the judges of the court of King's Bench were bound to issue such writs of *habeas corpus* in time of vacation, if a probable cause was shewn, but not without.”—Upon the 6th question, “ That the judges at the common law, and before the said statute, were not bound to make such writs, so issued in time of vacation, returnable *immediate*, but ought to make them returnable before themselves, or in court, as would best answer the purposes of justice. They could not in vacation-time enforce

“ as are therein specified, which appear or are laid not to exceed
 “ the sum of five pounds, although there may be other actions
 “ against the defendant, wherein the plaintiff’s demands may ex-
 “ ceed the sum of five pounds.” And by the statute of 19 Geo. 3.
 c. 70. § 6. “ no cause where the cause of action shall not amount
 “ to ten pounds or upwards shall be removed or removeable into
 “ any superior court, by any writ of *habeas corpus* or otherwise,
 “ unless the defendant shall enter into a recognizance to the plain-
 “ tiff in the inferior court, with two sufficient sureties in double
 “ the sum demanded, for the payment of the debt and costs in
 “ case judgment shall pass against him.”

By

enforce obedience to such writ; but, if the party served therewith, should neglect or refuse to obey the same, the court of King’s Bench, in the next term, could enforce obedience to such writ by attachment.”

—Upon the 7th question, “ That a judge, before the said statute, for his refusal to grant a writ of *habeas corpus*, where he ought to have granted it, would have been liable to punishment in the same manner as for any other breach of his duty.”—Upon the 8th question, “ That, in case such writ of *habeas corpus*, at the common law, be directed to any person returnable *immediatè*, such person may stand out an *alias* and *pluries*, if the party suing out the writ chuses to sue out an *alias* and *pluries habeas corpus*; but the court will grant an attachment for the first disobedience, without putting the party to his *alias* and *pluries*.”

—Upon the 9th question, “ That the said statute of the 31st of King Charles 2. and the several provisions therein, do not extend to any cases of imprisonment, detainer, or restraint whatsoever, except cases of commitment for criminal, or supposed criminal matters.”—Upon the 10th question, “ That the judges were so bound by the facts set forth in the return to the writ of *habeas corpus*, that they cannot enter into proof by affidavits to controvert the return; the facts set forth in the return can be controverted or contradicted only by the verdict of a jury.”

Mr. Baron *Legge*, upon the 2d question, delivered his opinion, “ That, in cases not within the said act, such writs of *habeas corpus*, by the law as it now stands, may issue in the vacation, by fiat from a judge of the court of King’s Bench, returnable before himself.”—Upon the 4th question, “ That, at the common law, and before the statute of *habeas corpus* in the 31st of King Charles 2. no judge could regularly issue a writ of *habeas corpus ad subjiciendum*, in time of vacation, in any case.”—Upon the 5th question, “ That the judges, at the common law, and before the said statute, were not bound to issue such writ of *habeas corpus ad subjiciendum*, in time of vacation, upon the demand of any person under restraint; but might refuse to award such writ, if they thought proper.”—Upon the 6th question, “ That the judges, at the common law, and before the said statute, were not bound to make such writs, issued in time of vacation, returnable *immediatè*, and could not enforce obedience to such writ issued in time of vacation, if the party served therewith should neglect or refuse to obey the same, by any means.”—Upon the 7th question, “ That if a judge, before the said statute, should have refused to grant the said writ upon the demand of any person under any restraint, the subject had not any remedy at law, by action or otherwise, against the judge for such refusal.”—Upon the 8th question, “ That in case a writ of *habeas corpus ad subjiciendum*, at the common law, had been directed to any person, returnable *immediatè*, such person might have stood out an *alias* and *pluries habeas corpus*, before due obedience thereto could have been regularly enforced by the course of the common law; but as the law now stands, the practice has long prevailed, for the court of King’s Bench to enforce the first *habeas corpus* by an attachment.”—Upon the 9th question, “ That the said statute of the 31st of King Charles 2. and the several provisions therein made for the immediate awarding and returning the writ of *habeas corpus*, do not extend to the case of any man compelled against his will, in time of peace, either into the land or sea service, without any colour of legal authority; or to any cases of imprisonment, detainer, or restraint whatsoever, except cases of commitment for criminal or supposed criminal matters.”—Upon the 10th question, “ That the judges are not in all cases whatsoever so bound by the facts set forth in the return to the writ of *habeas corpus*, that they cannot discharge the person brought up before them, although it should appear most manifestly to the judges, by the clearest and most undoubted proof, that such return is false in fact; and that the person so brought up is restrained of his liberty by the most unwarrantable means, and in direct violation of law and justice.”

Mr. Justice *Clive*, upon the 2d and 4th questions, delivered his opinion, “ That, at the common law, and before the statute of 31 Car. 2. no judge could regularly issue a writ of *habeas corpus ad subjiciendum* in time of vacation; but by the law as it now stands, such writs may issue in the vacation, by fiat from a judge of the court of King’s Bench, returnable before himself.”—Upon the 5th question, “ That no judge by the common law, and before the said statute, was bound to issue such writs of *habeas corpus* and *subjiciendum* in time of vacation upon the demand of any person under restraint, and the judges might refuse to award such writ.”—Upon the 6th question, “ That the judges by the common law, and before the said statute, were not bound to make such writs so issued in time of vacation, returnable *immediatè*,
and

By a proviso in § 6. of the statute of *James*, that act is limited to such "courts of record only, and for so long time only as there is or shall be an utter barrister of three years standing at the bar of one of the four inns of court, who shall be steward or under-steward, town-clerk, judge, or recorder of such inferior court, or assistant to such judge or judges of the same as shall not be an utter-barrister or utter-barristers of such standing, there present, and not of counsel in any action or suit there depending."

Clapham's case, Cro. Car. 79. Anon. If this proviso be not complied with, the cause may be removed at any time: and it is not enough that the judge is a barrister; he must be actually present at the trial.

3 Mod. 89. Fairley v. M'Connel, 1 Burr. 514. Tidd's Pr. 178.

Watson v. Clerk, Carth. 69. Haley's case, 1 Mod. 195. But if the writ be disallowed by the judge of the inferior court for any of the causes about specified, it must be returned to the court above with the *special matter*.]

Salk. 352. It suspends the power of the court below; so that if they proceed after, the proceedings are (a) void, and *coram non iudice*.

pl. 13. (a) That after serving a writ of *habeas corpus* it is error to proceed after. Cro. Car. 261. Ellis v. Johnson, 2 Jon. 209. S. P. adjudged. That if a *habeas corpus* be directed to an inferior court, returnable two days after the end of the term, yet the inferior court cannot proceed contrary to the writ of *habeas corpus*. Mod. 195. 12 Mod. 666.

By

and they could not enforce obedience to such writ issued in the time of vacation, if the party served therewith refused to obey the same."—Upon the 7th question, "That the subject had not any remedy, by law or otherwise, against a judge for what he did in his judicial capacity, before the said statute 31 Car. 2."—Upon the 8th question, "That at common law, the court always granted an *alias* and *pluries* *habeas corpus* before they enforced obedience by attachment."—Upon the 9th question, "That the words of the statute of the 31 Car. 2. and of the several provisions therein made, for the immediate awarding and returning the writ of *habeas corpus*, do not extend to the case of any man compelled against his will, in time of peace, either into the land or sea service, without any colour of legal authority; or to any cases of imprisonment, detainer, or restraint, whatsoever, except cases of commitment for criminal or supposed criminal matters."—Upon the 10th question, "That the judges are not in all cases so bound by the return to the writ of *habeas corpus*, that they cannot discharge the person brought before them, in case it manifestly appears to them that such return is false, and that the person is retrained of his liberty by the most unwarrantable means, and in direct violation of law and justice."

Mr. Justice *Dennison*, upon the 2d question, delivered his opinion, "That in cases not within the said act, such writs of *habeas corpus*, by the law as it now stands, may issue in the vacation by fiat from a judge of the court of King's Bench, returnable before himself."—Upon the 4th question, "That before the statute of the 31st of King Charles 2. the judges of the court of King's Bench, by usage, might issue a writ of *habeas corpus ad subjiciendum* in time of vacation."—Upon the 5th question, "That the judges of the court of King's Bench might issue such writs in time of vacation, upon probable cause proved by affidavits; but the usage was not certainly established."—Upon the 6th question, "That the judges of the court of King's Bench, before the said statute, might make such writs returnable either immediately, or in the subsequent term; but could not enforce obedience to such writ issued in the vacation; but it might be done in the subsequent term."—Upon the 7th question, "That if a judge, before the statute, should have refused to grant the said writ upon demand, no action would lie against him."—Upon the 8th question, "That before the said statute, the party might stand out an *alias* and *pluries*; but, since the said statute, the course hath been to grant an attachment without any *alias* or *pluries*."—Upon the 9th question, "That the said statute of the 31st of King Charles 2., and the several provisions therein made, for the immediate awarding and returning the writ of *habeas corpus*, do not extend to the case of any man compelled against his will, in time of peace, either into the land or sea service, without any colour of legal authority; or to any cases of imprisonment, detainer, or restraint whatsoever, except cases of commitment for criminal or supposed criminal matters."—Upon the 10th question, "That, in all cases whatsoever, where the return consists of facts justifying the taking and detaining by law, the judges are so bound by the facts set forth in the return to the writ of *habeas corpus*, that they cannot discharge the person brought up before them upon affidavits to be read in that proceeding,

By this writ the proceedings in the inferior court are at an end; for the person of the defendant being removed to the superior court, they have lost their jurisdiction over him, and all the proceedings in the superior court are *de novo*, and (a) bail *de novo* must be put in in the superior court.

merely a history or account of the proceedings below sent up to the superior court, to enable them to judge and determine the matter there. *Ibid.* 1 Salk. 352. 6 Mod. 177. 1 Term Rep. 372.] (a) That though the sum be under 10*l.*, yet if in the inferior court special bail was requisite, there shall be special bail in the court above.

And although this writ be a writ of right, yet where it is to abate a rightful suit the court may refuse it; as where an action of debt was brought against a feme sole in the palace court, who, after appearance and plea pleaded, married, and then removed the cause by *habeas corpus* to B. R. where she pleaded her coverture in abatement; the court held, that if this matter had been moved on the return of the *habeas corpus*, they would have granted a *procedendo*; but that now the plea in abatement must be holden good; for the proceedings are *de novo*, and the court takes not notice of the proceedings below, or of what preceded the *habeas corpus*.

After an interlocutory, and before final judgment in an inferior court, a *habeas corpus cum causa* was brought; before the return of the writ the defendant died, and a *procedendo* was awarded, because by the 8 & 9 W. 3. cap. 11. the plaintiff may have a *scire facias* against the executors, and proceed to judgment, which he cannot have in another court; and by this means he would be deprived of the effect of his judgment, which would be unreasonable.

If

proceeding, contradicting the facts contained in the return; but, if it should appear most manifestly to the court, by the clearest and most undoubted proof, either in action or in some collateral proceeding, that such return is false in fact, and that the person so brought up is restrained of his liberty by unlawful means, and in direct violation of law and justice, the prisoner may be discharged."

Lord Chief Baron Parker, upon the 2d question, delivered his opinion, "That in cases not within the act of the 31st of King Charles 2., writs of *habeas corpus ad subjiciendum*, by the law as it now stands, may issue in vacation, by fiat from a judge of the court of King's Bench, returnable before himself."—Upon the 4th question, "That before the statute of the 31st of King Charles 2., some of the judges of the King's Bench did, in fact, issue writs of *habeas corpus ad subjiciendum* in time of vacation; but it does not appear to his satisfaction, that there was any certain settled practice for issuing writs of *habeas corpus ad subjiciendum* in vacation, before the statute of the 31st of King Charles 2. upon the application of a person under restraint; but it has been shewn that, in two instances before the said statute, the court disapproved of such practice; and he is therefore inclined to think, that the judges of the court of King's Bench could not, before the said statute, regularly issue a writ of *habeas corpus ad subjiciendum*, for the purpose of discharging or bailing any person under restraint, as aforesaid, though he cannot positively say that they could not do so."—Upon the 5th question, "That the judges, at the common law, and before the said statute, were not bound to issue such writ of *habeas corpus ad subjiciendum* in time of vacation upon the demand of any person under restraint, but might refuse to award such writ, if a proper foundation was not laid for it by affidavit."—Upon the 6th question, "That the judges, at the common law, and before the said statute, were not bound to make writs of *habeas corpus ad subjiciendum*, issued in vacation, returnable immediately; nor could they in time of vacation enforce obedience to such writ issued in time of vacation, if the party served therewith should neglect or refuse to obey the same, by any means whatsoever."—Upon the 7th question, "That if a judge, before the said statute, should have refused to grant the said writ, upon the demand of any person under any restraint, the subject had not any remedy at law, by action or otherwise, against the judge for such refusal."—Upon the 8th question, "That in case a writ of *habeas corpus ad subjiciendum*,

2 Roll.
Abr. 69.
Carth. 75.

If an action be brought in *London* for calling a woman a whore, this cannot be removed by *habeas corpus*, because the words are not actionable elsewhere; and if allowed to be removed the custom would be destroyed.

Pope v.
Vaux, 2 Bl.
Rep. 1060.

[So, where a *feme covert*, sole trader in *London*, is sued in either of the city courts.

Fry v. Cary,
1 Str. 527.

Where an action was brought in the court of the sheriffs of *London* against two partners, and one of them brought a *habeas corpus* and put in bail for himself only, a *procedendo* was granted; for otherwise the plaintiff would have been disabled to go on in either court.

Anon.
1 Str. 303.

If a prisoner, who is brought up from a county gaol, to be turned over to the King's Bench, will not pay the sheriff the charges of bringing him up, the court will remand him.

Nicholas
Fling's case,
Barnes, 377.

If one shilling *per mile* is tendered and refused, attachment shall be granted.

Holman v.
Barber,
Str. 814.

But the gaoler must obey the *habeas corpus*, though the prisoner refuse to pay his fees, for he has his remedy for them.

If

at the common law, and before the said statute, had been directed to any person, returnable *immediatè*, such person might have stood out an *alias* and *pluries habeas corpus* before due obedience thereto could have been regularly enforced by the course of the common law; but the method of proceeding by *alias* and *pluries habeas corpus*, in cases out of the said statute, has been long discontinued; and, in case a writ of *habeas corpus ad subjiciendum*, at the common law, be now directed to any person returnable *immediatè*, he thinks that the court would enforce obedience to such writ by attachment."—Upon the 9th question, "That the said statute of the 31st of King Charles 2., and the several provisions therein made for the immediate awarding and returning the writ of *habeas corpus*, do not extend to the case of any man compelled against his will, in time of peace, either into the land or sea service, without any colour of legal authority; or to any cases of imprisonment, detainer, or restraint whatsoever, except cases of commitment for criminal or supposed criminal matters."—Upon the 10th question, "That in no case whatsoever the judges are so bound by the facts set forth in the return to the writ of *habeas corpus*, that they cannot discharge the person brought up before them, if it should appear most manifestly to the judges, by the clearest and most undoubted proof, that such return is false in fact, and that the person so brought up is restrained of his liberty by the most unwarrantable means, and in direct violation of law and justice; but, by the clearest and most undoubted proof, he understands the verdict of a jury, or judgment on demurrer, or otherwise, in an action for a false return; and, in case the facts returned to a writ of *habeas corpus* shew a sufficient ground in point of law for such restraint, he is of opinion, that the court, or judge, before whom such writ is returnable, cannot try the facts contained in such return by affidavits."

Lord Chief Justice *Willis*, upon the 2d question, delivered his opinion, "That in cases not within the said act, such writs of *habeas corpus*, by the law as it now stands, may issue in the vacation, by fiat from a judge of the court of King's Bench, returnable before himself."—Upon the 4th question, "That at the common law, and before the statute of the 31st of King Charles 2., none of the judges could regularly issue an *habeas corpus ad subjiciendum* in time of vacation, in any case whatsoever."—Upon the 5th question, "That the judges, at the common law, and before the said statute, were not bound to issue such writs of *habeas corpus ad subjiciendum* in time of vacation, upon the demand of any person under restraint; but that they might refuse to award such writ, if they thought proper."—Upon the 6th question, "That the judges, at the common law, before the said statute, were not bound to make such writs, so issued in time of vacation, returnable *immediatè*; and that they could not enforce obedience to such writs issued in time of vacation, if the party served therewith should neglect or refuse to obey the same, by any means whatsoever, before the next term."—Upon the 7th question, "That if a judge, before the said statute, should have refused to grant the said writ upon the demand of any person under any restraint, the subject had not any remedy at law, by action or otherwise, against the judge for such refusal."—Upon the 8th question, "That in case a *habeas corpus ad subjiciendum*, at the common law, had been directed to any person, returnable *immediatè*, such person might stand out an *alias* and *pluries habeas corpus* before due obedience thereto could be regularly enforced by the course of the common law."—Upon the 9th question, "That the words of the statute of the 31st Car. 2., and the several provisions therein made for the immediate awarding and returning the writ of *habeas corpus*,

49

If plaintiff deliver sheriff *habeas corpus* to remove defendant in execution on a *ca. sa.* to B. R. prison, he cannot refuse to obey till his poundage is paid. *Semb. Sed. qu.* For it was argued in this case, that he should carry him to a judge's chambers; and *Foster, J.* said, if he came before him, he would not turn him over till poundage paid.

White v. Heigh, Str. 1262.

If it is tested in term, it may be returnable *immediatè* before the chief justice.

Bettesworth v. Bell, 3 Burr. 1875.

Plaintiff may remove defendant by this writ, after he has declared against him in custody of the sheriff.

Ibid.

Defendant may be committed, though return-day is past.

Hewitt v. Powell, Barnes, 221.

A prisoner in the *Fleet* by process of *C. B.* may be brought up by rule, but if holden by execution of another court, there must be *habeas corpus*.

Barnes, 385.

do not extend to the case of any man compelled against his will, in time of peace, either into the land or sea service, without any colour of legal authority; nor to any cases of imprisonment, detainer, or restraint, except cases of commitment for criminal or supposed criminal matters."—Upon the 10th question, "That the judges are not in all cases whatsoever so bound by the facts set forth in the return to the writ of *habeas corpus*, that they cannot discharge the person brought up before them, though it should appear most manifestly to them, by the clearest and most undoubted proof, that such return is false in fact, and that the person so brought up is restrained of his liberty by the most unwarrantable means, and in direct violation of law and justice."

Then it was proposed, "That the following question be put to the judges," *videlicet*, "Whether, if a writ of *habeas corpus ad subjiciendum* at the common law be applied for, either in term or vacation-time, by the friend or agent, and on the behalf, of any person under actual confinement or restraint; and if the person so applying should make an affidavit of such confinement or restraint, and that he believes the same not to be by virtue of any commitment for criminal or supposed criminal matter, but should declare, that he could give no other material information relative thereunto; would such an affidavit, as the law now stands, be a proper probable cause for the awarding of the said writ of *habeas corpus*? and would the court, or judge, be bound immediately to award the same as a writ of right? or would the court, or judge, be bound to refuse the same upon such affidavit only? or is it in such case entirely left to the discretion of the court, or judge, to grant the said writ of *habeas corpus* to one person upon such affidavit, and refuse it to another upon such affidavit, if they should so think fit?" And the same being objected to, after debate, the question was put, "Whether the said question shall be put to the judges?" It was resolved in the negative.]

Heir and Ancestor.

(A) Of the Nature of the Relationship between Heir and Ancestor.

(B) Of the several Kinds of Heirs: And herein,

1. Of the Heir Apparent.
2. Of the Heir General, or Heir at Common Law.
3. Of the Special Heir, or Issue in Tail.
4. Of the Customary Heir.
5. Of the *Heres Factus*.

(C) Of what Conditions, Covenants, &c. of the Ancestor, the Heir shall take Advantage.

(D) What Conditions, Covenants, &c. shall extend to him so as to bind him.

(E) What Actions he may commence and prosecute in Right of his Ancestor.

(F) Where the Heir shall be said to be bound to answer his Ancestor's Debts and Contracts.

(G) How to be proceeded against where he is bound.

(H) Where he shall be liable himself, and the Judgment general or special: And herein,

1. Where he shall be liable for his false Pleading.
2. Where by his Promise to pay or discharge the Debt of his Ancestor.

(I) What shall be Assets in his Hands.

What Things shall go to the Heir, and not to the Executor,
vide Tit. Executors and Administrators.

(A) Of

(A) Of the Nature of the Relationship between Heir and Ancestor.

AN heir, saith my Lord *Coke*, in the legal understanding of Co. Lit. the (a) common law, is he to whom lands, tenements, or 7. b. hereditaments, by the act of God and right of (b) blood do descend, of some estate of (c) inheritance. 3 Co. 12. b. (a) But by the civil law *hæres*

ex testamento succedit in universum jûs testatoris; so that by taking the whole estate, whether it be real or personal, by the will he is made heir, and called only by that name. Godolph. Orph. Leg. 119. (b) And therefore heir and ancestor are always applied to natural persons, as predecessor and successor are to bodies politick and corporate. Co. Lit. 78. b. (c) For a man cannot be heir to goods or chattels; for *hæres dicitur ab hæreditate*, Co. Lit. 8. a. *vel dicitur ab hærendo, quia hæreditas sibi hæret.* Co. Lit. 7. b.

The word *heir* in the notion of it implies, that the party hath (d) Co. Lit. all those legal (d) qualifications which our laws require in all persons that represent or stand in the place of another, and is of 9. But such importance, that regularly without the word *heir* no fee-simple can be created. there are exceptions to the general rule. For these,

and that an heir at law is to be favoured, *vide tit. Descent, & vide tit. Estate in Fee-simple,* and tit. *Devise, & infra.*

(B) Of the several Kinds of Heirs: And herein,

1. Of the Heir Apparent.

HERE we must observe, that no person can be heir until the death of his ancestor, according to the rule, *nemo est hæres viventis* (e); yet in common parlance he, who stands nearest in degree of kindred to the ancestor, is called, even in his life-time, heir apparent (f). Co. Lit. 8. a. [(e) There is an exception to this rule in the case of

the Duchy of *Cornwall*, which the king's first-born son takes by hereditary right in the lifetime of his father under the 11 Ed. 3.; for without an act of parliament the course of descent could not be altered. 8 Co. 16. (f) He is not called heir apparent, unless his right of inheritance be indefeasible, provided he outlive the ancestor: if he be only heir in the present circumstances of things, subject to have his right defeated by the contingency of some nearer heir being born, he is called only presumptive heir. 2 Bl. Comm. 203.]

Also, the law takes notice of an heir apparent so far as to allow the father to bring an action of trespass for taking away his son and heir, *quare filium & hæredem rapuit*, the father being guardian by nature to his son where any lands descended to him. 3 Co. 37. Ratcliff's case, Co. Lit. 75. 84. Dyer, 189. Vaugh. 180.

Also, a person may take by purchase, or *descriptio personæ*, by the name of heir even in the life-time of his ancestor; as where a man devised lands to *A.* and his heirs during the life of *B.* in trust for *B.* and after the decease of *B.* to the heirs male of the body of *B.* now living, it was held that by this devise the remainder was immediately vested in the son, and that the words *heirs male now living* in a will, were a full description of the son, Vent. 311. 334. Raym. 330. 2 Lev. 232. Burchet and Durdant. But for this *vide tit. Devise, let.*

who then was the heir apparent of *B.* and known by the devisor to be so.

Kelw. 84. But the son and heir hath no power over the inheritance during the life of the ancestor: Therefore if a son and heir bargains and sells the inheritance of his father, this is void, because he hath no right to transfer; so if he (*a*) releases, the law is the same.
 Co. Lit. 265. a. he and his heirs are for ever barred by the rebutter. Co. Lit. 265. a.

Co. Lit. 265. a. But if the son makes a feoffment of the inheritance of his father, this passes an estate during the son's life; for it is a disseisin to the father, and the son after the father's death cannot avoid it: For no man can allege an injury in a voluntary act of his own.

2 Inst. 523. Neither is there that privity between the heir apparent and his
 3 Co. 89. a. ancestor, as to make a fine levied by the ancestor a bar within
 Hob. 333. the 4 *H. 7. cap. 24.* as if the heir apparent be seised of lands, and the father levy a fine and die, it shall not bar the heir; because he does not claim or derive any title to the land from his father, and therefore in that respect shall have five years to preserve himself from the fine: For the privies understood and intended by the act are those who are privy not only in blood, but likewise in estate and title to the land of which the fine was levied, that is, those who must necessarily mention the conuzor, and convey themselves through him, before they can make out their title to the estate.

2. Of the Heir General, or Heir at Common Law.

That he must be of the whole blood, not a bastard, alien, &c. *vide tit. Descents, and tit. Coparceners.*
 The heir at common law is he who after his father or ancestor's death hath a right to, and is introduced into all his lands, tenements, and hereditaments.

Co. Lit. 14. a. None but the heir general, according to the course of the common law, can be heir to a warranty, or sue an appeal of the death of his ancestor.
 Cro. Jac. 217, 218.
Vide tit. Appeal, letter (C).

Cro. Eliz. 204. If a condition be annexed to borough-english or gavelkind lands, and the condition be broken, the heir at common law shall enter; for the condition is a thing of new creation, and collateral to the land: But when the eldest son enters, the heir or heirs by custom shall enjoy the land; for by breach of the condition they are restored to their ancient estate.

Hob. 25. If a man seised of fee-simple lands, as also of lands of the
 Co. Lit. 376. nature of gavelkind and borough-english, acknowledge a statute, and die, the heir at law shall make the special or customary heirs contribute in proportion, because all of them come in as heirs to the land descended, and are equally chargeable with the debts of the ancestor.

3 Co. 13. a. So, if *A.* binds himself in a recognizance or statute, and after
 2 Co. 25. b. his death some of his lands descend to the heir of the part of the father,

father, and some to the heir of the mother, both heirs shall be equally charged; and if the conuzee loads one only, he shall have contribution.

The heir at law is bound by his ancestor's (a) alienations and dispositions, as also by his covenants and conditions, as far as he hath assets. (a) But if a man covenants that after his death his heir at law shall stand seised to the use of his youngest son, this is void. Hob. 313. *per. Hobart.*

Also, if the ancestor agrees to convey or sell lands, and receives part of the purchase-money, but dies before a conveyance is executed, and a bill is brought against the heir, he will be decreed to convey, and the money shall go to the executor, especially if there are more debts due than the testator's personal estate is sufficient to pay. 2 Vern. 215. Abr. Eq. 265. [See *supra*, vol. 1. 105.]

So, if a father conveys to a younger son by a defective conveyance, and dies, the heir at law in two cases shall be compelled to make it good. 1. Where there is a covenant for further assurance, binding the heir. 2. Where there is a provision made by the father in his life-time for the heir, or he hath such provision by descent from the father. *Vide 1 Vern. 16.*

Also, the heir at law is bound by a decree obtained against the ancestor; which may be carried into execution two ways. 1st, If the decree is enrolled, the party may sue out a *subpœna scire facias* against the heir, to shew cause against the decree: But this is only after an enrolment, and not before: And the party must, at the return of the *subpœna*, shew cause, if he have any, against the decree. [1 Vez. 184. The enrolment of decrees being now much disused, it is become the practice to revive in all cases, indiscriminately, by bill. Mitf. Eq. Pl. 65.]

2^{dly}, The plaintiff may bring his bill of revivor, to carry the decree into execution: And this is the surest and safest way; for where the decree was obtained against the ancestor, and his heir does not claim under that title, but by virtue of another title paramount, there the decree can never be carried into execution against him; as where an estate is decreed against a man, and his heir insists his father had no title thereto, or was only tenant for life thereof, the decree in that case can never be carried into execution against him; he is at liberty to controvert the justice and validity of that decree; he may make a new defence from what his ancestor did, and vary his case as he shall be advised, and the parties go into a new examination of the matter, and hear the cause *de novo*, and the court judge whether the decree is right or not, and may affirm or reverse it at their pleasure.

But where one man obtains a decree against another for a real estate, and the party dies before the plaintiff is put into possession, in that case if the heir at law claims the estate by descent under his ancestor, or as devisee under him, he shall never controvert the justice of the decree though his ancestor should have mistaken his defence; nor shall he be at liberty to make a new defence, or enter into new proof, so as to overthrow the former decree, especially where it appears to the court that the decree hath been of an ancient standing.

3. Of the special Heir, or Issue in Tail.

Lit. § 613. The issue in tail claims *per (a) formam doni*, and as the statute *de donis* preserves the estate to him, his ancestor cannot grant or alien, nor make any *(b)* rightful estate of freehold to another, but for term of his own life.

(a) And therefore the rule of *proffesso fra-* *tris* does not extend to lands in tail; for as to them a man must claim as heir *per formam doni*. Co. Lit. 15. *vide* tit. *Descents*, letter (C). (b) How far he may discontinue, *vide* tit. *Discontinuance*, letter (B). That by the 32 H. 8. c. 28. he may make leases for three lives, or 21 years, to bind his issue, but not those in reversion or remainder, *vide* tit. *Leases and Terms for Years*.

Plowd. 557. If the issue in tail be attainted of felony in the life of his father, 8 Co. 166. a. and pardoned, upon the death of the donee, the donor cannot enter; for though the disability to take by descent remains after the pardon, yet the donor cannot enter against his own gift while there is any issue in being; and though the issue cannot by reason of such disability claim as heir to the donee, yet he may enter as a special occupant, for the gift is still a good *designatio personæ*, who shall take upon the death of the donee; but then the issue must take it subject to the charges of his father, because he is to take it as the tenant left it, and consequently is to make good all charges which he left upon it.

4. Of the Customary Heir.

Ad. tit. A custom in particular places varying the rules of descent at *Descent,* common law is good; such as the custom of gavelkind, by which *letter (D),* all the sons shall inherit, and make but one heir to their ancestor: *tit. Borough-* the general custom of gavelkind lands extends to sons only: but *Englsh and* a special custom, that if one brother dies without issue, all his brothers may inherit, is good. *Gavelkind.*

Co. Lit. 10. But if a remainder of lands of the nature of gavelkind be limited *Co. Lit. 10.* to the right heirs of *J. S.*, the heir at common law shall take it, *Hob. 31.* and not the heirs in gavelkind; for this remainder being newly created, cannot be reckoned within the custom.

Co. Lit. 210. So, the custom of borough-english, that the youngest son only *2 Lev. 138.* shall inherit, is good; but the youngest brother shall not inherit, by force of this custom, unless there shall be a particular custom to that purpose also.

5. Of the *Hæres factus*.

3 Co. 42. a. An *hæres factus* is only a devisee of lands, being made so by the will of the testator, and has no other right or interest than the will gives him.

Pockley v. Pockley, Vern. 36, 7. It has been holden in Chancery, that such an heir shall have the aid of the personal estate in discharging the debts of the testator.

Preced. But this must be understood of an *hæres factus* of the whole estate, who shall have the benefit of the personal estate, but a devisee (c) of particular lands shall not.

Chan. 3. shall have this benefit; so ruled by Lord Nottingham in the above case of Pockley v. Pockley, and now admitted as settled law. Galton v. Hancock, 2 Atk. 437. Lutkins v. Leigh, Ca temp. Talb. 53.]

(C) Of what Conditions, Covenants, &c. of the Ancestor the Heir shall take Advantage.

Conditions (a) and covenants real, or such as are (b) annexed to estates, shall descend to the heir, and he alone shall take advantage of them. 43 E. 3. 4. And. 55. (a) That conditions can only be reserved to the feoffor, donor or lessor and their heirs, but not to any stranger. Lit. §. 447. Co. Lit. 214. (b) Secus of covenants in gross. Palm. 558. — Also, for a breach in the time of the covenantee, the action shall be brought by his executor, though the covenant was with him, his heirs and assigns only. Vent. 175. 2 Lev. 26. adjudged.

And this not only where there are express words, but also where there are none; for the law by implication reserves the condition to the heir of the feoffor, &c.; for being prejudiced by the disposition, it is but reasonable that he should take the same advantages which his ancestor whom he represents might. Roll. Abr. 470. 472.

If a man seised of land in right of his wife, makes a feoffment in fee upon condition, and dies, and after, the condition is broken, the heir of the husband shall enter; for though no right descended to him, yet the title of entry by force of the condition, which was created upon the feoffment, and reserved to the feoffor and his heirs, descended. 8 Co. 43. Co. Lit. 222. 336. b.

The heir shall take advantage of a *nomine pœnæ*, for being incident to the rent, it shall descend to the heir, being a security or penalty to secure the payment of the rent; whoever therefore has a right to the rent, ought in reason to have the penalty which is to oblige the tenant to pay it. Co. Lit. 162. b.

If an abbot and convent covenant to sing for the covenantee and his heirs in such a chapel, his heirs at all times shall have a writ of covenant for the not doing thereof. 2 H. 4. 6. b. 5 Co. 18.

If a man leases for years, and the lessee covenants with the lessor, his executors and administrators, to repair and leave the premises in good repair at the end of the term, and the lessor dies, &c., his heir may have an action upon this covenant, for this is a covenant which runs with the land, and shall go to the heir, though he is not named; and it appears, that it was intended to continue after the death of the lessor, in as much as his executors, &c. are named. 2 Lev. 92. Lougher v. Williams, Skin. 305. S. C. cited.

The plaintiff, as heir, declared, that his ancestor *per indenturam suam, cujus alteram partem sigillo* of the lessee (omitting *sigillat.*) *hic in curia profert*, did demise, that the lessee covenanted to repair from time to time, and to leave in repair, and then shewed that his ancestor died *anno 10 W. 3.* and for breach assigned, *quod primo apr. anno tertio Regine nunc, & per 10 annos ante tunc*, the premises were out of repair; after verdict for the plaintiff, it was moved in arrest of judgment, 1. That the word *sigillat.* was wanting; 2. That part of the ten years incurred in the life of the ancestor, and that this was a hard action; & *per Holt* C. J. the want of *sigillat.* is cured by the verdict and pleading over; and if the premises were out of repair in the time of the ancestor, and continued so in the time of the heir, it is a damage to the heir, and the jury give as

much in damages as will put the premises in repair; but hereby no damages are given in respect of the length of time they continued in decay, but in respect of what it will cost at the time of the action brought to put the premises in repair; therefore *per decem annos* was frivolous: and he said, that this is not a hard action, and good damages are always given in these cases, because the damages recovered ought to be applied to the repair of the premises.

Co. Lit.
214. b.

If *A.* enfeoffs *B.*, upon condition, that if the heir of *A.* pays to *B.*, &c., 20*s.*, then he and his heirs may re-enter; this is a good condition, of which the heir of *A.*, may take advantage, and yet *A.* himself never can.

Mich.
5 Geo. 1.
between
Marks and
Marks, in
Canc. Eq.
Caf. Abr.
106. pl. 6.
10 Mod.
419. Stra.
129. S. C.

J. S. had issue three sons, *William* his eldest, *Nathaniel* his second, and *Daniel* his third; *William* died in the life-time of his father, leaving issue only a daughter; afterwards the father devised the estate in question to *Anne* his wife for her life, and after her death to his son *Daniel* and his heirs; provided, that if *Nathaniel* did, within three months after the death of his wife, pay to *Daniel*, his executors or administrators, the sum of 500*l.* then the said lands should come to his son *Nathaniel* and his heirs; the wife lived several years after, and during her life *Nathaniel* died, leaving the plaintiff his heir; and the wife afterwards dying, the plaintiff brought his bill within three months after her death, praying, that upon payment of the 500*l.* he might have a conveyance of the estate; and the principal point of the case was, whether this 500*l.* being to be paid by *Nathaniel* within a limited time, and he dying before that time came, his heir at law could now, on payment of the money, make a title to these lands; for it was agreed that he was not heir at law to the testator: and it was insisted upon that he could not: that this was a condition precedent, and merely personal in *Nathaniel*, who had neither *jus in re*, nor *ad rem*, and could neither have devised, nor released, nor extinguished this condition; and being a bare possibility, and he dying before it was performed, his heir could not make it good; and though the word *heirs* be used in the devise to *Nathaniel*, yet that is not designed to give them any estate originally, but to denote the quantity of estate which *Nathaniel* was to take; and for this were cited the cases in the (a) margin. On the other side it was insisted, that this was like the common case in (b) *Co. Lit.* where a feoffment is made on condition that the feoffor shall, before such a day, &c., there, if the feoffor die before the day, his heir may perform the condition, for the reasons there mentioned, and that it being so at law, it should still be construed more liberally in equity, where the letter of a condition is not always required to be strictly performed; and for this were cited the cases (c) in the margin; that the possibility of performing this condition was an interest or right, or *scintilla juris*, which vested in *Nathaniel* himself; that he survived the testator; and therefore this differed from *Bret and Rigden's* case; that consequently, such right, possibility; or interest, descended to his heir, and might be performed by him;

(a) 10 Co.
Lamper's
case, Plowd.
Brett and
Rigden.
[See too
occ. 1 P.
Wms. 397.
(b) Co. Lit.
205, 219. b.
(c) 1 Chan.
Caf. 89.
3 Chan. Ca.
Bertie and
Falkland.

as before the statute *de donis*, the possibility of reverter descended to the heir of the donor; and for this were also cited the cases in the (d) margin: the cause being first heard by the master of the rolls, was thought by him a matter of great difficulty, and therefore he appointed the counsel to speak to it when the court was full: afterwards it was decreed by my lord chancellor, with the assistance of the master of the rolls, for the plaintiff, on *Lit.* § 334, 335. and my lord chancellor said, that though a condition, in strictness of law, was not devisable, yet, since the statute of uses, the devisee may take benefit of it by an equitable construction, &c., and that *Nathaniel* might have released or extinguished this condition.

(a) 2 Saund. Purefoy and Rogers, Cro. Car. 358. Cro. Jac. 591. 8 Co. Math. Manning's case.

(D) What Conditions, Covenants, &c. shall extend to the Heir so as to bind him.

AS the heir at law is the proper and only person who can take advantage of conditions, &c. annexed to the real estate, so shall he be bound by (a) all such conditions, &c., as (b) run with the land, whether such conditions were annexed to the estate by the original feoffor, grantor, or his immediate ancestor.

Roll. Abr. 421. (b) Shall be bound by conditions in law as well as ex-

press conditions. Co. Lit. 233. 8 Co. 44. Hard. 11. And though an infant, shall be bound to perform them; but for this *vide tit. Infants.* (c) If the ancestor levies a fine of ancient demesne lands to the prejudice of the lord, an action of deceit lies against the heir. Salk. 210. pl. 1. Ld. Raym. 177. 3 Salk. 35.

If a gift be made in tail, upon condition that the donee shall not discontinue, and the donee have issue two daughters, and one of them discontinue, the donor shall enter and evict them both; because it was the original condition annexed to the whole estate, that no part of it should be discontinued.

Co. Lit. 163. b.

But here we must take notice, that neither tenant in tail, nor his issue, can be restrained from aliening by fine and recovery, though they may be restrained from aliening by feoffment, or other tortious act, which amounts to a discontinuance.

Vide head of Estates Tail.

So, where one devised lands to *A.* and the heirs male of his body, provided, that, if he attempted to alien, then immediately his estate should cease, and *B.* should enter; and *A.* made a feoffment in fee, and thereupon *B.* entered; it was adjudged against *B.*, and that the condition was void, because *non constat* what shall be adjudged an attempt, and how it should be tried.

Vent. 321. 3 Keb. 787. Piers and Winn.

Also, where a condition is annexed to the estate given to the heir, which goes in abridgment and restraint thereof, the same shall in some cases be construed a limitation; for if it were a condition, no body could take advantage of it but the heir himself.

Dyer, 316. 10 Co. 41. Vent. 199.

As if a copyholder in borough-english surrenders to the use of his will, and after devises to his wife for life, remainder to his eldest son, paying 40s. to each of his brothers and sisters within two years after the death of his wife, &c., this is a limitation, and

Cro. Eliz. 204. Wellock and Hammond, 3 Co. 20, 21. 2 Leon. 114. S. C.

not a condition; for, if it should be a condition, it would extinguish in the heir, and there would be no remedy for the money.

Cro. Eliz.
833. 919.
Moor, 644.
pl. 891.
Noy, 51.
Haynsworth
and Pretty,
adjudged.
Vaugh. 271.
2 Mod. 26.
S. C. cited.

So, where one seised of lands in fee, having issue two sons and a daughter, devised to his youngest son and daughter 20*l.* a piece, to be paid by his eldest son, and devised his lands to his eldest son and his heirs, upon condition, that if he did not pay the said sums, that then the land should remain to his youngest son and daughter and their heirs, and died; the eldest son entered, and did not pay the money; it was adjudged that the youngest son and daughter should have the land; for, 1. This devise to the eldest son and heir, being no more than what the law gave him without such devise, was void. 2. If this should be a condition, it would be defeated by the descent upon the eldest son, who was to perform it; therefore, 3. It was holden to be a devise to the eldest son only, or no longer than till he failed to pay the said sums, and then to the youngest son and daughter, which gives them the land by way of limitation, upon his failing to pay the said sums.

2 Mod. 7.
Shuttle-
worth and
Barber.

One devises lands to *A.* his heir at law, and devises other lands to *B.* in fee, and if *A.* molest *B.* by suit or otherwise, he shall lose what is devised to him, and it shall go to *B.* and dies; *A.* enters into the lands devised to *B.* and claims them; and it was holden, 1. That this was a sufficient breach to give title to *B.* 2. That if this should be a condition, it would by the descent thereof to *A.* who was to perform it, and also to enter for the breach thereof, be merged and defeated; therefore it was holden to be a limitation, which determined the estate of *A.* and cast the possession upon *B.* without entry.

2 Co. Fran-
cis's case.
(a) This
diversity is
agreed in
the case of
Fry and
Porter.
Vent. 199.
Rep. 26.

But wherever the ancestor makes a conveyance or disposition on condition, which goes in restraint and abridgement of the estate of the heir, he must have notice of it; for having a good title by descent, he is not obliged to take notice of such condition at his peril, as (a) others must do.

Mod. 86. Lev. 21. Raym. 236. 2 Keb. 756. 737. 814. 867. 2 Ch. Rep. 26. 2 Show. 316.

Malloon and
Fitzgerald,
3 Mod. 28.
2 Show. 315.
S. C.
Skin. 125.
S. C.
[Whalley
v. Reede,
1 Lutw.
209. S. P.
Burleton v.
Humphrey,
Ambl. 256.
S. P.]

As where *A.* seised of lands in fee, and having issue only one daughter named *B.* by lease and release conveys his lands to the use of himself for life, and after his death to the use of *B.* in tail, provided that she married (with the consent of the trustees, or the major part of them) some person of the family and name of *Fitzgerald*, or who should take upon him that name immediately after the marriage; but if not, then the trustees to raise a portion out of the said lands for *B.* and the lands to remain to *C.*; afterwards *A.* dies, and *B.* marries one who neither was nor took upon him the name of *Fitzgerald*; the only point upon which judgment was given was the want of notice in *B.* of the settlement, without which, being heir at law, and so having a title by descent, she was not bound, *ex officio*, to take notice of the condition.

(E) What Actions he may commence and prosecute in Right of his Ancestor.

IT is clear that the heir may bring any real action, or action *droitural*, in right of his ancestor, but cannot regularly bring any personal action, because he has nothing to do with the assets or personal contracts of his ancestor. Co.Lit. 164.

Also, if an erroneous judgment be given against the ancestor, by which he loseth the lands, the heir may bring (a) a writ of error. Roll. Abr. 747. Dyer, 90. Godb. 337.

(a) That error and attain always descend to such person, to whom the land should descend, as if no such recovery or false oath had been. 1 Leon. 261.

And if one hath lands on the part of his mother, and loseth by erroneous judgment, and dies, the heir of the part of the mother shall have the writ of error. Leon. 261. 2 Sid. 56.

So the younger son, when entitled to the land by the custom of borough-english, shall bring the writ of error, and not the heir at common law; for this remedy descends with the land. Owen, 68. Leon. 261. 4 Leon. 5. adjudged; & vide Bridg. 79. Rol. Rep. 311.

So, if there be an erroneous judgment against tenant in tail female, the issue female, and not the son, shall bring a writ of error. Dyer, 90. Leon. 261. Roll. Abr. 747.

So, if a man settle land to the use of himself and the heirs of his body, the remainder to his own right heirs, and die, leaving issue only a daughter, who levies a fine, and dies without issue, and *J. S.* bring a writ of error as cousin and collateral heir to the daughter; yet he shall never reverse the fine, for there could no right descend to him from the daughter, because she had but an estate-tail, which determined by her death without issue; and it does not appear that the remainder in fee was in the daughter as right heir; wherefore *J. S.* shall not reverse the fine, *quia de non apparentibus & non existentibus eadem est ratio*, especially in a court of judicature, where the judges can take notice of nothing that does not come judicially before them, and appear in the pleading. Dyer, 89. Cro. Eliz. 469. 3 Lev. 36.

If *J. S.* bind himself and his heirs in a bond, and thereupon judgment be obtained against *J. S.* and he make his will, and his heir at law executor, and die, leaving lands which descend to his heir, yet he shall not have a writ of error as heir, for he is not privy to the judgment; and when an extent is made upon him, it is as tertenant; but after the lands are taken in execution, he may have a writ of error. Styl. 38, 39. White and Thomas, per Roll.

Also the heir at law may, in right of his ancestor, maintain an action of debt for rent reserved on a lease made by his ancestor, for the rent is part of the lands, and incident to the reversion; but for arrears of rent incurred in the life-time of the ancestor, neither the heir nor (a) executor could by the common law maintain any 11 H. 6. 15. 19 H. 6. 41. Co. Lit. 162. a. (a) But now by 32 H. 8. c. 37., an

executor
may main-
tain an ac-
tion of debt
for such ar-
rears; for which *vide tit. Debt*, letter (C).

any action; for as to the heir they were considered as part of the personal estate; and as to the executor, he could not represent his testator as to any contracts relating to the freehold and inheritance.

Co. Lit.
18. b. 3; for
this *vide*
Roll. Abr.
625. Noy,
104. Godb.
200. Cro.
Jac. 367.
2 Bull. 151.

If a nobleman, knight, esquire, &c. be buried in a church, and have his coat of arms, and pennons with his arms, and such other ensigns of honour as belong to his degree or order, set up in the church, or if a grave-stone or tomb be laid or made, &c. for a monument of him; in this case, albeit the freehold of the church be in the parson, and that these be annexed to the freehold, yet cannot the parson, or any, take them or deface them, but he is subject to an action by the heir and his heirs, in the honour and memory of whose ancestor they were set up.

(F) Where the Heir shall be said to be bound to answer his Ancestor's Debts and Contracts.

Plow. 441.
3 Co. 12. a.
Cro. Jac.
450.
(a) And. 7.
Or the ad-
ministrator
of the an-
cestor.
3 Lev. 139.

WHERE the ancestor binds himself and his heirs in an obligation, the obligee may sue his heir (a) or executor at his election, and may have execution of the land descended to the heir; for the common law having allowed the action of debt against the heir, he could have no benefit by the action, unless he were permitted to have execution of the lands which descended to the heir.

adjudged on demurrer.—May sue the same person, being both heir and executor; also may sue the executor for part, and the heir for the residue; but if the heir or executor pay the whole or part, and afterwards the other be sued, there shall be relief in an *audita querela*. 3 Lev. 330-4-5. — Where the heir, being likewise administrator, and having real assets by descent, discharged a bond debt, in which he was bound, which he insisted was out of the personal estate; the court of Chancery would not admit of this construction, to the defeating of the simple contract creditors. Abr. Eq. 44.

Dyer, 81.
pl. 62.
[And if he
pay his an-
cestor's debts
to the value of
the land descended,
he shall hold the
land discharged.]
Buckley v. Night-
ingale, 1 Str. 665. Ca. temp. Talb. 109.]

But the body of the heir is protected, for it would be most unreasonable to subject the heir to the payment of his ancestor's debts, any farther than the value of the assets descended.

2 Inst. 19.
Plow. 440.
Hob. 60.
vide tit.
Execution,
letter (A).
(b) And
therefore no
action will
lie against
the heir for
the escape
of one in
execution
suffered by
the ances-

Also the heir must be (b) expressly named, otherwise he is not chargeable; and the reason why the heir is not chargeable in this case, as the executor is in case of a bond entered into by the testator, without being named, is this; by the common law only the goods and chattels of the debtor, and the annual profits of the land as they arose, and not the land itself, were liable to execution for debt or damages, because these being the security the creditor depended upon, they were liable in the hands of his representative, or executor, as well as in the hands of the debtor himself; and hence it was, that the executor was bound to answer the debt of the testator, so far as he had chattels or assets, though he was not named in the contract; but the land was not liable

liable to execution, because it was preserved from the personal contracts and engagements of the tenant, that he might be the better able to answer the feudal duties to the lord, which were the life and support of the government; and therefore the land, not being originally liable to the demand in the hands of the obligor, must be much less liable in the hands of the heir, who was not comprehended in the contract.

tion shall be taken out by *elegit*, and not of all the lands descended. Dyer, 271. a. pl. 25. — But the heir shall answer for the escape of a prisoner in execution, on a statute-merchant, by the *stat. de Mercator*. 13 Ed. 1. stat. 3. & *vide infra*.

But if *A.* hath granted, for him and his heirs, to *B.* and his heirs, such a rent out of his lands; in this case the heirs being comprehended in the contract are bound to make good the grant, so far as they have assets by descent from the grantor; and this was allowed at common law, because the grantee of the rent had the land originally in view for his security, and by the grant itself having it in his power to distrain the land for the rent, it was equal to the heir whether the land was to answer the rent by distress, or by an execution upon a judgment in a writ of annuity.

If the ancestor binds himself in a statute, recognizance, &c. the heir is liable not only as tertenant, but also as heir, otherwise he could not have his age; and cannot oblige a purchaser, whether for valuable consideration, or without, to contribute; but one heir may oblige another to contribute; as if a man seised of two acres, the one descendible according to the course of the common law, the other in *borough-english*, acknowledge a statute, &c. the heir at law shall oblige the heir in *borough-english* to contribute: So, one coparcener shall oblige the other to contribute; or if the conuzor hath lands, some descendible to the heirs of the father, and some descendible on the heirs of the mother, the heir on the part of the father shall compel the heir on the part of the mother to contribute; & *sic vice versa*.

By the common law, if the heir before an action brought against him had aliened the assets, the obligee was without (a) any remedy; but if he only aliened, pending the writ, the lands, which he had by descent at the time of the (b) original purchased, were liable.

the value of the land aliened before action brought. 1 P. Wms. 777.] (a) Upon a motion for a new trial, Twissden said, that, in his practice, the heir in an action of debt against him upon a bond of his ancestor pleaded *riens per descens*: the plaintiff knew the defendant had levied a fine, and at the trial it was produced; but because they had not a deed to lead the uses, it was urged, that the use was to the conuzor and his heirs, and so the heir in by descent; whereupon there was a verdict against him; and being a just debt, they could never after get a new trial. Mod. 2. S. P. in *B. R.* Mich. 14 Geo. 2. Smith v. Higgins. (b) Or filing a bill in *B. R.* which to this purpose has been holden as effectual as an original writ. Carth. 245.

In consequence of this doctrine, that the lien shall have relation to the time of the original purchased, it hath been adjudged, that where there were two creditors to *J. S.* whose heir was bound, viz. *A.* and *B.*, and *A.* filed an original in *C. B.* and had judgment thereon, *Trin. Term*, 2 Jac. 2. by default, and thereupon a general *elegit* issued against all the lands of the heir, and

tor, nor for any tort or trespass of his; also if the ancestor be condemned in an obligation, and die, execu-

Roll.
Abr. 226.
Poph. 87.
Hob. 58.
Dyer, 344.
b. Co. Lit.
144. b.

3 Co. 12.
Sir William
Herbert's
case.

Co. Lit. 102.
[It seems
that before
the statute,
he was re-
sponsible in
equity for

Carth. 245.
Gree and
Oliver, ad-
judged; and
North's
opinion,
Mod. 253.
that he who

first obtains judgment shall be satisfied, denied to be law.

a moiety thereof was delivered to *A.*; and *B.* on a bill filed in *B. R.* 1 & 2 *Jac.* 2. had a special judgment against the assets confessed by the heir, *Trin. Term.* 3 *Jac.* 2.; though *B.*'s judgment be subsequent to *A.*'s, yet it appearing that his bill or original was filed before *A.*'s, the judgment should have relation thereto, and therefore he was to be first satisfied.

Carth. 246.
per Cur.

So it seems in the above case, that though *A.*'s judgment had been on an original actually filed before *B.*'s, *B.* must have been preferred, because his judgment was general against the heir, and the execution a general and common execution by *elegit*, and not against the assets only by way of extent; and therefore such a general judgment will not operate by way of relation to the original, but binds only as in common cases, from the time of the judgment given.

(a) A bill was brought in Chancery against the heir and his alienee, and the creditor relieved, though it was objected, that the statute being introductive of a new law, the relief on it ought to have been at common law. *Abr. Eq.* 149.
(b) Made perpetual by 6 & 7 *W. 3.* c. 14.

But to prevent the wrong and injury to creditors by alienation of the lands descended, &c. by the (a) 3 & 4 *W. & M. cap.* 14. (b) it is enacted, "That in all cases, where any heir at law shall be liable to pay the debt of his ancestor, in regard of any lands, tenements, or hereditaments descending to him, and shall sell, alien, or make over the same before any action brought or process sued out against him, that such heir at law shall be answerable for such debt or debts in an action or actions of debt to the value of the said land so by him sold, aliened, or made over; in which cases all creditors shall be preferred as in actions against executors and administrators, and such execution shall be taken out upon any judgment or judgments so obtained against such heir, to the value of the said land, as if the same were his own proper debt or debts; saving that the lands, tenements, and hereditaments *bonâ fide* aliened before the action brought, shall not be liable to such execution.

"Provided, That where any action of debt upon any specialty is brought against any heir, he may plead *riens per discent* at the time of the original writ brought, or the bill filed against him; any thing herein contained to the contrary notwithstanding: And the plaintiff in such action may reply, that he had lands, tenements, or hereditaments from his ancestor before the original writ brought, or the bill filed: And if, upon issue joined thereupon, it be found for the plaintiff, the jury shall inquire of the value of the lands, tenements, or hereditaments so descended, and thereupon judgment shall be given, and execution shall be awarded as aforesaid: But if judgment be given against such heir, by confession of the action without confessing the assets descended, or upon demurrer, or *nihil dicit*, it shall be for the debt and damages, without any writ to inquire of the lands, tenements, or hereditaments so descended."

Abr. Eq.
149.

Also if, before this statute, the ancestor had devised away the lands, a creditor by specialty had no remedy either against the heir or devisee.

But

But now by the said statute 3 & 4 W. & M. cap. 14. reciting that several persons had by bonds or other specialties bound themselves and their heirs, and had afterwards by will disposed of their lands, with an intent to defraud their creditors; it is enacted, "That all wills and testaments, limitations, dispositions, or appointments of or concerning any manors, messuages, lands, tenements, or hereditaments, or of any rent, profit, term, or charge out of the same, whereof any person or persons at the time of his, her, or their decease shall be seised in fee-simple, in possession, reversion, or remainder, or have power to dispose of the same by his, her, or their last wills or testaments, shall be deemed and taken (only as against such creditor or creditors as aforesaid, his, her, and their heirs, successors, executors, administrators, and assigns, and every of them) to be fraudulent, and clearly, absolutely, and utterly void, frustrate, and of none effect; (any pretence, colour, feigned or presumed consideration, or any other matter or thing to the contrary notwithstanding."

"And for the means that such creditors may be enabled to recover their said debts, it is further enacted, 'That in the cases before mentioned every such creditor shall and may have and maintain his, her, and their action and actions of debt, upon his, her, and their said bonds and specialties, against the heir and heirs at law of such obligor or obligors, and such devisee and devisees jointly (a), by virtue of this act; and such devisee or devisees shall be liable and chargeable for (b) a false plea by him or them pleaded, in the same manner as any heir should have been for any false plea by him pleaded, or for not confessing the lands or tenements to him descended."

11., by which, although the heir of the *cestui que trust* is made liable to answer, &c. yet by kind of plea, or other matter, he shall not be chargeable to pay the condemnation out of his own estate.

"Provided, That where there hath been or shall be any limitation or appointment, devise or disposition of or concerning any manors, messuages, lands, tenements, or hereditaments, for the raising or payment of any real or just debt or debts, or any portion or portions, sum or sums of money for any child or children of any person, other than the heir at law, according to or in pursuance of any marriage contract or agreement in writing *bonâ fide* made before such marriage, the same, and every of them, shall be in full force, and the same manors, messuages, lands, tenements, and hereditaments shall and may be holden and enjoyed by every such person or persons, his, her, and their heirs, executors, administrators, and assigns, for whom the said limitation, appointment, devise, or disposition was made, and by his, her, and their trustee or trustees, his, her, and their heirs, executors, administrators, and assigns, for such estate or interest as shall be so limited or appointed, devised or disposed, until such debt or debts, portion or portions shall be raised, paid, and satisfied; any thing contained in this act to the contrary notwithstanding."

[(a) So, in equity, the heir must be made a party with the devise. *Gawler v. Wade*, 1 P. Wms. 99. *Warren v. Stavell*, 2 Atk. 125.] (b) *Vide* 29 Car. 2. c. 3. § 10.

[If there be, therefore, a devise, subject to the payment of debts, simple contract creditors will be entitled to be paid *pari passu* with bond or other specialty creditors; for in conscience their debts are to be equally favoured, being equally due. *Woolsten-croft v. Long*,

1 Vern. 63. Child v. Stephens, *id.* 101. Sawley v. Gower, 2 Vern. 61. Wilson v. Fielding, *id.* 763. And such a devise will admit creditors whose debts are barred by the statute of limitations. Goston v. Mill, 2 Vern. 141. And though it hath been holden in some cases, that if the estate be devised to the executor for payment of debts, this will make it legal assets; yet it seems to be now settled that the circumstance of giving the real estate by any means to the executor, shall not occasion the produce of it when sold, to be applied, as it would in the ecclesiastical court; but it must nevertheless be considered as equitable assets. Per Lord Thurlowe, Newton v. Bennet, 1 Br. Ch. Rep. 135. See also Silk v. Prime, 1 Br. Ch. Rep. Addit. 7. But a devise of the real estate to the heir, charged with the payment of debts, does not break the descent. Allam v. Heber, 2 Str. 1270. Emerson v. Inchbird, *Ld.* Raym. 728. Clerk v. Smith, 1 Salk. 241. 1 Lutw. 793. Hurst v. Earl of Winchelsea, 2 Bur. 879. 1 Bl. Rep. 187. the estate, therefore, will be legal assets. Freemount v. Dedire, 1 P. Wms. 429. Plunket v. Penfon, 2 Atk. 290.]

And it is further enacted by the said statute, "That all and every devisee and devisees made liable by this act, shall be liable and chargeable in the same manner as the heir at law, by force of this act, notwithstanding the lands, tenements, and hereditaments to him or them devised shall be aliened before the action brought."

Ab. Eq. 149. Parflow v. Weedon. [Mr. Vernon, in referring to this case, in Pr. Ch. 521., observed, that till this resolution, he should have been of another opinion, for that such a disposition had been holden fraudulent by Lord Holt, in the case of Templeman v. Beke. And Mr. Vernon's dissatisfaction is taken notice of by Lord Talbot, in Jones v. Marsh, Ca temp. Talb. 64.]

In the construction of this statute it hath been holden, that, though a man is prevented thereby from defeating his creditors by will, yet any settlement or disposition he shall make in his life-time of his lands, whether voluntary or not, will be good against bond-creditors; for that was not provided against by the statute, which only took care to secure such creditors against any imposition, which might be supposed in a man's last sickness; but if he gave away his estate in his life-time, this prevented the descent of so much to the heir, and consequently took away their remedy against him, who was only liable in respect of the lands descended; and as a bond is no lien whatsoever on lands in the hands of the obligor, much less can it be so when they are given away to a stranger.

Carth. 353. Redshaw and Hester, adjudged. 5 Mod. 122. S.C. Comb. 344. S.C. adjudged, and that the statute was made not to create, but to prevent difficulties in pleading.

In debt against an heir, who pleaded *riens per descent* on the day of the bill, the plaintiff replied specially, that the obligor (father of the defendant) died on such a day, and that the defendant (after the death of his father) and before the day of the bill, viz. on such a day which was a day after the death of the obligor, had lands by descent from his father in fee-simple, *unde predict.* (the plaintiff) *de debito predicto satisfecisse potuit*, viz. *apud H. predict.* *Et hoc parat. est verificare, unde petit judicium*, according to the above statute. To this the defendant made a frivolous rejoinder; and thereupon the plaintiff demurred. The question was, if the replication was good in pursuance of the statute; for it was objected that it was ill, because the plaintiff had put the value of the lands in issue by these words, *unde, &c. de debito predicto satisfecisse potuit*, which ought to have been omitted, because the statute is express, that after the issue tried the jury shall inquire of the value; so that it is matter of inquest only *ex officio*, and not to be the point of the issue; and by this statute the plaintiff is only to recover *pro tanto* against the defendant with respect to the value of such aliened assets, and is not to have a general judgment against the heir, as at common law upon a false plea. *Sed per*

per Cur. upon debate, this replication is good and as it ought to be, and that if *unde, &c. de debito prædicto satisfecisse potuit* had been left out, it might have been a good cause of objection; for the statute doth not give occasion to alter any more of the form of the replication common in such cases, but only as to the time concerning assets by descent; and the conclusion, which (before the statute) was to the country, must now be with an averment only, because the defendants may have an opportunity to answer the new matter alleged in the replication.

It seems that neither before nor since this statute the (a) executor or administrator of the heir are liable; for the person of the heir is not chargeable, but with respect to the land; and if, before the statute, the heir had aliened before action brought, he should not be charged for the profits he received; which is evident from the plea of *riens per discent* the day of the writ purchased; much less then could his executor (b); for an executor is but in nature of a trustee for the personalty, and not at all privy to the inheritance.

and Dyer 344. a precedent cited in the book of entries, where debt was brought against the executor of an heir upon a bond made by the ancestor, which is also mentioned in *Rast. Entr.* 172. b. p. 4. *Plow.* 441. 2 Leon. 11. 3 Leon. 70. But the heir of an heir is liable. *F. N. B.* 120. b. note c. *Dy.* 358. a. p. 46. *Cro. Car.* 151. *Carth.* 129. (b) But *quære & vide* 2 Vern. 62. where it is said, that if the heir aliens the land to prevent the creditors from having satisfaction of their debts, equity will follow the money into the hands of the heir or his executor.

If there be judgment in debt against two, and one die, a *scire facias* lies against the other alone, reciting the death, and he cannot plead that the heir of him that is dead has assets by descent, and demand judgment if he ought to be charged alone: For at (c) common law the charge upon a judgment being (d) personal survived, and the statute of *Westm.* 2. which gives the *elegit* does not take away the remedy of the plaintiff at the common law, and therefore the party may take out his execution which way he pleases; for the words of the statute are, *sit in electione*; but if he should, after the allowance of this writ and revival of the judgment, take out an *elegit* to charge the land, the party may have remedy by suggestion, or by *audita querela*.

personal execution; and that a personal execution will survive, though a real one will not, *vide* 3 Co. 14. *Yelv.* 209. *Raym.* 153. 2 Keb. 3. 331. 4 Mod. 315. 3 Keb. 295. *Salk.* 319. pl. 3. 320. *Show* 402.

If there be a sequestration for a personal duty against the ancestor where the heir is not bound, and the defendant die, there is an end of the sequestration, and it cannot be revived against the heir; because neither the heir nor the lands are bound by such decree: But if the decree be upon a covenant that bound the heir, and the defendant die, such decree may be revived by *subpoena scire facias* against the heir to shew cause against the decree, if the decree be enrolled of record; or if not, by bill of revivor; and when revived against heir and executor, (which is the usual and regular way), the sequestration also will be revived on motion, if, upon coming into court, cause is not shewn why the decree should not be revived: And in this case it hath been resolved, that the decree should have the same authority to bind

Trin. 32
Car. 2. in
C. B. between
Baron Weston
and Danby,
adjudged.
(a) But for
this *vide*
2 Chan.
Cases, 175.
Vern. 400.

Lev. 30.
Raym. 26.
Keb. 92.
S. C. Edfar
and Smart.
(c) So ad-
judged. 1 E.
3. 13. pl.
41. & *vide*
29 Affise,
pl. 37.
29 E. 3. 29.
(d) For the
difference
between a
real and per-

Vern. 143.
3 Lev. 355.
2 Vern. 37.
88, 9.

the personal assets as a judgment at law, and therefore shall go *pari passu* to be paid off and discharged; but the lien of the judgment upon lands came in by the statute, which only gives an *elegit* for a moiety of the land in satisfaction of the debt, and therefore that could give no authority to lay a sequestration on the real estate for a mere personal duty, where the heir is not bound in the covenant.

Gott v. Vavasor, Barnes, 164. [If a declaration against the heirs and devisees under this statute disclose a devise for the payment of debts, it may be demurred to.

Mathews v. Lee, Barnes, 444. The plaintiff may join issue on the plea *riens per descent*, without replying, as he is empowered by the statute; and in such case the jury are not to set out the value of the lands descended; it is sufficient for them to find that lands came by descent, sufficient to answer the debt and damages.

Jefferys v. Barrow, P. 12 Ann. Bull. N^o. Pri. 176. To a plea of *riens per descent al temps del original*, the plaintiff replied that the defendant had sufficient lands before the time of the original purchased, and on issue thereon, a verdict was given for the plaintiff, but no inquiry of the value of the land: the court awarded a repleader; for issue ought not to have been joined on the sufficiency of the land descended.

Winder v. Barnes, P. 15 Geo. 2. Bull. N^o. Pri. 176. The heir cannot have two defences, one at common law, and one on the statute: therefore, if to *riens per descent al temps del writ*, the plaintiff reply, that before that time lands descended; the heir cannot rejoin that he sold them, and paid bond debts to the amount; he ought to disclose the whole in his bar at once.]

(G) How to be proceeded against where he is bound.

Salk. 355. pl. 2. But for this *vide* case of Kellow v. Rowden, Carth. 126. 3 Mod. 25. Show. 248. 3 Lev. 286. IF the heir be sued upon a bond or covenant in which he is bound, it need not be shewn how he is heir; for the plaintiff is a stranger, and it would be hard to compel him to set forth another's pedigree: But where the heir sues, he must shew his pedigree, and *coment heres*; for it lies in his proper knowledge.

Vern. 130. Croffing v. Honor. It must be alleged, that the heir was bound; and therefore, where a bill was brought by the obligee in a bond against the heir of the obligor, alleging, that he, having assets by descent, ought to satisfy this bond; the defendant demurred, because the plaintiff had not expressly alleged, in the bill, that the heir was bound in the bond; and though it was alleged that the heir ought to pay the debt, yet that was holden insufficient, and the demurrer was allowed.

5 Co. 36. a. Plow. 440. Dyer, 344. pl. 6. Jon. 87. Lev. 130. Cro. Eliz. 712. S. P. and the reasons there given, because he is bound by special words in the obligation, & *vide* 2 Leon. 11., 2 Brownl. 204, 5., Cro. Eliz. 350., like point. (a) But if in the *detinet* only, it is good after verdict, by the 16 and 17 Car. 2. c. 8. Comber and Watten, Lev. 224. adjudged. Sid. 342. 575. S. C.

[In

[In a declaration against the heir on a covenant that runs with the land, the plaintiff may charge him as assignee; for evidence that the land descended to him as heir of the lessor will support such an issue.]

Derisley v. Cuffance, 4 Term Rep.

(H) Where he shall be liable himself, and the Judgment general or special: And herein,

1. Where he shall be liable for his false Pleading.

THE heir at law, though bound by his ancestor, shall yet, as hath been observed, be chargeable no further than he has assets from such ancestor, unless by false pleading he make himself so: And therefore if an action of debt be brought against him, and he confesses the action, and also set forth in certainty what assets he hath, he shall be charged no further; and neither his goods (b), body, nor other lands shall be liable; but the judgment in such case shall be special, to recover the debt of the lands descended.

21 E. 3. 10.
40 E. 3. 14.
Dyer, 81.
pl. 62. 149.
pl. 80.
Plow. 440.
Benl. 157.
5 Co. 35.
2 Roll.
Abr. 70.
and the same point admitted in all the modern books.

(a) And therefore an heir at law is not to be holden to special bail, because the demand is not on the person, but on the assets, of the deceased. 2 Jon. 82. & vide tit. Bail, letter (B).

But if an action (c) of debt be brought against an heir on the obligation of his ancestor, in which he is bound, and he plead *riens per discent*, which is found against him, the judgment shall be general* to recover the debt, which he must pay out of his own pocket for his false plea.

Vide the authorities *sup.* and Roll. Abr. 269. Roll. Rep. 234.
(b) But

there is a diversity between an action of debt and a *scire facias* against the heir upon a judgment had against his ancestor; for if in a *scire facias* the heir plead a false plea, and it be found against him, yet the judgment shall be of the lands descended only; for the execution in such case shall be upon the first judgment against the ancestor, and not upon the judgment in the *scire facias*, *quod habeat executionem*, because such judgment did not alter nor enlarge the first judgment. *Bowyer v. Rivett* adjudged. Pas. 193. 3 Bulst. 317. Jon. 87. Cro. Car. 296. Carth. 93. S. C. cited. * And execution of his own lands and goods, and against his body by *capias ad satisfaciendum*, like as for his own debt, Plowd. Com. 440. a. 2 Roll. Abr. 70. l. 40. Dyer 149 a. 2 Leon. 11. *vide infra*.

So, if an action of debt be brought against the heir, who confesses the action, but does not set forth the assets in certainty, the judgment shall be general; for he is charged in the *debet* as well as *detinet*, and assets shall be presumed.

Plow. 440.
2 Roll.
Abr. 70.

So, if an action be brought against the heir on the bond of his ancestor, and there be judgment against him by default, *non sum informatus, nihil dicit, &c.* the judgment against him shall be general, and he shall be charged *de bonis propriis*.

Plow. 440.
Davis and Pepys, adjudged, and cited, and

agreed to be law in several books.

So, where debt was brought against an heir, who pleaded in bar that *J. S.* was jointly and severally bound with his ancestor, and that he paid the money; which being found against him, it was holden, that the judgment should be general, and he for his false plea chargeable *de bonis propriis*.

Carth. 93.
Bradlin and Milbank, adjudged, and said, that the law was so set-

tled in the case *supra* of Davis and Pepys. Plow. 440. Comb. 162. S. P. adjudged.

Salk. 354.
pl. 2. Ld.
Raym. 783.
Smith &
Ux. v.
Angel,
7 Mod. 40.
S. C.
3 Salk. 178.
pl. 1. 180.
pl. 5 Comb.
162. Ld.
Raym. 53.
2 Wils 49.

So, where the heir pleaded that his ancestor was seised in fee of three fourth-parts of such and such tenements, and that he demised the same for 500 years to *A.* who entered, and that the said reversion descended, & *riens ultra*, and that at the time of the action brought he had no tenements in fee-simple by descent *præterquam* the said reversion; and that afterwards there was a bill in Chancery exhibited against him by the ancestor's wife for dower, and a decree obtained against him for the third part of these three-fourths for the wife's life; & *hoc*, &c. in this case a general judgment was given against him; and it was holden by Holt, C. J. 1st, That an heir could not plead a term for years in delay of present execution, but ought to confess assets; and that the common law had no regard for a term for years, and that there is no mischief in this case; for though in consequence a *levari facias* may go, yet the lessee may maintain himself against an ejectment by virtue of his lease. 2. As to the decree in Chancery, he held it plain that there was no estate or interest vested in the wife by that, so that the plea in this respect is naught and most apparently false.

2 Roll.
Abr. 71.
Allen and
Holden, ad-
judged.
Trin. 1651.

And it is said, that in these cases the court cannot give a special judgment without the assent of the plaintiff; as where debt was brought against the heir, who pleaded *riens per descent*, which was found for the plaintiff; and there being judgment to recover the debt, damages and costs of the lands descended; and it not being known what land descended, a writ was awarded to inquire what land descended; the court held this judgment erroneous, because by law the judgment ought to be general, which cannot be altered without the plaintiff's consent, and that did not appear here.

2 Roll.
Abr. 71.
Pasch. 1652.
Snelgrave
and Colville.

So, in an action of debt against an heir, if he pleads *riens per descent*, which is found against him; and it is further found by the jury, that he had certain lands by descent, upon which judgment is given that the plaintiff shall recover his debt, damages, and costs of the lands descended; this is an erroneous judgment, because it ought to have been general: also, it is said, that upon this issue they could not inquire of the assets descended.

2 Roll.
Abr. 71.
Frank v.
Stukely.

But if in a writ of annuity the plaintiff declares for the arrears, &c. against the heir, upon the grant of his ancestor, and the heir pleads that it is not the deed of his ancestor, which is found against him; in this case the judgment may be special, without the consent of the plaintiff; for being in the case of an annuity, which is always executory, it is at least in the election of the plaintiff to have execution of all the lands descended; whereas on a general judgment he can only have a moiety of all the heir's land in execution: also, in this case, the entering of a special judgment is for the heir's advantage, and therefore he cannot assign it for error.

2 Roll.
Abr. 71.

Also, if upon pleading *riens per descent* it be found against the heir, or if he confesses the action without setting forth the assets, or if there be a general judgment; upon these, or upon a *non sum*

sum informatus, nihil dicit, &c. against him, the execution may be general of all the lands of the heir.

But if in an action of debt brought against the heir, the defendant acknowledge the action, and shew in certainty the assets, upon which there is a judgment that the plaintiff shall recover, and that the debt shall be recovered of the assets descended, here the plaintiff shall have execution to levy the debt of all the land descended, and to have a moiety only, as on an *elegit*.

Also, in case of a general judgment against the heir, although the plaintiff may have execution by *elegit* of a moiety of all the heir's lands; yet may he also at his election surmise that the heir hath such and such land by descent, and pray execution thereof; for were it otherwise, the plaintiff might be a loser by this general judgment, in which he is only entitled to a moiety of the land, in as much as the heir might not have any other lands, except those descended.

2. Where by his Promise to pay or discharge the Debt of his Ancestor.

If a man binds himself and his heirs in an obligation, and dies, and after the obligee sues the heir upon the obligation, who had no assets descended to him; and the heir says to him, that, if he will not sue him, then he will pay him the money; this is no consideration so as to maintain an action, because he was not chargeable (a) without assets.

held, that in *assumpsit* against an executor on his promise it is not necessary to allege the assets, and that forbearance is a good consideration. *Vide tit. Executors and Administrators*, letter (M).—And note, by the statute of frauds 29 Car., 2. c. 3. § 4. the promise must be in writing.

So, in an *assumpsit* against an heir upon such a promise, it must be expressly shewn that the heir was bound, else it shall not be intended, though after a verdict.

judged; *Hunt and Swain*, Sid. 248. Raym. 12. Lev. 165. Keb. 890. S. P. adjudged.—And *Keeling* said, to charge an executor upon his promise you need not say assets, (though without them he shall not be bound) because we will intend assets, but we cannot intend the heir was bound, but in this case must look upon him as a mere stranger.

But in such a case where the plaintiff declared, that the defendant, in consideration the plaintiff would deliver the bond to him and discharge the debt, promised, &c. it was holden a good declaration, and that it should be intended he was liable, or at least, that the discharge should be made to him who was so.

(I) What shall be Assets in his Hands.

Wherever the ancestor binds himself and his heirs, all his lands of (b) freehold, which descend in (c) fee-simple, are assets by descent, and shall be liable, as far as they extend, to answer the ancestor's obligations.

(b) But if a copyhold descends to an heir, this shall not be assets, because it is an inheritance created by custom,

2 Roll.
Abr. 71.

2 Roll.
Abr. 71, 72.

Roll. Abr.
28. Lord
Gray's case.
3 Leon. 67,
68. 4 Leon.
6. S. P. per
Curiam.

(a) But it is
Baker and
Fox, 2 Sand.
136. Vent.
159. ad-

And
Sid 31.
Lev. 165.
& vide
Yelv. 56.

Vide Bro.
tit. *Assumpsit*.
Fit. tit.
Assets. Roll.
Abr. 260.
tit. *Assumpsit*.

custom, and the common law directs the descent; but not that it shall have any other collateral qualities which do not concern such descent, and which other inheritances at common law have. 4 Co. 22 a.—But lands by descent in ancient demesne shall be assets. 7 H. 4. 14. Bro. tit. *Assets*, 11.—So, an advowson is assets, and may be extended at the rate of a shilling for every mark of their early value of the living. Co. Lit. 374. b. [Robinson v. Tonge, 3 Br. P. C. 556. 3 P. Wms. 401. 2 Str. 879. Westfaling v. Westfaling, 3 Atk. 460.] (c) Must be lands in fee-simple. 42 E. 3. 10 b.—For what shall be assets to make a lineal warranty a bar to an estate-tail, *vide* Co. Lit. 374. b. 2 Inst. 293. Kelw. 104. b. 124. 2 Roll. Abr. 774.

Salk. 354. A reversion after a lease for years made by the ancestor is present assets, (a) so that the heir cannot plead *riens per descent* in delay of execution of the rent and reversion, (b) though the plaintiff cannot have benefit of the reversion till the lease be determined. 7 Mod. 50, 51.

Ld. Raym. 53. Hern Plead. 320. (a) In debt against the heir if he pleads *riens per descent*, the plaintiff may have judgment presently, and a *scire facias* when assets descend. 8 Co. 134. in *Mary Shepley's* case, which point is held to be law; likewise in case of an executor, in Hob. 199. Vent. 94 5. Sid. 448. contrary to the case of Dorchester and Webb. Cro. Car.—So, in a *warrantia chartæ* against an heir, who pleads *riens per descent*, or that the plaintiff is not empleaded, the plaintiff may pray judgment presently, F. N. B. 134. 8 Co. 134. Vent. 94. and Hob. 199. S. P. and that the same may be done in the case of an executor; but if the plaintiff will proceed to prove assets presently, and that be found against him, he shall be barred for ever; and yet there was a debt due, and that in effect confessed. Hob. 199. (b) Where a man obtains a judgment against an heir who has a reversion in fee descended to him, the judgment is only of assets *quando acciderit*, and the creditor cannot by a bill in equity compel the heir to sell the reversion, but must expect until it falls. 2 Vern. 134. Fortrey and Fortrey.

Carth. 129. So, a reversion expectant upon the determination of an estate per Holt. for life in *quasi* assets, and ought to be pleaded specially by the heir, and the plaintiff in such case may take judgment of it *cum acciderit*. 1 Ld. Raym. 53.

6 Co. 58. But a reversion in fee expectant upon an estate-tail is not assets, because it lies in the will of the tenant in tail to dock and bar it at his pleasure. Roll. Abr. 269. 2 Roll. Rep. 129.

S. P. 3 Lev. 287. 3 Mod. 257. Carth. 129. S. P. agreed, and that it shall not charge the heir upon the general issue, *riens per descent*.—But after the tail is spent, it is assets. 3 Mod. 257. [That such a reversion is assets for the debt of the first person who was in possession, and who created the reversion, hath been expressly determined by Lord Hardwicke in *Kinafton v. Clarke*, 2 Atk. 204. but whether it be so for the debt of any of the intermediate takers, is a point which hath lately been much agitated, but hath received no decision. *Tweedale v. Coventry*, 1 Br. Ch. Rep. 240. *Arundel v. Knight* 1787. *Id.* 260. The case of *Smith v. Parker*, 2 Bl. Rep. 1240. purports to have decided that such a reversion is assets. In that case, which was debt upon bond against the heirs of the obligor, Edward Perrot devised an estate to his brother Charles Perrot for life, remainder to his brother Robert Perrot for life, and his first and other sons in tail, remainder to trustees for thirty years, remainder to Edward John Perrot and his first and other sons in tail, remainder to William Perrot for life and his first and other sons in tail-male, remainder to Benjamin Perrot for life and his first and other sons in tail-male, remainder to the testator's right heirs. On the testator's death Charles entered and died without issue. Robert died without issue before the testator. Edward John entered, and whilst in possession made the bond in question, and died without issue. William entered, and died without issue. And on his death, Benjamin being dead without issue, and all the said persons having died intestate, the estate came into possession of the defendants who were heirs at law both of the testator and of Edward John the obligor, which Edward John was also, whilst in possession of the estate, the heir at law of the testator.—In this case, however, Lord Thurlow observes in *Tweedale v. Coventry*, the contingent uses never came into possession, so that it was not a reversion after an estate-tail, but after an estate for life only. See the case of *Giffard v. Barber*, Vin. Abr. tit. *Charge*, A. pl. 17. where Lord Hardwicke is reported to have said, that the reversion would not be liable to a bond of an intermediate taker, unless the estate came as assets by descent to the very heir of such person; though it would be to a judgment, because that attaches on the land.]

Carth. 127. If *A.* hath issue *B.* and *C.*, and conveys lands to the use of himself for life, the remainder to *B.* in tail male, the remainder to his own right heirs, and *A.* dies, and the reversion descends to *B.* his son, and *B.* dies seised, and the reversion descends to his son, who dies
3 Lev. 286.
3 Mod. 253.
S. C. Kel-
low v.
Rowden.

dies without issue, so that the tail is spent, and C. enters, these lands shall be assets to answer the debt of his father.

The lands, as hath been observed must *descend* to the heir; and therefore it was formerly holden, that if he took by purchase, as if the testator devised them to him paying so much, or if he devised lands to one or two, and his heir at law jointly, that those lands were not assets; but if he devised one part to A., and another to B., another to his heir at law, this third part was assets.

By the statute of frauds and perjuries it is enacted, that if lands come to the heir by reason of a special occupancy, they shall be chargeable in his hands as assets by descent, as in case of lands in fee-simple; and in case there be no special occupant thereof, it shall go to the executors or administrators of the party that had the estate thereof by virtue of the grant, and shall be assets in their hands.

Statute of fraudulent devises, 3 & 4 W. & M. c. 14., and liable to specialty debts. Westfaling, 3 Atk. 460. Marwood v. Turner, 3 P. Wins. 164.]

Cro. Eliz.
431.
2 Mod. 236.

That it was not assets before the statute.
10 Co. 98. a.
[An estate *pur autre vie* limited to heirs is within the Westfaling v.

Also, by the said statute, § 10 & 11. where lands are settled in trust, and descend in fee to the heir of *cessuy que trust*, the same shall be assets in the same manner as lands in possession, but the heir shall not, by reason of any plea or other matter, be chargeable to pay the condemnation out of his own estate.

Vide 2 Vern.
248.

An equity of redemption of an inheritance is assets, for the heir having a right in (a) equity, that ought in equity to be liable to satisfy a bond debt.

4 Chan. Ca.
148.
(a) But the equity of

redemption of a mortgage that is forfeited is not assets at law, for at law there is no redemption. 2 Vern. 61.—And there it is made a *quare*, whether an heir being creditor by bond or judgment may not retain, the reason being the same in the case of an heir as it is of an executor, for neither can sue himself.

Tenant in tail suffers a recovery to let in a mortgage of 500 years, and then limits the land to the old uses, and makes his will, and devises all his lands for the payment of his debts, the redemption was limited to him, his heirs and assigns; and the court thought that the equity of redemption of this mortgage should be assets to satisfy creditors, or a subsequent grantee of an annuity.

Preced.
Chan. 39.
Fosset and Austin.

A right without any estate in (b) possession, reversion, or remainder, is not assets till it be recovered and reduced into possession.

6 Co. 58.
(b) If a rent-
seek de-

scends to an heir, it is not assets till he hath gained seisin. 6 Co. 58. b. — But if lands descend to an heir, they are assets before entry, for he may enter when he will. 42 E. 3. 10. b. Roll. Abr. 269.

Where the personal estate only shall be applied in discharge of debts, *vide supra* 85.

Heresy, and Offences against Religion.

(A) Of Heresy: And herein,

1. What it is.
2. By whom it is cognizable,
3. How punished.

(B) Of Witchcraft, and how punished.

(C) Of Offences against Religion as punishable by the Common Law.

(D) Of Offences by Statute against Religion: And herein,

1. Of the Offence of profaning the Lord's Day.
2. Of the Offence of Swearing.
3. Of the Offence of Drunkenness.
4. Of the Offence of reviling the Sacrament.
5. Of Offences against the Common Prayer.
6. Of the Offence of teaching School without conforming to the Church.
7. Of the Offence in not coming to Church: And herein,
 1. *What Forfeitures of Money, Lands or Goods such Offenders incur.*
 2. *In what Manner they are to be proceeded against for these Forfeitures.*
 3. *What other Inconveniencies they are subject to.*
 4. *By what Means they may be discharged.*
 5. *How far a Person is punishable for suffering such Absence in others.*
8. Of Offences against the Established Church by Protestant Dissenters.

Of the Offence of professing or encouraging the Popish Religion, *vide tit. Popish Recusants.*

Of the Offence of holding an Office without conforming to the Established Religion, *vide tit. Office.*

(A) Of Heresy: And herein,

1. What it is.

HERESY (*a*) among protestants is said to be a false opinion repugnant to some point of doctrine clearly revealed in scripture, and either absolutely essential to the christian faith, or at least of most high importance. Hawk. P.C. c. 2. [4 Bl. Comm. 44.] (*a*) That anciently under the

general name of heresy there have been comprehended three sorts of crimes: 1. Apostacy, when a christian did apostatize to Paganism or to Judaism. 2. Witchcraft. 3. Formal heresy, which seems to be an apostacy from the established religion; for which, and the several ways of determining, punishing, and the difference between the civil and imperial laws, popish canons, and the laws of England concerning heresy, *vide* a large account in Hal. Hist. P. C. 383 to 410.

It seems (*b*) difficult precisely to determine what errors shall amount to heresy, and what not; but the statute 1 Eliz. cap. 1. which erected the high commission court, having restrained it to such as are either determined by scripture, or by one of the four first general councils, or by some other council, by express words of scripture, or by parliament, with the assent of the convocation; these rules are at present generally thought the best directions concerning this matter. Hawk. P.C. c. 2. (*b*) And it is said by my Lord Hale, that the papal canonists have by ample and general terms

extended heresy so far, and left so much in the discretion of the ordinary to determine it, that there is scarce any the smallest deviation from them but may be reduced to heresy, according to the great generality and latitude of their definitions and descriptions; from whence he observes, how miserable the servitude of christians was under the papal hierarchy, who used so arbitrary and unlimited a power to determine what they pleased to be heresy, and then, *omni appellations postposita*, subjecting mens lives to their sentence. Hal. Hist. P. C. 383, 389.

2. By whom it is cognizable.

According to the common and imperial law, and generally by other laws in kingdoms and states where the canon law obtained, the ecclesiastical judge was the judge of heresies, and hereby he obtained a large jurisdiction touching them. Hal. Hist. P. C. 384.

Hence it is, that, by the common law with us, the convocation of the clergy, or provincial synod, might and frequently did proceed to the sentencing of hereticks, and, when convicted, left them to the secular power, whereupon the writ of *heretico comburendo* * might issue. Bro. tit. Heresy. 2 Roll. Abr. 226. * This writ is taken away, by sta. 29 Car. 2. c. 9.

Also, it is agreed, that every bishop may convict persons of heresy within his own diocese, and proceed by church censures against those who shall be convicted; but it is said, that no spiritual judge, who is not a bishop, hath this power; and it has been (*c*) questioned, whether a conviction before the ordinary was a sufficient foundation whereon to ground the writ *de heretico comburendo*, as it is agreed that a conviction before the convocation was. F. N. B. 269. 12 Co. 56, 57. 3 inst. 40. Gibf. Codex. 401. Hawk. P. C. 4. State Trials, Vol. 2. 275. (*c*) Ld. C. J. Hale seems

to be of opinion, that if the diocesan convict a man of heresy, and either upon his refusal to abjure, or upon a relapse, decree him to be delivered over to the secular power; and this be signified under the seal of the ordinary into the Chancery, the king might thereupon by special warrant command a writ *de heretico comburendo*

comburendo to issue, though this were a matter that lay in his discretion to grant, suspend or refuse, as the case might be circumstanced. Hal. Hist. P. C. 392.

27 H. 8. 14. But it seems agreed, that regularly the temporal courts have no
b. 5 Co. 58. consufance of heresy, either to determine what it is, or to punish
Hob. 236. the heretick as such, but only as a disturber of the public peace; and that therefore, if a man be proceeded against as an heretick in the spiritual court *pro salute animæ*, and think himself aggrieved, his proper remedy is to bring his appeal to a higher ecclesiastical court, and not to move for a prohibition from a temporal one.

3 Inst. 42. Yet a temporal judge may incidentally take knowledge, whether
Roll. Rep. a tenet be heretical or not; as where one was committed by force
110. of 2 H. 4. cap. 5. for saying that he was not bound by the law of
2 Bulf. 360. God to pay tythes to the curate; another for saying, that though he was excommunicate before men, yet he was not so before God; the temporal courts on an *habeas corpus* in the first case, and an action of false imprisonment in the other, adjudged neither of the points to be heresy within that statute, for the king's courts will examine all things which are ordained by statute.

5 Co. 58. Also, in a *quare impedit*, if the bishop plead that he refused the
And. 191. clerk for heresy, it seems that he must set forth the particular point,
3 Leon. 199. that it may appear to be heretical to the court wherein the action
3 Lev. 314. is brought, which having consufance of the original cause, must by consequence have a power in all incidental matters necessary for the determination of it, and without knowing the very point alleged against the clerk, will not be able to give directions concerning it to the jury, who (if the party be dead) are to try the truth of the allegation.

3. How punished.

F. N. B. By the common law, one convicted of heresy, and refusing to
269. abjure it, or falling into it again after he had abjured it, might be
3 Inst. 43. burnt by force of the writ *de heretico comburendo*; which issued out
Doctor and of Chancery upon a certificate of such conviction; but he forfeit-
Student, ed neither lands nor goods, because the proceedings against him
lib. c. 26. were only *pro salute animæ*.
Hawk. P. C. c. 2.

12 Co. 44. But at this day the said writ *de heretico comburendo* is abolished
Hawk. P. C. by 29 Car. 2. cap. 9. and all the old statutes, that gave a power to
c. 2. arrest or imprison persons for heresy, or introduced any forfeiture on that account, are repealed; yet, by the common law, an obstinate heretick, being excommunicate, is still liable to be imprisoned by force of the writ *de excommunicato capiendo*, till he make satisfaction to the church.

Also, by the 9 & 10 W. 3. cap. 32. it is enacted, "That if any
" person, having been educated in or having made profession of
" the christian religion within this realm, shall be convicted in any
" of the courts of *Westminster*, or at the assises, of denying any of
" the persons in the Holy Trinity to be God, or maintaining that
" there are more gods than one, or of denying the truth of the
" christian religion, or the Divine authority of the holy scriptures,
" he

“ he shall for the first offence be adjudged incapable of any office,
 “ and for the second shall be disabled to sue any action or to be
 “ a guardian, executor or administrator, or to take by any legacy
 “ or deed of gift, or to bear any office civil or military, or be-
 “ nefice ecclesiastical for ever, and shall also suffer imprisonment
 “ for three years, without bail or mainprize, from the time of
 “ such conviction.”

[But it is provided, that if within four months after the first conviction, the delinquent will in open court publicly renounce his error, he is discharged for that once from all disabilities.]

(B) Of Witchcraft, and how punished.

Witchcraft or *sortilegium*, was by the ancient laws of *England* of
 (a) ecclesiastical conuzance, and upon conviction thereof without abjuration, or relapse after abjuration, was punishable with death by writ *de heretico comburendo*.

(a) Also it is said, that offenders of this kind may be condemned to the pillory, &c. upon an indictment at common law. Hawk. P. C. c. 2.

3 Inst. 44.
 Cro. Eliz.
 571. Hawk.
 P. C. c. 2.
 Hal. Hitt.
 P. C. 383.

Also, by an act of parliament 1 Jac. 1. cap. 12. it was made felony without benefit of clergy, to use any invocation or conjuration of any evil spirit, or to consult or covenant with any evil spirit, or to exercise any witchcraft, incantment, charm, or sorcery, whereby any person shall be killed, destroyed, consumed or lamed in his body, &c.

But by the 9 Geo. 2. cap. 5. the abovementioned statute is repealed; and it is thereby enacted, “That no prosecution, suit, or proceeding, shall be commenced or carried on against any person or persons for witchcraft, sorcery, incantment or conjuration, or for charging another with any such offence in any court whatsoever in *Great Britain*.”

But for the more effectual preventing and punishing of any pretences to such arts or powers as are beforementioned, whereby ignorant persons are frequently deluded and defrauded, it is enacted by the said statute, 9 Geo. 2. cap. 5. “That if any person shall pretend to exercise or use any kind of witchcraft, sorcery, incantment or conjuration, or undertake to tell fortunes, or pretend, from his or her skill or knowledge in any occult or crafty science, to discover where or in what manner any goods or chattels, supposed to have been stolen or lost, may be found; every person so offending, being thereof lawfully convicted on indictment or information in that part of *Great Britain* called *England*, or on an indictment or libel in that part of *Great Britain* called *Scotland*, shall for every such offence suffer imprisonment by the space of one whole year, without bail or mainprize; and once in every quarter of the said year, in some market-town of the proper county, upon the market-day there stand openly on the pillory by the space of one hour, and also shall

See 17 G. 2.
 c. 5. § 1.

“ shall (if the court, by which such judgment shall be given, shall
 “ think fit) be obliged to give sureties for his or her good beha-
 “ viour, in such sum, and for such time, as the said court shall
 “ judge proper, according to the circumstances of the offence ;
 “ and in such case shall be further imprisoned until such sureties
 “ be given.”

(C) Of Offences against Religion, as punishable by the Common Law.

Hawk. P.C.
 c. 2.

[Fitzg. 65.]

Although offences against religion are, strictly speaking, of ecclesiastical consueance; yet where a person, in maintenance of his errors, sets up conventicles, or raises factions, which may tend to the disturbance of the public peace; or where the errors are of such a nature as subvert all religion or morality, which are the foundation of government, they are punishable by the temporal judges with fine and imprisonment, and also such corporal infamous punishment as to the court in discretion shall seem meet, according to the heinousness of the crime, *ne quid detrimenti respublica capiat*.

Taylor's
 case, Vent.
 293. 3 Keb.
 607. 621.

Such as all blasphemies against God, as denying his being or providence, and all contumelious reproaches of Jesus Christ.

[Rex v. Woolston, 2 Str. 834. Fitzg. 64.]

Hawk. P.C.
 c. 2.

Also, all profane scoffing at the holy scriptures, or exposing any part thereof to contempt or ridicule.

Hawk. P.C.
 c. 2.

Impostors in religion, as falsely pretending to extraordinary commissions from God, and terrifying or abusing the people with false denunciations of judgments, &c.

Sid. 168.
 Keb. 620.
 [2 Str. 791.]

All open lewdness grossly scandalous, such as was that of those persons who exposed themselves naked to the people in a balcony in *Covent-Garden*, with most abominable circumstances.

Fortesc.
 Rep. pl. 95.
 99. 2 Roll.
 Abr. 187.

Seditious words in derogation of the established religion are (a) indictable, as tending to a breach of the peace; as these, “ Your religion is a new religion, and preaching is but prattling, and prayer once a day is more edifying.”

Hawk. P.C.
 c. 2.

(a) But not before justices of the peace. Cro. Jac. 44.

(D) Of Offences by Statute against Religion: And herein,

1. Of the Offence of profaning the Lord's Day.

BY the 1 Car. 1. cap. 1. it is enacted, “ That there shall be no
 “ assembly of people out of their own parishes on the
 “ Lord's-day for any sport whatsoever, nor any bull-baiting, or
 “ bear-baiting, interludes, common plays, or other unlawful ex-
 “ ercises and pastimes used by any persons in their own parishes,
 “ or

“ on pain that every offender shall forfeit 3*s.* 4*d.* to the use of the poor,” &c.

By the 29 *Car. 2. cap. 7.* it is enacted, “ That all persons shall every Lord’s day apply themselves to the observation of the same, by exercising themselves in duties of piety and true religion publickly and privately, and that no tradesman, artificer, workman, labourer, or other person whatsoever, shall do or exercise any worldly labour, business, or work of their ordinary callings, upon the Lord’s day, or any part thereof (works of necessity and charity only excepted); and that every person being of the age of fourteen years, or upwards, offending in the premises, shall for every such offence forfeit the sum of 5*s.* and that no person shall publickly cry, shew forth, or expose to sale any wares, merchandizes, fruit, herbs, goods or chattels whatsoever, upon the Lord’s day, or any part thereof, upon pain that every person so offending shall forfeit the same goods so cried, or shewed forth, or exposed to sale *.”

* Selling meat on Sunday, no offence at common law; therefore the indictment must be *contra formam*, &c. *Stra. 702.*

And it is further enacted, § 2. “ That no drover, horse-courser, waggoner, butcher, higgler, their or any of their servants, shall come into his or their inn or lodging upon the Lord’s day, or any part thereof, upon pain that each and every such offender shall forfeit 20*s.* for every such offence; and that no person or persons shall use, employ, or travel upon the Lord’s day with any boat, wherry, lighter, or barge, except it be upon extraordinary occasion, to be allowed by some justice of the peace of the county, or head officer, or some justice of the peace of the city, borough, or town corporate, where the fact shall be committed; upon pain that every person so offending shall forfeit and lose the sum of five shillings for every such offence; and that if any person offending in any of the premises shall be thereof convicted before any justice of peace of the county, or the chief officer or officers, or any justice of the peace of or within any city, borough, or town corporate, where the said offence shall be committed, upon his or their view, or confession of the party, or proof of any one or more witnesses by oath, (which the said justice, chief officer or officers, are by this act authorised to administer), the said justice, or chief officer or officers shall give warrant under his or their hand and seal to the constable or churchwardens of the parish or parishes, where such offence shall be committed, to seize the said goods cried, shewed forth, or put to sale as aforesaid, and to sell the same, and to levy the said other forfeitures or penalties by way of distress and sale of the goods of every such offender distrained, rendering to the said offenders the overplus of the monies raised thereby; and in default of such distress, or in case of insufficiency or inability of the said offender to pay the said forfeitures or penalties, that then the party offending be set publickly in the stocks by the space of two hours: And all and singular the forfeitures or penalties aforesaid shall be employed and converted to the use of the poor of the parish where the

But by 11 & 12 W. 3. c. 21., forty watermen may be appointed by the Company of Watermen to ply on the River Thames.— And by the 9 Ann. c. 23. § 20., hackney-coachmen and chairmen are permitted to work within the bills of mortality on Sunday.—

* Mackerel may be sold on a Sunday, 10 & 11 W. 3. c. 24. § 14.

“ said

“ said offences shall be committed ; saving only that it shall and
 “ may be lawful to and for any such justice, mayor, or head of-
 “ ficer or officers, out of the said forfeitures or penalties, to re-
 “ ward any person or persons that shall inform of any offence
 “ against this act, according to their discretions, so as such re-
 “ ward exceed not the third part of the forfeitures or penal-
 “ ties.”

[It having
 been deter-
 mined that
 bakers, who
 baked din-
 ners on a
Sunday were
 within the

equity of this proviso, *Rex v. Cox*, 2 Burr. 785. *Rev v. Younger*, 5 Term Rep. 449; and it being found that the liberty given by this determination had been carried to a very unreasonable extent, particularly in the metropolis, it was enacted, by St. 34 Geo. 3. c. 61. “ that no baker in *London*, or within twelve miles thereof, shall exercise his trade on a *Sunday*, under a penalty of ten shillings, except between 9 o'clock in the forenoon and one o'clock in the afternoon, within which time he may sell bread, and bake meat, pudding, or pies only, so as the person requiring the baking thereof carry or send the same to and from the place where they are baked.”]

[Upon this
 act a person
 can be con-
 victed in
 only one
 penalty upon
 the same day.

“ Provided, That this act shall not extend to the prohibiting
 “ of dressing of meat in families, or dressing or selling of
 “ meat in inns, cook's-shops, or victualling-houses, for such as
 “ otherwise cannot be provided, nor to the crying or selling of
 “ milk before nine of the clock in the morning, or after four of
 “ the clock in the afternoon.

“ Provided also, That no person shall be impeached, profe-
 “ cuted, or molested for any offence before mentioned in this act,
 “ unless he or they be prosecuted for the same within ten days
 “ after the offence committed.”

Crepps v. Durden, Cowp. 640.]

(a) It hath
 been holden,
 that, not-
 withstand-
 ing this sta-
 tute, a per-
 son may be
 taken up on
 a *Sunday*
 upon a
 judge's war-
 rant for es-
 caping out
 of prison.
Parker v.

Also it is enacted by the said statute, § 6. “ That no person
 “ upon the Lord's day shall serve or execute, or cause to be served
 “ or executed, (a) any writ, process, warrant, order, judgment,
 “ or decree, (except in cases of treason, felony, or breach of the
 “ peace), but that the service of every such writ, process, war-
 “ rant, order, judgment, or decree shall be (b) void to all intents
 “ and purposes whatsoever, and the person or persons so serving
 “ or executing the same shall be as liable to the suit of the party
 “ grieved, and to answer damages to him for doing thereof, as if
 “ he or they had done the same without any writ, process, war-
 “ rant, order, judgment, or decree at all.”

Sir William More, 6 Mod. 95. 2 Salk. 626. 2 Ld. Raym. 1028. [See too 5 Ann. c. 9. § 3. But in the case of a voluntary escape, the party cannot be re-taken on a *Sunday*. *Featherstonehaugh v. Atkinson*, Barnes, 373. *Atkinson v. Jamefon*, 5 Term Rep. 25.] A citation out of the spiritual court may be served on a *Sunday*, notwithstanding the act. *Alanfon v. Brookbank*, 5 Mod. 449. Carth. 504. [But *Comyns*, Chief Baron, in abridging this case, says, that although a citation may be published on the church-door on a *Sunday*, according to the usage of the spiritual court, yet it cannot be served on the person on that day. *Com Dig. tit. “Tempus,”* (B. 3). In the case of *Walgrave v. Taylor*, 1 Ld. Raym. 706. 12 Mod. 606. the above decision respecting the service of a citation on a *Sunday*, is recognized as good law by *Holt, C. J.*, and no notice is taken of the distinction made by the Chief Baron. So, a person may be arrested on a *Sunday* on the Lord Chancellor's warrant, or an order of commitment for contempt; for he is considered as in custody from the time of making the order, and the warrant is in nature of an escape warrant. *Semb.* 1 Atk. 55. So, a person may surrender voluntarily on a *Sunday*. *Ibid.* So, process on an indictment and an attachment for contempt may be served on a *Sunday*. *Ibid.* Bail may take their principal on a *Sunday*, for this is not under any process at all. 6 Mod. 231. 1 Atk. 239. But a person cannot be taken on a *Sunday* upon an attachment for non-performance of an award, for it is only in the nature of a civil execution. *Rex v. Myers*, 1 Term Rep. 265., nor for non-payment of the forfeiture under a penal statute. *Ibid.*] An indictment cannot be taken, 2 Keb. 731. 1 Vent. 107. 2 Saund. 290., [nor can a writ of inquiry be executed on a *Sunday*. *Fortesc.* 373. 1 Str. 387.]

(b) In Salk. 78. pl. 1., it is said, that the arrest is void, so that the party may have an action of false imprisonment

imprisonment for it. — And in 5 Mod. 95., it is said, that the court would not discharge the party on motion, but directed him to bring an action of false imprisonment. — And in 6 Mod. 95., it is said by Holt, C. J., that if the court will relieve from such an arrest, it must be by *audita querela*; for it being on a *Sunday*, is a fact traversable: but the other judges held, that it could be done on motion. 2 Ld. Raym. 1023.

2. Of the Offence of Swearing.

[By 19 Geo. 3. c. 21. “ If any person shall profanely curse or swear, and be convicted on the oath of one witness, or by confession, or by the hearing of one magistrate, he shall forfeit, 1st. Every day-labourer, common soldier, failor, or seaman, 1 s. 2. Every other person under the degree of a gentleman, 2 s. 3. Every person of or above the degree of a gentleman, 5 s. On a second conviction double, and on every other treble the sum first forfeited, for the use of the poor of the parish where the offence shall be committed; and in default of immediate payment, or giving immediate security for payment, shall, if not a common foldier, failor, or seaman, be confined to hard labour for ten days; but if a common foldier, sailor, or seaman, in actual service, shall be set in the stocks for one hour for any single offence, and for two hours for any greater number at the same time. All charges of the information and conviction are to be borne by the offender; but if he be not able, or obstinately refuse to defray them, he is to be committed to the house of correction for six days over and above the time limited in case of non-payment of the penalties. The justice neglecting his duty forfeits 5 l. and the constable 40 s. The act is to be read quarterly in all churches, &c. under a penalty of 5 l.; and all prosecutions under it are to be made within eight days next after the offence committed.” By 22 Geo. 2. c. 33. All flag-officers, and persons belonging to his Majesty’s fleet, are punishable for this offence at the discretion of a court-martial.]

1386. 8 Mod. 366. A conviction of a person as being of a higher degree, must negative his being of a lower degree. *Ibid*.

This act repeals 21 Ja. 1. c. 10., & 6 & 7 W. 3. c. 11. In a conviction of this kind, the oaths and curses must be set forth; for what is a profane oath or curse is matter of law, and ought not to be left to the judgment of the witness. Rex v. Sparling, 1 Str. 497. 8 Mod. 58. But a conviction for swearing the same oath several times need not repeat the oath, 2 Ld. Raym.

3. Of the Offence of Drunkenness.

By the statutes 4 Jac. 1. cap. 5. and 21 Jac. 1. cap. 7. all persons whatsoever convicted of drunkenness by the view of a justice, oath of one witness, or party’s confession, shall forfeit five shillings to the use of the poor, to be levied by distress and sale of goods; and for want of a distress, shall be set in the stocks six hours. [And by the above statute of 22 Geo. 2. c. 33. this offence is punishable in persons belonging to the fleet in like manner as the preceding offence.]

4. Of the Offence of Reviling the Sacrament.

By the 1 E. 6. cap. 1. Reviling the sacrament is an offence for which the party shall be imprisoned, fined, and ransomed; and this statute, which was repealed 1 Mar. cap. 2. is again revived by 1 Eliz. cap. 1. and is now in force.

5. Of

5. Of Offences against the Common Prayer.

By the 2 & 3 E. 6. cap. 1. and 6 E. 6. cap. 1. (which were repealed by 1 M. sess. 2. cap. 2. and revived by 1 Eliz. cap. 2.) the Common Prayer Book was first established, under severe penalties; but the same penalties being repealed and enlarged by 1 Eliz. cap. 2. and 13 & 14 Car. 2. cap. 4. which enacts the use of the same Common Prayer, with some alterations, those statutes of Ed. 6. seem at this day to be of little use.

By the 1 Eliz. cap. 2. § 4. "If any parson, vicar, or other whatsoever minister, that ought to say the said Common Prayer, &c. shall refuse to use in such church, &c. or other place where he should use to minister the same, or, wilfully or obstinately standing in the same, use any other form, or speak any thing in derogation of the said book, or any thing therein contained, he forfeits for the first offence one year's profit of all hit spiritual promotions, and shall suffer six months imprisonment, and for the second offence shall be deprived."

In the construction hereof it hath been resolved,

Dyer, 203.
Pl. 73.

That under the words parson, vicar, or other whatsoever minister that ought or should say the said Common Prayer, &c. those clergymen, who have no cure, are included as much as those who have one, and that they are punishable for using any other form, &c. inasmuch as by their ordination they are obliged to officiate in the offices of the church, &c. and it is said that they are sufficiently shewn to be in holy orders by the word *clericus* in the indictment.

5 Co. 5, 6.
Cawdry's case, Poph.
59. 2 Roll.
Abr. 222.

That this statute being not only in the affirmative, but also expressly saving the jurisdiction of the ecclesiastical courts, does not restrain them from proceeding against those offenders in their own methods as disturbers of the unity and peace of the church, and consequently that such persons may be deprived by the said court, according to the ecclesiastical law, for the first offence.

(a) Whether, if the party die within six weeks, the said forfeiture be not discharged; since by the act of God the election of paying it, or suffering imprisonment in lieu of it, is taken away;

And it is further enacted by 1 Eliz. cap. 2. § 9. "That if any person shall in plays, songs, or other open words, speak any thing in derogation, depraving, or despising of the said book, &c. or by open fact compel, or otherwise procure or maintain any minister to say any common prayer openly, &c. in other form, or shall by any of the said means let any minister to say the said Common Prayer, &c. he shall forfeit one hundred marks for the first offence, and four hundred for the second, &c. (which if he pay not (a) within six weeks after conviction, he shall suffer six months imprisonment for the first offence, and twelve for the second) and for the third offence shall forfeit all his goods and chattels, and shall suffer imprisonment for life."

94 are, & vide Dyer 203, 231.

6. Of the Offence of teaching School without conforming to the Church.

By the 23 *Eliz. cap. 1. § 6 & 7.* it is enacted, "That if any person or persons, body politick or corporate, shall keep or maintain any schoolmaster who shall not repair to church according to the form of the said statute, or be allowed by the bishop or ordinary of the diocese, (who shall not take any thing for the said allowance) they shall forfeit for every month ten pounds; and such schoolmaster presuming to teach contrary to the said act, and being thereof convicted, shall be disabled to be teacher of youth, and shall suffer imprisonment without bail or mainprize for one year."

And by the 1 *Jac. 1. cap. 4. § 9.* it is enacted, "That no person shall keep any school or be a schoolmaster out of the universities or colleges of this realm, except it be in some publick or free grammar school, or in some such nobleman's or noblewoman's, or gentleman's or gentlewoman's house, as are not recusants, or where the same schoolmaster shall be specially licensed thereunto by the archbishop, bishop, or guardian of the spiritualties of that diocese; upon pain that as well the schoolmaster, as also the party that shall retain or maintain any such schoolmaster contrary to the meaning of the said statute, shall forfeit each of them, for every day so wittingly offending, forty shillings."

And *note*; These statutes are still in force as to persons not within the benefit of the toleration act (a); but as to such persons they seem to be impliedly repealed by that act; and 12 *Ann. cap. 7.* which obliged schoolmasters to subscribe the declaration concerning the liturgy, and to have a licence from the bishop, is repealed by 5 *Geo. 1. cap. 4.*

(a) Enlarged by 19 G. 3. c. 44.

7. Of the Offence in not coming to Church: And herein,

1. *What Forfeitures of Money, Lands, or Goods such Offenders incur.*

By the 1 *Eliz. cap. 2.* it is enacted, "That all persons inhabiting in any of the (b) king's dominions, having no reasonable excuse to be absent, shall endeavour to resort to their parish church, &c. or on let thereof to some usual place where the Common Prayer, &c. shall be used, upon every Sunday and holiday, and then and there orderly abide (c) during the service, on pain of punishment by the (d) censures of the church, and twelvecence for every offence."

(b) An indictment or suit on this statute need not shew that the party was an inhabitant of the king's dominions, or

that he had no reasonable excuse to be absent; but the defendant, if he hath any matter of this kind in his favour, must shew it himself. 2 *Leon. 5. Godb. 148.*—Nor need the offence be alleged in the county where the party was in truth at the time, because a mere non-feazance, and properly speaking not committed any where. *And. 139. Hob. 251.* (c) A misbehaviour at church, or absence from morning or evening service, is equally punishable with a total absence; also he who is absent from his own parish church shall be obliged to prove where he went to church. *Id. Rol. Rep. 93. Godb. 148. Sid. 230.* (d) If the spiritual court ground its proceedings on this statute, and refuse to allow a reason-

able

able excuse, it shall be prohibited; but not where it proceeds merely on the canons of the church. 2 Rol. Rep. 438. 455. Bulf. 159. Gibf. Cod. 358.

(a) This is no more than what the law implies, and therefore there must be a judgment on the conviction

By the 23 *Eliz. cap. 1. § 5.* it is enacted, "That every person above the age of sixteen years, who shall not repair to some church, chapel, or usual place of common prayer, but forbear the same contrary to the tenor of the said statute of 1 *Eliz. cap. 2.* being thereof lawfully (a) convicted, shall forfeit to the king, for every (b) month which he or she shall (c) so forbear, (d) twenty pounds."

to cause a forfeiture. Dyer, 160. pl. 40. 11 Co. 57. b. 59. b. Rol. Rep. 89. 233. 3 Bulf. 87. Lutw. 162.—A condemnation by demurrer or *nil dicit* is as much within the statute as a conviction by verdict. 11 Co. 58. Rol. Rep. 89. 90. (b) Which is to be understood a lunar month, or 28 days, according to the common rule of expounding statutes which speak generally of a month. Yelv. 100. Cro. Eliz. 835. 2 Rol. Abr. 521. (c) One sick for part of the time shall not be excused, if it be proved that he was a recusant before and after. Cro. Jac. 529. (d) This forfeiture of twenty pounds dispenses not with that of twelve-pence given by 1 *Eliz. c. 2.*

(e) That this statute is the 28th, and not the 29th, as it is sometimes improperly called.

By the (e) 28 *Eliz. cap. 6.* and 3 *Jac. cap. 4.* it is enacted, "That ever offender being convicted of not coming to church, contrary to the purport of the statutes above-mentioned, shall pay twenty pounds for every month after such conviction, until he shall conform himself, and come to church; and that if the offender shall have made default of payment of the twenty pounds both for every month contained in the conviction, and also for every month subsequent, during which he shall not conform himself to the church, the king shall seize, take, and enjoy all his goods, and two parts of his hereditaments, leases, and farms, leaving the third part only of the same hereditaments, leases, and farms to and for the maintenance and relief of the same offender, his wife, children, and family, notwithstanding any prior conveyance thereof made by such offender, with power of revocation, or to the use of himself or his family: Also, by the said statute of 3 *Jac. 1.* the king may refuse the penalty of twenty pounds a month, though it be tendered according to law, and thereupon seize two parts of all the hereditaments, leases, and farms which at the time of such seizure shall be, or afterwards shall come to any such offender, or to any other to his use, or in trust for him, or at his disposition, or whereby or in consideration whereof he or his family shall be relieved, maintained, or kept, leaving unto him his chief mansion-house as part of his third part."

In the construction of these statutes it hath been holden,

Jones, 24.
Cawley, 171.

1. That the king by making his election given him by 3 *Jac. 1. cap. 4.* to seize the offender's hereditaments, &c. waives the benefit of the twenty pounds a month, and the power of seizing the offender's goods.

12 Co. 1, 2.
Leon. 98.
Roll. Rep. 7.

2. That bonds, recognizances, &c. taken in the offender's own name, or in the names of others to his use, come within the words, *all his goods, &c.*

3. That no copyhold lands are within either of the statutes, by reason of the prejudice that would accrue thereby to the lord of the manor. Owen, 37.
Leon. 97.

4. That though it may be doubtful on the statute 28 *Eliz. cap. 6.* whether lands conveyed in trust by some friend for the recusant may be seized; yet it is clear that such lands may be seized by 3 *Jac. 1. cap. 4.* which expressly provides, that the king, upon his waiving the forfeiture of twenty pounds a month, may seize two parts of all the hereditaments, &c. which shall come to any such offenders, or to others to their use, or in trust for them. Lane, 105.
Cawley, 169.
22 Co. 1, 2.

5. But that the king cannot seize lands of which the offender is seized in trust for another, although the statute hath made no express provision for *cestui que trust*. Lane, 39.
Hard. 466.

6. That the profits of the lands seized by the king by force of 28 *Eliz. cap. 6.* for the non-payment of the twenty pounds a month, ought not to be applied to the satisfaction thereof, but that the lands ought to remain in the king's hands by way of pledge, till the whole forfeiture be paid some other way: but this construction of the statute seeming over severe, it was provided by 3 *Jac. 1. cap. 4.* that the profits of the said lands should go towards the satisfaction of the twenty pounds. Cro. Eliz.
845. 2 Roll.
Rep. 25.
Palm. 41.
Jones, 24.
Hawk. P.C.
c. 10. § 17.

2. *In what Manner they are to be proceeded against for those Forfeitures.*

As to the forfeiture of twelvecence, it is by the 1 *Eliz. cap. 2.* and 3 *Jac. 1. cap. 4.* enacted, "That the said forfeiture of twelvecence for the absence of a *Sunday* or holiday may, on the confession of the party, or oath of one witness, &c. be levied on the goods of the offender, &c. by the warrant of a justice of peace to the churchwarden of the parish where the party dwells, and employed to the use of the poor."

As to the forfeiture of twenty pounds for a month's absence by the 23 *Eliz. cap. 1.* 28 *Eliz. cap. 6.* and 3 *Jac. 1. cap. 4.* "The same may be recovered by indictment, not only in the court of King's Bench, but also before justices of oyer, assise, gaol-delivery, and quarter-sessions of the peace." And by the 3 *Jac. 1. cap. 4.* § 7. it is enacted, "That upon an indictment at the assises, gaol-delivery, or general sessions of the peace, proclamation shall be made, that the offender render himself to the sheriff before the next assises, gaol-delivery, or sessions; and that if he shall not then make appearance of record, upon such default recorded, the same shall be a conviction in law, as if a trial by verdict on the indictment had been recorded: and by the said statute every such conviction shall be certified into the Exchequer." For the exposition of these clauses of these statutes, vide Hawk. P.C. c. 10. § 20, &c.

By the 35 *Eliz. cap. 1.* § 10. it is enacted, "That all and every the said pains, duties, forfeitures, and payments, shall and may be recovered and levied to her majesty's use, by action of debt, bill, plaint, information, or otherwise, in any of the

“ courts commonly called the King’s Bench, Common Pleas, or
 “ Exchequer, in such sort and in all respects, as by the ordinary
 “ course of the common laws of this realm any other debt due
 “ by any such person in any other case should or may be reco-
 “ vered or levied, wherein no essoin, protection, or wager of
 “ law shall be admitted or allowed.”

By the 28 *Eliz. cap. 6.* and 3 *Jac. 1. cap. 4.* “ Every such of-
 “ fender, being once convicted, shall for every month after such
 “ conviction, without any other indictment or conviction, pay
 “ into the Exchequer twice in the year, *viz.* in every *Easter* and
 “ *Michaelmas* term, as much as shall then remain unpaid, after
 “ the rate of twenty pounds for every month after conviction;
 “ and that for a default herein, the king may seize all the goods,
 “ and two parts of the hereditaments of such an offender,” &c.

3. *What other Inconveniencies they are subject to.*

By the 23 *Eliz. cap. 1.* it is enacted, “ That every person, for-
 “ bearing the church twelve months, shall on certificate thereof
 “ into the King’s Bench, by the ordinary, a justice of assize and
 “ gaol-delivery, or a justice of peace of the county where such
 “ offender shall dwell or be, be bound with two sufficient sure-
 “ ties in the sum of two hundred pounds, at the least, to the
 “ good behaviour, and so continue bound until such offender shall
 “ conform himself,” &c.

4. *By what Means they may be discharged.*

By the 23 *Eliz. cap. 1. § 10.* it is enacted, “ That every per-
 “ son guilty of the above-mentioned offences, who shall, before
 “ he be thereof indicted, or at his arraignment or trial before
 “ judgment, submit and conform himself before the bishop of
 “ the diocese where he shall be resident, or before the justices
 “ where he shall be indicted, arraigned, or tried, (having not be-
 “ fore made like submission at any his trial, being indicted for his
 “ first like offence) shall, upon his recognition of such submission,
 “ in open assizes or sessions of the county where such person shall
 “ be resident, be discharged of all and every the said offences
 “ against the said statute,” &c.

And by the 28 *Eliz. cap. 6. § 6.* “ That whensoever any such
 “ offender shall make submission, and become conformable ac-
 “ cording to the form limited by the above-mentioned statute of
 “ 23 *Eliz. cap. 1.*—or shall fortune to die, that then no forfeiture
 “ of 20*l.* for any month, or seizure of the lands of the same
 “ offender, from and after such submission and conformity, or
 “ death, and full satisfaction of all the arrearages of twenty
 “ pounds monthly, before such seizure due or payable, shall en-
 “ sue, or be continued against such offender, so long as the same
 “ person shall continue in coming to divine service, according to
 “ the intent of the said statute.”

By the 1 Jac. 1. cap. 4. it is enacted, "That recusant con- forming himself according to the meaning of the above-men- tioned statutes, &c. shall, during such conformity, be (a) dis- charged of all penalties which he might otherwise sustain by reason of his recusancy."

even after judgment may have an *audita querela* against the informer; also he may plead it after a judgment for the king, before execution awarded; but after execution hath been awarded for the king, or the profits of his lands on a seizure have been actually taken to the king's use, he hath no other remedy but by petition to the king. Raym. 391. 2 Jon. 187. Mod. 213.

If the heir of a recusant be a conformist, he is discharged by 1 Jac. 1. cap. 4. as to all penalties happening by reason of his ancestor's recusancy, unless two parts of his lands were seized by the king in his ancestor's life, in which case they shall continue in the king's hands till the whole debt be levied.

5. How a Person is punishable for suffering such Absence in others.

By the 1 Jac. 1. cap. 4. "Whoever shall keep in his service, fee, or livery, or willingly maintain, &c. in his house, any servant, sojourner, or stranger, (except a parent wanting, without fraud, other habitation or maintenance, and except a ward, &c.) who shall forbear going to church, &c. for a month, shall for every such month forfeit 10*l*."

8. Of Offences against the Established Church by Protestant Dissenters.

By 31 Eliz. cap. 1. "Obstinate nonconformists were compellable to abjure the realm, and were also subject to other penalties; and dissenters were farther restrained by 17 Car. 2. cap. 2. and 22 Car. 2. cap. 1. but at this day, by 1 W. & M. cap. 18. all persons dissenting from the church (except papists, and those who shall in preaching or writing deny the doctrine of the Trinity) are exempted from all penal laws relating to religion; except 25 Car. 2. cap. 2. (by which all officers of trust are bound to receive the sacrament according to the usage of the church of England, and also to take the oaths of allegiance and supremacy, and the test; and also, except 30 Car. 2. cap. 1. by which the members of both houses of parliament, and all the king's sworn servants, are bound to make a declaration against transubstantiation, and the invocation of saints, and the sacrifice of the mass); provided such dissenters take the oaths of allegiance and supremacy, and make the said declaration against transubstantiation, &c. and come to some congregation for religious worship in some place registered (b), either in the bishop's court, or at sessions, the doors whereof shall neither be locked, barred, nor bolted."

(a) Ardmay plead his conformity to a suit either by the informer or king, and

[(b) In registering the certificate the justices are merely ministerial; and if the persons resorting to the meeting-house do not bring themselves within this act, the registering will not protect them from the penalties of the law. Rex v. Justices of Derbyshire, 1 Bl. Rep. 606.]

Also, by the statute 1 W. & M. cap. 18. "Dissenting teachers are tolerated, if they take the said oaths, &c. at the general or quarter sessions, to be held for the place where such persons live, and subscribe the thirty-nine articles of the church of

[(a) But the subscription to the non-excepted articles being alleged to prets too hard upon some tender consciences, it is now no longer required, and the benefit of this act is extended by 19 Geo. 3. c. 14. to all protestant dissenting ministers upon their taking the oaths, making and subscribing the declaration against popery, and also the following declaration: "I A. B. do solemnly declare, in the presence of Almighty God, that I am a Christian and a Protestant, and as such that I believe, that the Scriptures of the Old and New Testament as commonly received among Protestant churches, do contain the revealed will of God, and that I do receive the same as the rule of my doctrine and practice."—This act, as well as the toleration-act, are declared to be publick acts: the latter had been holden to be a private act. Reg. v. Larwood, 4 Mod. 274. 1 Ld. Raym. 30. (b) The contrary was formerly holden, *vide* Salk. 572.]

[See 8 G. 1. c. 6 respecting Quakers.] And by the statute 1 W. & M. cap. 18. "Those who scruple the taking of any oath are within the like indulgence, provided they subscribe the aforesaid declaration, and also a declaration of fidelity to the king, and against the deposing doctrine and papal supremacy, and also profess their faith in God the Father, and Jesus Christ his eternal Son, the true God, and the Holy Spirit, one God for evermore; and acknowledge the holy scriptures of the Old and New Testament to be given by Divine inspiration."

6 Mod. 190. [If a man be a professed churchman, and his conscience will permit him sometimes to go to meetings, instead of coming to church, the toleration act will not excuse him. *Per Holt, C. J.*

Dr. Trebec v. Keith, 2 Atk. 498. Nor will it authorise a minister, to exercise his functions, without being licensed by the bishop in a chapel of ease according to the rites of the church of *England*; for the act was made to protect tender consciences from penalties; and to extend it to those of the church who act contrary to its rules and discipline, would introduce an endless confusion.

Attorney-General v. Cock, 2 Vez. 273. (c) Rex v. Barker, 3 Burr. 1265. But see Rex v. Joatham, 3 Term Rep. 575, the difference between a *mandamus to admit*, and a *mandamus to restore*. (d) Rex v. Hall, 1 Term Rep. 320. The law so far favours dissenters upon the foundation of this act, that charities are permitted to be established for the support of dissenting ministers; and a *mandamus* (c) will issue to admit or restore them. And in the present disposition of the courts, prosecutions against dissenters for occasional non-compliance with all the requisitions of the statutes do not seem likely to meet with any great encouragement (d).

The toleration act exempts dissenting ministers from serving upon juries, and from county, ward, or parish offices; and 19 Geo. 3. cap. 4. exempts them from serving in the militia.

By 1 Geo. 1. st. 2. c. 5. It is felony without benefit of clergy to destroy any religious meeting-house registered according to the toleration act: and the hundred is made liable to the damages.]

3 Lev. 376. It has been holden, since this statute, that a prohibition lies to the spiritual court proceeding against persons for incontinency who have been married in a licensed conventicle. [See the marriage-act, 25 G. 2. c. 33.]

By the 5 Geo. 1. cap. 4. it is enacted, "That if any magistrate shall be knowingly present at any publick meeting for religious worship, other than the church of *England*, in the peculiar habit of, or attending with the ensigns belonging to his office, he shall be disabled to hold such office, and adjudged incapable to bear any publick office or employment whatsoever."

Heriot.

(A) Of the Original and Nature of Heriots.

(B) Of the several Kinds, and where an Heriot shall be said to be due: And herein,

1. Where an Heriot shall be said to be due by Custom.
2. Where an Heriot shall be said to be due by Tenure or Reservation.

(C) Of the Remedies to be pursued for the Recovery of an Heriot where it is due.

(A) Of the Original and Nature of Heriots.

THE heriot duty is thought by our best antiquaries to be far more ancient than and to differ from (a) *relief*. Its original seems to be thus.

Spelm. 287.
(a) *Relief* began in this manner:

When the feuds were only for life, yet if the tenant had any son or relation fit for the service, the tenant would recommend him to the lord, and the lord would generally let him in on better terms than any other; and thus began the payment of money on new admittances, which, when the feud became inheritable, was turned into a sum certain, and was called a *relief*, being originally a charitable benignity to the heir, to admit him though he paid not the full value of the land. See *Wright, of Tenures*, 97.

—And Fleta, [in the very words of Bracton, lib. 2. c. 36. to 86. a.] thus defines a heriot: *Heriotum est quædam præstatio ubi tenens liber, vel servus in morte sua dominum suum respicit de meliori averio suo vel de secundo meliori, quæ quidem præstatio magis fit de gratia quam de jure, & nullam habet comparationem ad relevium, eo quod hæred. non contingit, quia factum est antecessoris.* Fleta, lib. 3. c. 18.

—My Lord Coke says, that heriots are very ancient, and that they were preferred to mortuaries, the lord being entitled to the best beast, and the second only being due as a mortuary. Co. Lit. 185. b.

Anciently, when the tenures were military, and for life only, the arms and war-horse of the tenant, upon his death, went, together

Spel. Gloss.
287. Bract.
lib. 2. fo. 60.
Britton. 178.

(a) That in the Saxon language the word heriot signifies armour, weapons, or provision, and was a tribute of old given to the lord of a manor for his better preparation towards war; and therefore at its first institution was paid in arms, and habiliments of war. Fortesc. in the Preface to *Absolute and limited Monarchy*, 57. (b) *Vide* Kitchen, 133.

Spel. 287. (c) In Lambard we have an account of these laws, and among others, that which follows: *Si quis incuria sine morte repentina fuerit interfectus, mortuus, dominus tamen nullam rerum suarum partem (præterquam quæ de jure debetur herioti) sibi assumito, verum ea judicio suo uxori, liberis & cognatione proximis jussit pro suo cuique jure distribuito.* Lamb. Sax. Laws, 119. — In Co. Lit. 185. b. the same law is cited.

gether with the land, to the lord, being due to him, as having been purchased out of the profits of the land, or as having been originally granted by the lord for publick defence, and therefore belonged to the lord, that he might bestow them on the succeeding tenant for the like service; but when the feud became inheritable, the reason of the heriot ceased, and then the arms and war-horse went to the heir who succeeded to the land; yet in some manors the custom of the heriot was by particular agreement retained, or the lord reserved it as parcel of his tenure; and though originally the heriot was the (a) best horse, yet in time it came to be the best beast; for the tenants, to disappoint their lords, would often sell their arms and horses, and then of necessity a law was made that the lord might take the best beast in lieu of them, and so the heriot came to be esteemed the best beast ever after; and as it arose by custom, or tenure, after the feud became inheritable; hence we find, in some manors, a custom of paying it in (b) goods, and in some, in money.

It appears, not only from *Spelman's* conjectures, but likewise from the (c) laws themselves by king *Canutus*, that the *Danes* were the first inventors of heriots, and that it was a political institution of theirs, whereby the *Danish* tenants were to hold by military service, and their arms and horses, at their deaths, to revert to the publick; by which means the whole strength and defence of the kingdom were put into their hands, whilst only the affairs of agriculture, and the improvement of the nation were committed to the *English*, who thereby indeed enjoyed greater freedom and immunities in their tenures, than the *Danish* tenants did.

(B) Of the several Kinds, and where an Heriot shall be said to be due: And herein,

I. Where an Heriot shall be said to be due by Custom.

Dyer, 199. b. Bro. tit. *Heriot*, 2, 3. (d) That an heriot may be due by custom as well upon an alienation of the tenant, as by his death.

8 Co. 106. a. Palm. 342.

AS to the several kinds of heriots, some are due by custom, some by tenure, and some by reservation on deeds executed within time of memory; those due by custom are the most frequent, and arose by the contract or agreement of the lord and tenant, in consideration of some benefit or advantage accruing to the tenant, for which an heriot, as the best beast, best piece of household furniture, &c. became due and belonged to the lord, either on the death or (d) alienation of the tenant, and which the lord might seize, either within the manor or without, at his election.

Dyer, 199. b. Dav. 33. 2 And. 153.

But, though a custom that the lord shall have the best beast, &c. of his tenant who dies, is good, yet a custom or prescription to have

have a heriot of every stranger dying within such a manor, is void ; because it cannot have a reasonable commencement between the lord and a stranger, though it may between him and his tenants. Roll. Abr. 561.

So, a custom or prescription to have a heriot, viz. the best beast of his tenant, and if it be esloigned before the lord (a) seises it, that then he may take the beast of any other person levant and couchant upon the land, is unreasonable and void. Moor, 16. pl. 58. adjudged. N. Bendl. 112. pl. 147. ad-

judged. 4 Mod. 321. cited. Dyer, 199. b. (a) But the cattle of a stranger may be distrained, though not seised. N. Bendl. 302. pl. 294. Dalf. 61. Owen, 146. March, 165., & vide infra, letter (C).

If the custom be, that the lord ought to have the best beast as an heriot of him that dies his tenant, and the parson of the parish the second best beast as a mortuary ; if the tenant hold two several tenements of the lord, subject to the custom, within the parish, the lord shall have the two best beasts, within the intent of the custom, and the parson the third. 7 H. 6. 26. b. Bro. tit. Heriot, 3. Bro. Custom, 22. Roll. Abr. 567. S. C.

A copyholder for life, where the custom is, that if the tenant die seised, a heriot shall be paid, dies disseised or ousted, the lord having first granted the feignory to A. for 99 years, if the tenant should so long live, remainder to B. for 4000 years : and herein two questions were made : 1st, Whether the heriot should be paid, because the copyholder did not die seised : and as to this, the court held clearly, that a heriot was due and payable ; for notwithstanding the ouster and disseisin, he still continued legal tenant, and such disseisin might have been by combination to defeat the lord of his heriot. The second question was (b), to whom the heriot should be paid : and as to this, the court held clearly, that the remainder man for 4000 years could have no right to it, because the copyholder was never his tenant ; and as to the grantee for 99 years, Barkley Justice was of opinion, that it belonged to him ; but hereof Jones Justice (they two only being in court) doubted, because that *eo instante* the tenant died, *eodem instante* the estate of the grantee for 99 years was determined. (b) That an heriot shall go with the reversion, Winch. 57. and always incident thereto, 2 Lutw. 1367.

If by the custom of a copyhold manor the lord may grant a copyhold to three persons, to hold to them *successive sicut nominantur in charta*, & *non alibi*, for their lives, and that on the death of every tenant the lord should have his best beast for an heriot, and a grant is made to J. S. and his assigns, to hold to him for his own life and the lives of two others ; this at least is a good grant for the life of J. S., though not strictly pursuant to the custom, and the lord on his death shall have an heriot ; but he cannot have an heriot on the death of the *cestui que vies* (c), because they were never his tenants. 6 Mod. 63., &c. Salk. 188. pl. 7. S. C. Smartle and Penhallow, Ld. Raym. 9. 4. S. C. (c) So, where a bill was exhibited in Chancery to discover the

best beast of *cestui que trust* of a college lease, and the defendant demurred thereto, because the best beast of *cestui que trust* could not be taken for a heriot ; and also because it appeared by the plaintiff's own shewing, that the tenants who had the estate in law in them were still living ; the demurrer was allowed. Vern. 441.

If a copyholder for life, on whose death the lord is entitled to a heriot, becomes a bankrupt, and the copyhold is assigned to the creditors, this transmutation of the tenant by act of parliament shall Salk. 189.

(a) But not shall not work a prejudice to the lord; but the lord shall, on the death of the (a) copyholder, have an heriot.
 of the assignee, 2 Ld. Raym. 1002.

8 Co. 106. If an heriot be due by *custom* of the manor, viz. that upon the death of every tenant of the manor the lord shall have an heriot; if the lord purchase parcel of the tenancy it shall not extinguish the custom, because the lord has only purchased part, and the tenant, on account of the residue, is still within the lord's homage, and tenant of his manor; and consequently upon his death, as upon the death of every other tenant of the manor, the lord is entitled to the heriot.
 2 Brownl. 296.

8 Co. 104. But if the heriot were due by *tenure* or *heriot service*, and the lord had purchased parcel of the tenancy, the whole heriot-service had been extinct; for being entire, it cannot, from the nature of the thing, be apportioned, and the tenant shall be discharged from the payment of it: for the whole tenancy being equally chargeable with the payment of such service, the lord by his own act shall not discharge part, and throw the whole burden upon the residue, for his own private benefit and advantage.
 6 Co. 1.
 Moor, 203.
 Co. Lit.
 149. a.

8 Co. 104. If there be lord and tenant by fealty and heriot-service, and the tenant alien part of the tenancy, the alienee shall hold by a distinct heriot-service; for in this case the services shall be (b) multiplied; and if after such alienation the lord purchase the residue of the tenancy, only the heriot-service due from the first tenant shall be extinguished; because by the alienation each held his proportion by a separate and distinct tenure; and therefore if the lord purchase one tenancy, that can no way affect the services of his other tenant; but if the lord, before the tenancy had been separated and holden by two distinct tenures, had purchased part of it, the whole heriot-service had been extinct, for the reasons above-mentioned.
 J. Talbot's case, Co. Lit. 149. b.
 (b) That if the tenure be by homage, fealty, and a horse, hawk, or spur, if the tenant aliens part, the services shall multiply, and both

feoffor and feoffee shall pay each of them a horse and a spur to the lord; but if the tenure be by any corporal service, as to be butler to the lord, steward or bailiff of his manor, or to cover or repair his house, or to reap or thresh his corn; in all these cases upon alienation of part, such personal services shall not multiply. Co. Lit. 149. 6 Co. 1. Bruerton's case, Plow. 240. b.

Palm. 342. If by the custom of a manor every copyholder, upon his alienation and surrender, is to pay a heriot to the lord, and a copyholder surrenders part of his copyhold to one, and part to another, and retains part in his own hands, the heriots in this case shall be multiplied; and as to the first alienation, the heriot shall be paid by the copyholder who aliened, because he still continued tenant to the lord, and so upon the alienation of every other tenant *toties quoties*; for otherwise it might be in the power of the copyholder entirely to defeat the lord of his heriot.
 Snag v. Fox.

6 Co. 37. The dean and chapter of Worcester were seised of the manor of H. in fee, in right of their church, of which manor one G. was copyholder for life under the ancient rent of 8s. 8d. payable at the four quarter-days of the year, and heriotable at the death of the tenant, and the copyholds of that manor were grantable by custom for three lives; the dean and chapter by indenture
 Cro. Jac. 76, 77.
 Moor, 759.
 Dean and Chapter of Worcester.
 Co. Lit.

indenture under their common seal demise the said lands to G. and his assigns, for the lives of A. B. and C., and the survivor of them, rendering 8s. 8d. half-yearly, and without reservation of any heriot; and after this lease made, the dean dies, and his successor and the chapter enter to avoid this lease, upon the 13 *Eliz. cap. 10.* (among other reasons) because the ancient rent was not reserved, by reason of the loss of the heriot: but the lease was adjudged good, and binding upon the successor. For the 13 *Eliz. cap. 10.* does not avoid any lease, if the accustomed rent or more be reserved; and here the accustomed rent is reserved, and the omission or loss of the heriot is not material, because that was not a thing annual or depending upon the rent, but perfectly casual and accidental.

44. b. S. P.
6 Mod. 64.
S. C. cited.

2. Where an Heriot shall be said to be due by Tenure or Reservation.

It has been already observed, that when the feud became inheritable the heriot was still continued by custom, or the lord reserved it as parcel of his tenure, and then he might either seize or distrain for the same as he might do for any other feudal service.

Plow. 96.
Bro. tit.
Heriot, 2.

If a feme tenant by fealty, certain rent, and heriot-service dies, leaving a husband tenant by the curtesy, the heriot becomes due by the death of the (a) wife, though the lord need not distrain for it till after the death of the husband; but if he distrains for it after the death of the husband, it is not sufficient for him to allege seisin of the services by the hands of the tenant by the curtesy; for such seisin can no more bind the heir, than the seisin of any other tenant for life, who has no body's estate but his own.

Keilw. 84:
pl. 8.
(a) But by
Dodderidge
it does not
become due
by the death
of the wife,
because the
wife can

have no property.
4 Leon. 239.

A man made a lease for 99 years, if A. B. and C. should so long live, rendering an heriot after the death of each of them successively as they were all three named in the deed; the last named died first; and if an heriot should be paid, was the question. It was objected, that the reservation being upon the death of the three successively, the lessor was contented to trust to that contingency: but as to this point the court gave no opinion; but judgment was given against the avowant for other faults in the pleadings.

Mod. 216.
2 Mod. 93.
S. C. In-
gram and
Tottil.

In covenant the plaintiff sets forth a lease made to the defendant for 99 years, if J. and S. should so long live, which lease was to commence after the end, forfeiture, surrender, or other determination of another lease for 99 years, if A. and B. did so long live, & *post principium inde reddendo & solvendo* 10l. rent per ann. and also one capon every Christmas, *ac etiam reddendo & solvendo* to the lord the chief rent, and also rendering and paying at the death of J. or S., or either of them, 3l. in the name of an heriot, and also doing several days work with his team at such days in the year as were therein appointed; the plaintiff saith that J. is dead,

2 Sand. 161.
Vent. 9. 91.
Lev. 294.
Sid. 437.
2 Keb. 677.
S. C. be-
tween La-
nion and
Kerne.

and that S. is living, and that the defendant according to his covenants hath not paid the 3*l.* &c. and upon demurrer, the question was, whether the 3*l.* was payable before the lease took effect. Keeling C. J. was of opinion, 1st, That a reservation being in lieu of the profits, the other reservations (though there had been no such thing expressed as *post principium inde*) must not have begun till the lease had come into possession. 2^{dly}, That this 3*l.* is a sum in gross, and could not have been distrained for, being only an agreement of the parties that a sum of money should be paid at the death of J. and S., or either of them, like an agreement to pay a fine; and being such an agreement shall be paid, though the lease never take effect; neither is it material what other reservations it comes in company with, for nobody shall make any interpretation of the express words of the party. But the other three judges were of opinion that the 3*l.* in the name of an heriot was not to be paid upon any death that fell out before the lease came into possession; for though it be appointed to be paid after the death of J. and S., or either of them, yet that must be understood *secundum subjectam materiam*, viz. if their death happen within the term; for till the former lease expire, this is a future interest, and then the lessor hath no reversion, and the lessee has no term; and how then can a heriot be payable? for a heriot by reservation is in the nature of a rent, and may be distrained for as well as a rent. 2^{dly}, (a) Covenants must be expounded according to the intentions of the parties, which are to be collected from the nature of the grant on which they depend, and of other covenants which come in company with them; and therefore the reservation of 3*l.* in the name of an heriot being upon account of the term, and the term not being yet come *in esse*, and also being joined with other reservations, none of which were to begin till *post principium* of the term, this must have the same construction too, and must not commence before the term.

(a) For this
vide Hob.
275. Dyer,
371. pl. 5.
377. pl. 27.
10 Co. 107.

Hob. 176.
Hutt. 4. 5.
Shaw and
Taylor.

(b) The lord
shall have
his heriot,
though the
tenant de-
vises away
all his goods.

Co. Lit. 158. b. (c) An action brought on this statute by the lord against a person being party to a fraudulent disposition, in order to defeat a lord of his heriot. 2 Leon. 8.

(C) Of the Remedies to be pursued for the Recovery of an Heriot when it is due.

Bro. tit.
Heriot, 2. 3.
Keilw. 82.

IT seems to have been always agreed, that for an *heriot-custom* the lord might seize the best beast of the tenant, or whatever else was due as an heriot, wherever he could find it.

But according to some ancient opinions, the lord could only distrain, but not seize for an *heriot-service*; because, say they, it lies in *render*, and not *prender*; also the form of pleading is, that he was seized thereof by the hands of his tenant, which would be absurd, if the lord had such a property therein that he might seize it as his own.

But it hath been solemnly adjudged, that for a *heriot-service*, or for a *heriot* reserved by way of *tenure*, the lord may either seize or distrain; for when the tenant agrees that the lord shall on his death have his best beast, &c. the lord hath his election which beast he will take, and by seizing thereof reduces that to his possession, wherein he had a property at the death of the tenant, without the concurring act of any other person; and it is not like the case where the lessor reserves 20s. or a robe, for there the lessee hath his election which he will pay, and being to do the first act, the lord cannot seize, but must distrain.

S. C. adjudged accordingly in B. R. on a conference with the judges of the court of C. B. S. C. as adjudged in C. B.

Also, though the lord may either seize or distrain for an *heriot-service*, yet he can only seize the (a) proper beast of the tenant; but he may (b) distrain any man's beasts which are upon the land, and retain them until the heriot be paid.

(b) For this *vide* Dalf. 61. Owen, 146. March, 165. N. Bendl. 302. pl. 294.

So, it hath been ruled, that for a *heriot-custom* or service the lord may seize as well in the manor as out; (c) but if he distrains, it must be in the manor.

81. S. P. 3 Mod. 231. S. P. *arguendo*. Cro. Car. 260. Jones, 300. (c) For a *heriot-custom* the lord may seize on the highway, for that is no distress, but a seizure; but he cannot distrain for a *heriot-service* there. 2 Inst. 132.

But it is said, that this liberty must be understood to be annexed to ancient tenures, on which the lords had many privileges, and not to be extended to those which are created within time of memory, upon particular reservations; and therefore (d) where a lease was made of land for 99 years, if A. and B. should so long live, reserving a yearly rent and an heriot, or 40 s. in lieu thereof, after the death of either of them, provided that no heriot should be paid after the death of A. living B., and A. and B. were both dead, and consequently the lease (e) determined; the court was divided in opinion, whether the lessor could (f) distrain for the heriot or not.

termination of the lease the lessor cannot distrain. Co. Lit. 47. 6 Co. 64. But for this *vide* title *Rents*, and the statute of the 3 Ann. c. 14. § 6. (f) But may have an action of covenant. 2 Saund. 165.

If the tenure be by rent and *heriot-service*, *viz.* to have the best beast after the death of the tenant, and the lord distrain for the heriot, he need not in his avowry shew which was the best beast which he was entitled to, nor of what value it was; for the tenant might have esloigned the cattle, and thereby it might be impossible

DeGor and Student, Dialogue 2. c. 9. N. Bendl. 30. pl. 47. Keilw. 82.

Plow. 96. adjudged. Cro. Eliz. 589. Odiham and Smith, S. P. adjudged in B. R. on a writ of error of a judgment to the contrary in C. B. Moor, 540. And. 298.

Cro. Car. 60. (a) This must be the very beast of the tenant. 3 Mod. 231. Lit. Rep. 35.

Salk. 356. Austin and Bennet, per Cur. Show.

Show. 81. 3 Mod. 231. (d) 2 Lutw. 1366. Osborne and Steward, 3 Mod. 230. S. C. adjourned into Exchequer, *et vide* Mod. 217. 2 Mod. 93. (e) That after the de-

Cro. Car. 260. Major and Brandwood adjudged, and two precedents cited

to the same purpose.

Jones, 300.
S. C. ad-

judged, and the same precedents taken notice of; but there said, that there were divers precedents in which the best beast is precisely avowed, and this by the reporter is said to be the best way, when it can be known, though the other is sufficient:—But in Hob. 176., Shaw and Taylor, for this incertainty in the avowry judgment was given against the lord. Hut. 4. S. C. and S. P.

Cro. Car.

313. Randal and Scory: but vide this case as reported in Hetley, 57., and 2 Roll. Abr. 451.

If in replevin the defendant avows for an heriot upon a lease made by indenture to *A.* his executors and assigns, for 99 years, if the said *A. B.* and *C.* or any of them, should so long live, rendering rent, and rendering and paying after the death of the said *A.* his *executors and assigns*, his or their best beast for an heriot, or 50 s. at the election of the lessor, his heirs or assigns, and *A.* assigns to *J. S.* and dies, on whom the lessor distrains; and upon oyer of the indenture it appears, that the clause for the heriot was *rendering and paying to the lessor, his heirs and assigns, after the death of the said A. B. and C. and every of them, his or their best beast in the name of an heriot, or 50 s. &c.*; this variance is fatal; for though the lessor be entitled to an heriot on the death of *A. B.* or *C.* yet ought he to have set it forth according to the indenture, and not to have avowed for an heriot after the death of *A.* his *executors and assigns*, when there are no words which make an heriot payable on the death of the executors or assigns.

Bull. 101.

If an heriot be due by custom from every tenant dying seised, the lord need not allege what estate the tenant died seised of.

Cro. Eliz.

530.
Dyer, 229.
Sid. 265.
(a) Mod.
217.
2 Mod. 93.

But where a person would entitle himself as devisee of a reversion after a lease on which an heriot is reserved, he ought to shew of what estate the deviser was seised at the time of making his will, and (a) that he died seised of such estate; for if disseised before his death, the will could not operate.

Highways.

(A) Of the several Kinds, and what shall be said a Highway.

(B) To whom the Highway and Soil belong.

(C) Who hath a Right to a Way, and how he must claim it.

(D) Whether a Highway may be changed.

(E) Of

- (E) Of stopping a Highway, and other Nuisances therein.
- (F) Who are obliged to repair a Way by the Common Law: And herein where a Person shall be liable by reason of Inclosure, Tenure, or Prescription.
- (G) Of the Provision for Repairing the Highways by several Acts of Parliament.
- (H) How the Parties obliged to repair are to be proceeded against, and what Defence they may make.

(A) Of the several Kinds, and what shall be said a Highway.

IT seems that (a) anciently there were but four highways in England, which were free and common to all the king's subjects, and through which they might pass without any toll, unless there was a particular consideration for it; all others, which we have at this day, are supposed to have been made through private persons grounds, on a writ of *ad quod damnum*, &c. which being an injury to the owner of the soil, it is (b) said that he may prescribe for toll without any special consideration.

(a) That without any reservation of tenure, &c. the *trinitas* lay upon all lands in England, viz. contributions

against invasions, to the highways, and to bridges. (b) Mod. 231. 2 Mod. 143. Ld. Raym. 385.

There are, says my Lord Coke, at this day three kinds of ways: 1. A footway, called in Latin *iter*. 2. A pack and primeway, which is both a horse and a footway, called in Latin *actus*. 3. A cartway, called in Latin *via* or *aditus*, which contains the other two, as well as a cartway, and is called *via regia*, if it be common to all men; and *communis strata* (b), if it belong only to some town or private person.

Co. Lit. 56. a. [(b) *Communis strata* and *alta via regia* are synonymous. 1 Str. 44.]

But notwithstanding these distinctions, it seems that any of the said ways which is common to all the king's subjects, whether it directly lead to a market-town, or only from town to town, may properly be called a highway, and that any such cartway may be called the king's highway; and that a river (c) common to all men may also be called a highway; and the nuisances in any of the said ways are punishable by indictment; for otherwise they would not be punished at all: for they are not actionable unless they cause a special damage to some particular person; because if such action would lie, a multiplicity of suits would ensue. But it

[(c) So, Callis compares a navigable river to a highway: but per Buller, J. no two cases can be more distinct. For, in the latter case, if the way be found-

rous and out of repair, the publick have a right to go on the adjoining land: but if a river should happen to be choked up with mud, that would not give the publick a right to cut another passage through the adjoining lands. 3 Term Rep. 263. The publick have no common-law right to tow upon the banks of navigable rivers. Ball v. Herbert, 3 Term Rep. 253.] Palm. 389. Cro. Eliz. 63. 664. Vent. 189. 208. 3 Keb 28. Co. Lit. 56. 6 Mod. 255. Hawk. P. C. c. 76. 2 Ld. Raym. 1174. Saik. 359. pl. 8. [(a) But a highway may be described as leading from a hamlet. 4 Burr. 2091. It is unnecessary indeed particularly to describe a highway, for, as Lord Hale saith, whether it be such or not depends much upon reputation. 1 H. Bl. 355.]

Roll. Abr. 390. Cro. Car. 366. S. C. [Doug]. 749. acc.] If passengers have used, time out of mind, when the roads are bad, to go by outlets on the land adjoining to a highway in an open field, such outlets are parcel of the highway; and therefore, if they be sown with corn, and the track foundrous, the king's subjects may go upon the corn.

(B) To whom the Highway and Soil belong.

2 E. 4. 9. Roll. Abr. 392. **T**HOUGH every highway is said to be the king's, yet this must be understood so, as that in every highway the king and his subjects may pass and repass at their pleasure.

Roll. Abr. 392. But the freehold, and all the profits, as trees, &c. belong to the (b) lord of the soil, or to the owner of the lands on both sides the way. (b) That if trees grow upon the highway, he to whom the feigniory of the leet of the same place doth belong shall have the trees. Roll. Abr. 392.

8 E. 4. 9. Roll. Abr. 392. [Sir John Lade v. Shepherd, 2 Str. 1004. acc.] Also, the lord or owner of the soil shall have an action of trespass for digging the ground.

Roll. Abr. 392. Brownl. 42. Keilw. 141. But the lord of a rape, within which there are ten hundreds, may prescribe to have all the trees growing within any highway within this rape, though the manor or soil adjoining belongs to another: for usage to take the trees is a good badge of ownership.

(C) Who hath a Right to a Way, and how he must claim it.

Vent. 274. 2 Lev. 148. 3 Keb. 528. 531. St. John v. Moody. **A** Man may have a way either by prescription, by grant, by reservation, by implication, or by owelty of partition, and shall not in a *cur. claudend.* be obliged to shew which way he claims it; but it will be sufficient for him to allege *debet & solet*, &c. though in a bar or replication he must shew his title precisely.

Yelv. 163. But he who prescribes for a way, must shew in certain whether it is a foot, horse, or cartway.

If in bar of an action of trespass the defendant pleads that *J. S.* and all those whose estate he hath in certain lands, for themselves and their servants, time out of mind have had and used a way *in per & trans* the place where, &c. to the said lands, this is no good plea, because it is not (a) shewn (b) *a quo loco* the said way is claimed, and the rather, because it is claimed by prescription, which ought not to be laid *in certo loco*.

Yelv. 163. adjudged, [and see Rouse v. Bardin, 1 H. Bl. 351., that in pleading a publick highway it

is not necessary to state the *termini*.] (a) In an indictment for an incroachment upon, or not repairing the highway, this must be shewn, 2 Roll. Abr. 81. pl. 18. But it need not be shewn, where in pleading an highway is named only as an abuttal, and is not the foundation of the plea. Palm. 421. [And in an indictment for a nuisance the *termini* need not be stated. Rex v. Hammond, 1 Str. 44.] (b) It must be shewn *a quo loco ad quem*, because you must not go over any ground but to the right place. Hob. 198.; yet *vide* 2 Roll. Rep. 134.; but such defect is helped where issue is joined and tried upon the right of the way. Hob. 189, 190. Hutton, 10. Vent. 13. 2 Keb. 480. 488. adjudged; & *vide* Brownl. 6.

If *A.* be seised in fee of a backside in a town, and the high-street be next adjoining thereto of the east, and there be a gate in the backside which incloses it from the street, the gate being in the east next to the street; and *A.* be also seised in fee of a messuage and piece of land next adjoining to the backside of the north of the backside, and by deed enfeoff *B.* of the messuage and piece of land which are of the north of the backside, and by the same deed further grant to him and his heirs *liber. ingressum, egressum, & regressum in, ad & extra eadem concessa premissa in, per & trans predict. Januam* and backside; by fore of this grant *B.* may go from the street through the gate, and over the backside, to the messuage or piece of land of which he is enfeoffed; but he cannot go through the said gate and backside to other places, or from other places, to the street, without coming to the said messuage or piece of land; for the liberty is granted to him of ingress and egress *in, ad & extra eadem concessa premissa*; so that this is made appurtenant to the premises before granted.

Roll. Abr. 391. Hodder and Holman.

In trespass for breaking the plaintiff's close, if the defendant justifies going over this close, because he had used time out of mind to have a way over it from *D.* to *Blackacre*, and the plaintiff replies, that at the time of the trespass the defendant went with his carriages from *D.* to *Blackacre*, & *debinc* to a mill; this will not maintain his action, for when the defendant was at *Blackacre*, he might go whither he would.

Roll. Abr. 311. Sanders and Mose, but *vide* 1 Mod. 190. 1 Ld. Raym. 75. 1 Lutw. 111. [That the grantee of a

road between certain limits, can only use it so as to go from one of those limits to the other. So, it hath been determined, that under a grant of a way from *A.* to *B.*, *in, through, and along* a particular way, the grantee cannot make a transverse road across it. Senhouse v. Christian, 1 Term Rep. 560.]

But it seems, that if a man hath a way for carriages from *D.* to *Blackacre* over my close, and after he purchases land adjoining to *Blackacre*, he cannot use the said way with carriages to the land adjoining, for then it may be very prejudicial to my close; but it seems, if I will help myself, I must shew the special matter, and that he used it for the land adjoining.

Roll. Abr. 391.

A way must not be claimed as (c) appendant or appurtenant to a house, because it is only an easement, and no interest.

Yelv. 159. (c) But it may be *quasi* appendant thereto, and as such pass by grant thereof. Cro. Jac. 190.

[A right

Latch. 153.
Poph. 166.
Bull. Ni.
Pri. 74.

[A right of way may be extinguished by unity of possession, unless it be a necessary one, and then it shall not. But a right of watercourse doth not seem to be extinguished by unity of possession in any case.]

11 H. 4. 5.
21 E. 3. 2.
Bull. Ni.
Pri. 74.

If *A.* have *Blackacre*, and *C.* have *Whiteacre*, and *A.* have a way over *Whiteacre* belonging to *Blackacre*, and then purchase *Whiteacre*, the way will be extinct; and if *A.* afterwards enfeoff *C.* of *Whiteacre*, without excepting the road, it is gone.

Cro. Ja. 170.
189.

J. had four closes of land together, and sold three of them, reserving the middle close, to which he had no way but through that which he sold: it was holden, that though he did not reserve the way, yet it should be reserved for him.

Keymer v.
Summers,
Hereford
Summer
Assizes,
1769. Bull.
Ni. Pri. 74.

In an action for obstructing a way, the plaintiff proved that *Fowler* was seised of the plaintiff's tenement and the defendant's close, and in 1753 conveyed the tenement to the plaintiff with all ways therewith used, and that this way had been used with the tenement as far back as memory could go. The defendant produced a subsisting lease from *Fowler* for three lives made in 1723, by which *Fowler* demised the field in question in as ample manner as *Rock* a former tenant held it; and in this lease there was no exception of a way over the close. *Yates, J.* held, that by the lease without any reservation, the way was gone, and therefore could not pass under the words *all ways*, &c. But as there were thirty years intervening between the defendant's lease, and the plaintiff's conveyance, and the way had been used all the time, that was sufficient to afford a presumption of a grant or licence from the defendant so as to make it a way lawfully used at the time of the plaintiff's conveyance, and then the words of reference would operate upon it, and the way would pass.]

Yelv. 163.
adjudged.
(a) For this
vide 8 Co.
46. b.
(b) So, a
presentment
in a leet for
diverting
the king's
highway
is merely void,
for the word *divert*
may be applied to a
course of water,
and a way may be
obstructed or
stopped, but it is
not diverted when
it is stopped, and
another made in
another place. And.
234. adjudged.

If in bar to an action of trespass the defendant pleads, that *J. S.* and all those whose estate he hath in certain lands time out of mind, for themselves and their servants, have had and used *passagium in, per & trans* the place where, &c. and so justifies as servant, this is no good plea, for (a) *passagium* is (b) properly a passage over water, and not over land; and he ought to have prescribed in the way, and not in the passage, and should have such words as are proper and known in law.

Palm. 387,
388. 2 Roll.
Rep. 397.
(c) So, if a
man hath a
way over a
common
field, part whereof
doth belong to
himself, for the
infiniteness of the
case he may
prescribe generally.
Palm. 388. 2
Roll. Rep. 393.

A man may prescribe for a way from his house, through a certain close, &c. to church, (c) though he himself hath lands next adjoining to his house, through which of necessity he must first pass; for the general prescription shall be applied only to the lands of others.

Godb. 52,
53. * If a
way is in
part ob-

A man cannot allege that he cannot use his way as well as he could before, but must plead that he could not use the way at all *.

structed, and may be passed through, but such passage is attended with danger or difficulty, he may allege, that he cannot use his way in so large and ample a manner as he was used, and of right still ought to use the same.

(D) Whether a Highway may be changed.

AN ancient highway cannot be changed without an inquisition found on a writ of *ad quod damnum* (a), that such change will be no prejudice to the publick; and it is said, that if one change a highway without such authority, he may stop the new way whenever he pleases: neither can the king's subjects, in an action brought against them for going over such new way, justify generally as in a common highway, but ought to shew specially, by way of excuse, how the old way was obstructed, and a new one set out: neither are the inhabitants bound to keep watch in such new way, or to repair it, or to make amends for a robbery committed in it.

roads by their award, is equally binding with a writ of *ad quod damnum*. 1 Burr. 465.]

But it hath been holden, that if a water, which hath been an ancient highway, by degrees changes its course, and goes over different ground from that whereon it is used to run, yet the highway continues in the new channel in the same manner as in the old.

(E) Of stopping a Highway, and other Nuisances therein.

IT is clearly agreed to be a nuisance to dig a ditch, or make a hedge over-thwart the highway, or to erect a new gate, or to lay logs of timber in it, or generally to do any other act which will render it less commodious.

Also, it is a nuisance for an heir, for which he may be indicted, to continue an incroachment, or other nuisance to a highway, begun by his ancestor; because such a continuance thereof amounts in the judgment of law to a new nuisance.

Also, it is agreed, that it is no excuse for him who lays logs in the highway, that he laid them only here and there, so that the people might have a passage through them by windings and turnings.

It is a nuisance to suffer the highway to be incommoded by reason of the foulness, &c. of the adjoining ditches, or by boughs of trees hanging over it, &c.; and it is said, that the owner of land next adjoining to the highway, ought of common right to scour his ditches; but that the owner of land, next adjoining to such land, is not bound by the common law so to do, without a special prescription: also it is said, that the owner of trees hanging over an highway, to the annoyance of travellers, is bound by the common law to lop them; and it is clear that any other person may lop them, so far as to avoid the nuisance.

But it is no nuisance for an inhabitant of a town to unlade billets, &c. in the street before his house, by reason of the neces-

Cro. Car. 266.
Vaugh. 341.
Yelv. 141.
Hawk. P.C. c. 76.
[(a) A private act of parliament for inclosing lands, which vests a power in commissioners to set out new

22 Aff. 93.
Roll. Abr. 390.

Kitchen, 34.
Hawk. P.C. c. 76. § 48.

Hawk. P.C. c. 76. § 61.

2 Roll. Abr. 137.
Hawk. P.C. c. 76. § 42.

8 H. 7. 5. a.
Kitchen, 34.
Dalt. c. 26.
Hawk. P.C. c. 76. § 52.

2 Roll. Abr. 137.

sity of the case, unless he suffer them to continue there an unreasonable time.

2 Roll. Abr. 144. Cro. Car. 184. Jon. 221. 2 Salk. 458. pl. 3. Any one may justify pulling down, or otherwise destroying, a common nuisance, as a new gate or house erected in a highway; and it hath been of late holden, that there is no need, in pleading such justification, to shew that as little damage was done as might be.

2 Roll. Abr. 84. Hawk. P.C. c. 75. § 14. [Vide 1 Str. 586.] Also, besides that all nuisances are punishable by indictment with fine and imprisonment, it is said, that one convicted of a nuisance to the highway, may be commanded by the judgment to remove it at his own costs, &c.

(F) Who are obliged to repair a Way by the Common Law: and herein, where a Person shall be liable by reason of Inclosure, Tenure, or Prescription.

Roll. Abr. 390. March, 26. Vent. 90. 183. 8 H. 7. 5. OF common right, the general charge of repairing highways lies on the (a) occupiers of lands in the parish wherein they lie; but it is said, that the tenants of the lands adjoining are bound to scour their ditches.

(a) But if there be no occupier, by the owner's letting the lands lie fresh, he must repair them himself. 2 Rol. Rep. 412. Palm. 389.

Mod. 112. Vent. 256. 3 Keb. 301. [(b) In this case of roads, the whole parish shall not contribute, tho' it is otherwise in the case of

Also, if a parish is part in one county and part in another, and the highways in one county are out of repair, the whole parish shall contribute to the repair (b); but there may be an agreement between the inhabitants, that the one shall repair one part, and the other the other; and such agreement is good between themselves, and for breach the one may have an action upon the case against the other: but in an indictment they shall take no advantage of these agreements, for as to the king they are equally liable.

bridges, because one part of a bridge cannot stand without the other. And an indictment will lie against the whole of that part of the parish which lies in the county in which the ruinous road may happen to be. 4 Burr. 1507.]

Vent. 256. Mod. 112. 3 Keb. 301. and the authorities in the last paragraph. Therefore, if the indictment is general against all the parish, all the parish shall be charged; but if it be intended to charge one part or precinct of the parish to repair all the ways within the parish, it must be alleged in pleading, that by special prescription, or *ratione tenuræ*, such a part of the parish *de tempts dont*, &c. have been charged with the reparation of the ways. [And. 216. 5 Burr. 2700. 2 Term Rep. 111. 513.]

Rex v. Inhabitants of Sheffield, 2 Term Rep. 106. 1 Ld. Raym. 725. [If part of a parish be exempted by the provisions of an act of parliament from the charge of repair, the charge must necessarily fall upon the rest of the parish.]

But

But though the parish be obliged of common right to repair the highways in it, yet it is certain that particular persons may be bound to repair the highway, by reason of inclosure or prescription; as where the owner of lands not inclosed, next adjoining to the highway, incloses his lands on both sides of it; in which case he is bound to make a perfect good way, and shall not be excused by making it as good as it was before the inclosure, if it were then any way defective; because by the inclosure he takes from the people the liberty of going over the lands adjoining to the common track.

Roll. Abr.
390.
Cro. Car.
366.
Sid. 464.

Also it is said, that if one inclose land on one side, which hath anciently been inclosed on the other side, he ought to repair all the way; but that if there be not such an ancient inclosure on the other side, he ought to repair but half the way.

Sid. 464.

Therefore, if there be an old hedge, time out of mind, belonging to *A.* on the one side of the way, and *B.* having land lying on the other side, make a new hedge, there *B.* shall be charged with the whole repair.

Sid. 464.
2 Keb. 665.
2 Sand. 157.

But if *A.* make a hedge on the one side of the way, and *B.* on the other, they shall be chargeable by moieties.

Sid. 464.
2 Keb. 665.

But it seems clear, that wherever a person makes himself liable to repair a highway by reason of inclosure, he by throwing it open again frees himself of the burden of any further reparation.

2 Sand. 160.
1 Burr. 465.

[Where a new road has been made on a writ of *ad quod damnum*, in the same parish with the old road, the parishioners ought to keep it in repair; because being discharged from the repair of the old road, no new burthen is laid upon them; their labour is only transferred from one place to another. But if the new road lies in another parish, the person who sued out the writ, and his heirs, ought to keep it in repair; because the inhabitants of the other part gaining no benefit from the other road being taken away, it would be imposing a new charge upon them, for which they received no compensation. *Per Lord Hardwicke.*]

3 Atk. 772.

Particular persons may be bound to repair a highway by prescription; and it is said, that a corporation aggregate may be charged by a general prescription, that it ought and hath used to do it, without shewing any consideration in respect whereof it had used to do it, because such a corporation never dies; neither is it any plea, that the corporation have done it out of charity; but it is said, that such a general prescription is not sufficient to charge a private person; because no man is bound to do a thing which his ancestors have done, unless it be for some special reason; as having lands descended to him holden by such service, &c. but it seems, that an indictment charging a tenant of lands in (a) fee with having used of right to repair such a way *ratione tenuræ terræ suæ*, without adding that his ancestors, or those whose estate he hath, have so done, is sufficient, for it is implied.

27 Aff. 8.
21 E. 4. 33.
Bro. Pre-
scription,
49. 73.
Keilw. 52. 2.
Litch. 206.
Hawk. P.C.
202, 203.
(a) Also an
occupier as
such, tho'
at will only;
is indictable
for suffering
a house
standing
upon the
highway to

be ruinous, &c. and the words *ratione tenuræ*, &c. if added, are surplus. Salk. 357. pl. 3.

And it seems certain in all those cases, whether a private person be bound to repair a highway by inclosure or prescription, that

Mod. 112.
3 Keb. 301.
Vent. 250.
Sira. 179.

that the parish cannot take advantage of it on the general issue, but must plead it specially; and that therefore, if to an indictment against the parish for not repairing a highway, they plead not guilty, this shall be intended only that the ways are in repair, but does not go to the right of reparation.

(G) Of the Provision for repairing the Highways and Turnpike Roads by Act of Parliament.

[THE general statutes for this purpose, which were formerly very numerous, have lately been repealed, and reduced into two acts, viz. 13 Geo. 3. cap. 78. & c. 84. the former of which relates to highways, and the latter to turnpike roads. These acts branch out into such a variety of clauses, that to detail their provisions would far exceed the limits of a work of this kind: We shall therefore content ourselves merely with stating such decisions as appear to bear upon them; among which will be found a few upon the abrogated statutes, the language of those statutes being followed, with very little variation, in these modern ones.]

3 Keb. 255. Clergymen are within the purview of the statutes in respect of their spiritual possessions, as much as any other persons in respect of other possessions; for the words are general, and there is no kind of intimation that any particular persons shall be exempted more than others.
476.
1 Vent. 273.
2 Inst. 704.
1 Hawk.
P. C. c. 76.
§ 15. [By stat. 30 Geo. 2. c. 25. § 23. persons serving for themselves as privates in the militia, are exempted from statute-work during the time of such service.]

Dalt. c. 26. That it is no excuse for parishioners being indicted at common law for not repairing the highways, that they have done their full work required by statute; for the statutes being made in the affirmative, do not abrogate any provision of this kind by the common law.
1 Hawk.
P. C. c. 76.
§ 18.

1 Salk. 347. The justices in appointing the six days work upon the roads, must fix the particular days, and not generally appoint six days between such and such a day.
2 Ld. Raym. 858.

Rex v. Inhabitants of Bockenham, Cowp. 78. [Though the 13 Geo. 3. c. 78. § 24. declares, that no indictment shall be removed by *certiorari* before traverse and judgment, yet this clause does not take away the writ at the instance of the prosecutor, for the crown does not traverse, and it was calculated merely to prevent delay on the part of defendants.]

Rex v. Balme, Cowp. 648. The power given by § 16. of 13 Geo. 3. cap. 78. to two justices to order any highway to be widened, extends to roads repairable *ratione tenuræ*; and upon disobedience to such order, the party may either be proceeded against summarily under the statute, or by indictment as an offence at common law.

Rex v. Inhabitants of Chadderton, 5 Term Rep. 272. If the defendants be acquitted on an indictment removed by *certiorari* for want of prosecution, the court of King's Bench have no power to award them costs upon the ground of its being a vexatious

vexatious prosecution under the 13 Geo. 3. c. 78. § 65. but the application must be made to the judge at *nisi prius*.

Though a *certiorari* to remove a presentment be prosecuted by another than the justice who made the presentment, yet if it be done with his consent, that circumstance will be no objection to it.

If a parish, consisting of two districts, which are bound to repair separately, be convicted for not repairing the road in one of the districts, the other district having no notice of the indictment, it will be considered as substantially the conviction of the one district, and if the fine be levied on an inhabitant of the other, a *mandamus* will be granted for a rate to be levied on the district bound to the repair. But the *mandamus* must be special, suggesting, that the part of the highway which was the subject of the indictment, lay wholly in the one township, and that the two townships were separately bound to repair their respective parts of the highway, in order to give such township an opportunity to traverse, by the return, either of those facts.]

Rex v. Inhabitants of Penderryn, 2 Term Rep. 260.

Rex v. Townshend, Dougl. 421.

(H) How the Parties obliged to repair are to be proceeded against, and what Defence they may make.

IT seems clear, that no one ought to be punished for any offence against the highways, without being first called upon to answer for himself, except in the case of a presentment in a court-leet, and, as (a) some say, in the case of a presentment by a justice of peace on his view; and even in the case of a presentment in a court-leet, if it touch a man's freehold, as by charging him with being bound to repairs in respect of the tenure of his land, it may so far be traversed in the King's Bench, being removed thither by *certiorari*: and it may be traversed where the defendant in trespass justifies under it.

Keilw. 34. Crom. 131. Dalt. c. 26. 5 H. 7. 4. a. Dyer, 13. b. 14. pl. 64. Keb. 256. 829. 991. 2 Keb. 715. 728. Raym. 182. (a) So held by Holt; (but the

other justices cont.) because such a presentment cannot be a greater estoppel than the finding of a grand jury, who are upon oath. Carth. 212, 213. [And it is now settled that a general traverse will lie to it. Rex v. Justices of Wilts, 3 Burr. 1530. 1 Bl. Rep. 467.]

Upon a certificate and affidavit that the highway is in good repair, exceptions to the form of the indictment may be taken, but not easily without such certificate and affidavit; and the exceptions of this kind are:

Hawk. P.C. 219.

1. That the indictment doth not certainly shew a *locus a quo*, and a *locus ad quem*, but there is no need to shew that a highway leads to a market-town.

2 Roll. Abr. 81. pl. 18. Palm. 389. 420. 2 Keb. 420. 2 Keb. 420. 2 Keb. 420. 2 Keb. 420.

715, 728. Brownl. 6. [Neither of these particulars seems to be now requisite. 1 Str. 44. Andr. 137. 1 Term Rep. 570. 1 H. Bl. 355.]

2. That it is repugnant to itself, in shewing where the nuisance was done; as where it sets forth, that a man stopped a way at D., leading from D. to E.

2 Roll. Abr. 81. 3 Keb. 644. [See a.c. Rex v.

Inhabitants of Gamlingay, 3 Term Rep. 513. and that it will not be aided by a subsequent allegation that a certain part of the same highway situate in D., is out of repair. The words "from" and "to" are both exclusive. Hammond v. Brewer, 1 Burr. 376.]

Cro. Jac. 324. 2 Roll. Abr. 8c, 81. [But see *contr. Rex v. Smith, Say. 96.* Rex v. Brookes, *Id.* 167. Rex v. Inhabitants of East Lidford, *Id.* 301.]

3. That it doth not certainly shew to what part of the highway the nuisance extended; as where it only says, that a certain part of the king's highway at *K.* was stopped, without shewing how much; or where it says, the place nuisanced contained so many feet in length, and so many in breadth, by estimation.

Salk. 359. pl. 8. 2 Ld. Raym. 1174. 6 Mod. 255. Cro. El. 63. Vent. 208. Poph. 206. 2 Keb. 728. [But if it be alleged that the nuisance is to all the king's subjects, it is necessarily implied that the way wherein it is, is a common way to all the king's subjects. 1 Ventr. 208. Say. 168.]

4. That it doth not shew, with sufficient certainty, that the place nuisanced was a way common to all the king's people; as where it only calls it a horseway, or having called it a common footway to the church of *D.* adds, for all the inhabitants of *D.*

Noy, 93. 3 Keb. 855. (a) But this exception *filæ.* hath been of late over-ruled. Hawk. P. C. c. 76. § 90. 1 Str. 178.

5. That an indictment for not repairing a highway, which the defendant ought to repair *ratione tenuræ*, doth (a) omit the word

3 Keb. 58. 6. That an indictment against *J. S.*, bishop of *A.*, for not repairing a highway, &c. doth not shew in what capacity he ought to do it.

And. 234. 7. That the nuisance is not expressed in proper terms; as where the indictment is, that the defendant diverted the highway, which cannot be, because a highway cannot be diverted, must always continue in the same place where it was, howsoever it be obstructed, and a new way made in another place.

2 Roll. Abr. 79. 81. Vent. 4. 8. That an indictment against several persons for not repairing, is laid jointly and severally; but it is no exception, that a presentment of such a highway's being out of repair by the default of the inhabitants, &c. doth not name any persons in certain; or that a presentment against a man for stopping a highway in his own land, which is well proved by the evidence of ploughing it, doth not lay the offence *vi & armis*.

Rex v. Inhabitants of Hartford, Cowp. 111. 9. [That a presentment against parishioners for not repairing a road doth not allege it to lie in the parish, for they are otherwise not bound to repair it.]

Rex v. Inhabitants of Steyning, Say. Rep. 92. The court of King's Bench will not grant an information to compel a parish to repair a highway, which is not much used, and when it appears that another highway, equally convenient to the publick, is in good repair. They indeed never give leave to file an information for not repairing a highway, unless it appear that the grand jury have been guilty of gross misbehaviour in not finding the bill; and they refuse it for this reason, that the fine set on conviction upon an information cannot be expended in the repair of the highway; whereas on an indictment it is always so expended.]

Sid. 140. Carth. 203. S.P. agreed. That the defendants cannot plead *quod non debent reparare*, without shewing who ought.

Salk. 358. 6 Mod. 163. And note; the defendant shall not be discharged by submitting to a fine, but a *disfringas* shall go *ad infinitum*, till he repair the way.

Hue and Cry.

HUE and cry is the pursuit of an offender from town to town till he be taken, which all who are present when a felony is committed, or a dangerous wound given, are by the (a) common law, as well as by statute, bound to (b) raise against the offenders who escape, on pain of fine and imprisonment.

Cro. Eliz. 654. Crompt. 178. [Lord Coke saith, that hue and cry, (called in ancient records *butesium et clamor*) mean the same thing; for that *buer* in French is to hoot or shout, in English to cry. 2 Inst. 173. 3 Inst. 116. But since it appeareth by the old books (of which also Lord Coke maketh observation, 2 Inst. 173.) that hue and cry was anciently both by horn and by voice, it may seem that these two words are not synonymous, but that this *butesium* or *booting* is by the horn, and *crying* by the voice; with which also accordeth the French word *hubbet*, which signifieth a huntsman's horn: so that hue and cry in this sense will properly signify a pursuit by horn and by voice. Which kind of pursuit of robbers by blowing a horn, and by making an outcry, is said to be practised also in Scotland. And this blowing of a horn, by way of notice or intelligence, in other cases as well as in the pursuit of felons, seemeth to have been in use of very ancient time; for amongst the laws of Wihtrud king of Kent, in the year 696, is this one; "if a stranger go out of the road, and neither shout, nor blow a horn, he shall be taken for a thief." Burn's Just. tit. "Hue and Cry."] (a) That it is the old common law process after felons and such as have dangerously wounded any person. 2 Hal. Hist. P. C. 98. — And therefore *Bracton* says, *quod omnes tam milites quam alii, qui sunt quindecim annorum & amplius, jurare debent quod utlagatos, murtheratores, robbatores & burglatores non receptabunt, nec iis consentient, nec eorum receptatibus, & si quos tales noverint eos attachiari facient, & hoc vicemcomiti & ballivis suis monstrabunt, & si butesium vel clamorem de talibus audierint, statim audito clamore sequentur cum familia & hominibus de terra sua.* Bract. lib. 3. c. 1. (b) May be by a horn or by the voice. 2 Inst. 172.

As the raising of hue and cry is enjoined by the common law, which may be called a raising of it at the suit of the king, as well as by several acts of parliament, which may be called a raising of it at the suit of a private person, inasmuch as those statutes make the hundred answerable to the party robbed, if they neglect to pursue the hue and cry, and apprehend the robbers; therefore we shall consider,

(A) Hue and Cry at the Common Law, or Suit of the King: And herein,

1. By whom Hue and Cry is to be levied.
2. In what Manner it is to be levied.
3. In what Manner to be pursued.
4. What the Persons may justify doing who pursue it.
5. How the Omission or Neglect of doing it is punished.

(B) Of raising Hue and Cry pursuant to the several Statutes, which declare in what Manner the Hundred shall be chargeable: And herein,

1. What Kind of Robbery it must be so as to make the Hundred liable, and how far it is necessary that it be done on the Highway.
2. On what Day, or Time of the Day, it must be committed.
3. What Hundred shall be said to be liable.
4. What Person is to bring the Action, and make Oath of the Robbery.
5. Of the Notice to be given of the Robbery.
6. Where the Party must give Bond for Payment of Costs, in case he does not prevail.
7. Of the Oath to be taken of the Robbery, and before whom the same must be.
8. At what Time the Action is to be brought.
9. What Evidence will maintain it; and therein of the Witnesses for and against it.
10. What shall excuse the Hundred; and therein of apprehending the Robbers.
11. How the Money is to be levied, and each Hundredor to contribute to the Charges.

(A) Hue and Cry at Common Law, or Suit of the King: And herein,

1. By whom Hue and Cry is to be levied.

2 Inst. 172.
3 Inst. 116.
Hal. Hist.
P. C. 464.

IT seems to be clearly agreed, that a private person who hath been robbed, or who knows that a felony hath been committed, is not only authorised to levy hue and cry, but is also bound to do it under pain of fine and imprisonment.

2 Hal. Hist.
P. C. 99.

From hence it follows, that although it is a good course, as my Lord *Hale* says, to have a precept or warrant from a justice of peace for raising hue and cry, yet it is neither of absolute necessity, nor sometimes convenient, for the felons may escape before the justice can be found; also hue and cry was part of the law before the statute of 1 *E. 3. cap. 16.* which first instituted justices of the peace.

2 Hal. Hist.
P. C. 99,
100.

And although also, says he, it is especially incumbent upon constables to pursue hue and cry, when called upon, and they are severely punishable if they neglect it; and it prevents many inconveniencies if they be there, for it gives a greater authority to the pursuit, and enables the pursuants, in their assistance, to plead the general issue upon the statutes of 7 *Jac. 1. cap. 5.* & 21 *Jac. 1. cap. 12.* without being driven to special pleading; and therefore to prevent inconveniencies that may happen by unreasonableness, it is most advisable that

that the constable be called to this action; yet upon a robbery, or other felony committed, hue and cry may be raised by the (a) country, in the absence of the constable; and in this there is no inconveniency, (b) for if hue and cry be raised without cause, they that raise it are punishable by fine and imprisonment.

Of the manner of raising it according to the law of the forest, *vide* 4 Inst. 294. (b) Fitz. Trespas 252. Crompt. 179. 21 H. 7. 28. a.—As disturbers of the king's peace.

(a) And is therefore called *cry de pais*, 2 Hal. Hist. P. C. 100.—

29 E. 3. 39. 2 Inst. 172.

2. In what Manner it is to be levied.

The regular method of levying hue and cry, is for the party to go to the constable of the next town and declare the fact, and (c) describe the offender, and the way he is gone; whereupon the constable ought immediately, whether it be night or day, to raise his own town, and make search for the offender; and upon not finding him, to send the like notice, with the utmost expedition, to the constables of all the neighbouring towns, who ought in like manner to search for the offender, and also to give notice to their neighbouring constables, and they to the next, till the offender be found.

and such other circumstances, as he knows, which may conduce to his discovery. P. C. 100.

3 Inst. 116. Dalt. Justice, c. 28. Crompt. 178. 2 Hawk. P. C. c. 12. § 6.

(c) Ought, if he knows it, to tell his name, describe his person, habit, horse, 2 Hal. Hist.

3. In what Manner to be pursued.

The constable is not only to make search in his own vill, but is also to raise all the neighbouring vills, who are all to pursue the hue and cry with horsemen as well as footmen until the offender be taken.

2 Hal. Hist. P. C. 101.

4. What the Persons may justify doing who pursue it.

For the understanding hereof we shall here insert what my Lord Chief Justice *Hale* apprehends to be the law in this matter.

1. That in case of hue and cry once raised and levied upon supposal of a felony committed, though in truth there was no felony committed; yet those, who pursue hue and cry, may arrest and proceed as if a felony had been really committed.

And therefore the justification of an imprisonment by a person upon suspicion, and by a person, especially a constable, upon hue and cry levied, do extremely differ; for in the former there must be a felony averred to be done, and it is issuable; but in the latter, *viz.* upon hue and cry, it need not be averred, but the hue and cry levied upon information of a felony is sufficient, though perchance the information was false; and therefore an averment of a felony committed, in case of a justification of an imprisonment upon hue and cry, is not necessary; the reasons whereof are, 1. Because the constable cannot examine the truth or falsehood of the suggestion of him who first levied it, for he cannot administer him an oath; and if he should forbear his pursuit of the hue and cry till it be examined by a justice of peace, the felon might escape,

2 Hal. Hist. P. C. 101.

5 H. 7. 5. a. 21 H. 7. 28. a. *per* Regd. 2 E. 4. 8 & 9. 29 E. 3. 39. 2 Inst. 173. 2 Hal. Hist. P. C. 102.

escape, and the pursuit would be lost and fruitless. 2. By several acts of parliament he is compellable to pursue hue and cry, and is punishable, as those of the vill, if they do it not. 3. Because he that raised a hue and cry where no felony is committed, *viz.* the person that giveth the false information, is severely punishable by fine and imprisonment, if the information be false; and therefore if he raise a hue and cry upon a person that is innocent, yet they that pursue the hue and cry may justify the imprisonment of that innocent person, and the raiser is punishable; and by the same reason, if he give notice of a felony committed when there was in truth none.

2 Hal. Hist.
P. C. 102.

2. If hue and cry be raised against a person certain for felony, though possibly he is innocent, yet the constables, and those that follow the hue and cry, may arrest and imprison him in the common gaol, or carry him to a justice of the peace.

7 E. 3. 16. b.
2 Hal. Hist.
P. C. 102.

3. If the person pursued by hue and cry be in a house, and the doors be shut, and refused to be opened upon demand of the constable, and notice given of his business, he may break open the doors; and this he may do in any case where he may arrest, though it be only a suspicion of felony, for it is for the king and commonwealth, and (a) therefore a virtual *non omittas* is in the case; and the same law is upon a dangerous wound given, and a hue and cry levied upon the offender.

(a) 5 Co.
92. Se-
main's case.

Hal. Hist.
P. C. 102.

And it seems in this case, that if he cannot be otherwise taken, he may be killed, and the necessity excuseth the constable.

Dalt. c. 28.
2 E. 4. 8. b.
Crompt. de
Pace, 178.
2 Hal. Hist.
P. C. 103.
2 Hal. Hist.
P. C. 103.

4. Upon hue and cry levied against any person, or where any hue and cry comes to a constable, whether the person be certain or uncertain, the constable may search in suspected places within his vill, for the apprehending of the felons.

But though he may search suspected places or houses, yet his entry must be *per ostia aperta*, for he cannot break open doors barely to search, unless the person against whom the hue and cry is levied be there, and then it is true he may; therefore in case of such a search, the breaking open the door is at his peril, *viz.* justifiable if he be there; but it must be always remembered, that in case of breaking open a door, there must first be a notice given to them within of his business, and a demand of entrance, and a refusal before the doors can be broken.

2 Hal. Hist.
P. C. 103.

5. If the hue and cry be not against a person certain, but by description of his stature, person, clothes, horse, &c., the hue and cry doth justify the constable, or other person, following it, in apprehending the person so described, whether innocent or guilty, for that is his warrant; it is a kind of process that the law allows, (not usual in other cases) *viz.* to arrest a person by description.

2 Hal. Hist.
P. C. 103.

6. But if the hue and cry be upon a robbery, burglary, manslaughter, or other felony committed, but the person that did the fact is neither known nor describable by person, clothes, or the like, yet such a hue and cry is good, as hath been said, and must be pursued, though no person certain be named or described.

And

And therefore in this case, all that can be done is, for those who pursue the hue and cry, to take such persons as they have probable cause to suspect; as for instance, such persons as are vagrants, that cannot give an account where they live, whence they are, or such suspicious persons as come late into their inn or lodging, and give no reasonable account where they have been, and the like.

And here the justification of the imprisonment is mixed, partly upon the hue and cry, and partly upon their own suspicion; and therefore, 1. In respect that it is upon hue and cry, there needs no averment that the felony was done; yet it must be averred that an information was given that the felony was done; if the arrest be by that constable that first received the information, and so raised the hue and cry; or if the arrest were made by that constable, or those vills to whom the hue and cry came at the second hand, it must be averred that such a hue and cry came to them, purporting such a felony to be done; but, 2. Also in as much as the hue and cry neither names nor describes the person of the felon, but only the felony committed; and therefore the arrest of this or that particular person, and so applied, is left to the suspicion and discretion of the constable, or the people of the second or third vill; he, that arrests any person upon such general hue and cry, must aver that he suspected, and shew a reasonable cause of suspicion.

But now by the statute of 7 *Jac.* 1. *cap.* 5. the constable, or any that come in to his assistance, even in this case of hue and cry, may plead the general issue, and give the whole matter of the justification in evidence; for the pursuit of hue and cry, though performed by others as well as the constable, is principally the act of the constable of the vill, and the others are but his deputies or assistants within the precincts of his constable-wick.

5. How the Omission or Neglect of not doing it is punished.

There can be no doubt but that both by the common law, as also by the several statutes which injoin the levying of hue and cry, they who neglect to levy one, (whether officers of justice, or others) or who neglect to pursue it when rightly levied, are punishable by (a) indictment, and may be fined and imprisoned for such neglect.

punished in the sheriff's torn or leet. Dalt. Sheriff, 394. 2 Hawk. P. C. c. 10.

And now by the 8 *Geo.* 2. *cap.* 16. it is enacted, "That every constable of the hundred, and every constable, borsholder, head-borough, or tithingman of any town, parish, village, hamlet, or tithing, within the hundred, or the franchises within the precinct thereof, wherein the robbery shall happen, as soon as the same shall come to his knowledge, either by notice from the party or parties robbed, or from any other person or persons, to whom notice shall be given thereof, pursuant to this or any other statute, shall, with the utmost expedition, make and cause to be made, fresh suit and hue and cry after the felon or felons

2 E. 4. 8. b.
2 Hal. Hist.
P. C. 103.

2 Hal. Hist.
P. C. 104.

2 Hal. Hist.
P. C. 104.

2 Hal. Hist.
P. C. 4.
(a) That it is one of the offences which may be inquired of and

“ felons by whom such robbery shall be committed; and if any
 “ constable, borsholder, headborough, or tithingman, shall of-
 “ fend in the premises, by refusing or neglecting to make, or
 “ cause to be made, such fresh suit and hue and cry, every such
 “ offender shall, for every such refusal or neglect, forfeit 5 l.”

(B) Of raising Hue and Cry pursuant to the several Statutes which declare in what Manner the Hundred shall be chargeable for Robberies.

(a) That though some imagine that hue and cry was grounded on this statute, yet my Lord Coke says, that it was used long before, as appears even by this statute, which, instead of introducing a new law, enforces obedience to that which was founded in the ancient laws of the realm. 2 Inst. 171.

THE levying of hue and cry is, as has been already observed, enjoined by several acts of parliament, and to this purpose it is enacted by (a) *Westm. 1. cap. 9.* “ That all be ready and apparelled at the summons of the sheriff & cry de pais, to pursue and arrest felons, as well within franchises as without; and if they do it not, and be thereof attaind. *le roy prendra a eux grievement*, they are to be indicted and fined for the neglect.”

By the statute of 4 E. 1. *de officio coronatoris*, “ Hue and cry shall be levied for all murders, burglaries, men slain or in peril to be slain, as elsewhere is used in *England*; and all shall follow the hue and steps as near as they can; and he that doth not, and is convicted thereof, shall be attached to be before the justices in eyre.”

(b) My Lord Coke says, that this statute expressly gives half a year, and not forty days, as mentioned in an edition of the statutes then lately published; but that the forty days are given by the statute 28 E. 3. c. 11., 2 Inst. 569. — But in 3 Lev. 320.

By the statute of *Winton*, or 13 E. 1. cap. 1. it is enacted, “ That from thenceforth every country shall be so well kept, that immediately upon robberies and felonies committed fresh suit shall be made from town to town, and from country to country.” And cap. 2. of the said statute, “ If the country will not answer for the bodies of such manner of offenders, the pain shall be such, that every country, that is to wit, the people dwelling in the country, shall be answerable for the robberies done, and also the damages; so that the whole hundred where the robbery shall be done, with the franchises being within the precinct of the same hundred, shall be answerable for the robberies done: And if the robbery be done within the division of two hundreds, both the hundreds and the franchises within them, shall be answerable: And after that the felony or robbery is done, the country shall have no longer space than (b) half a year, within which half-year it shall behove them to agree for the robbery or offence, or else that they will answer for the bodies of the offenders.”

it is said, that upon search of the parliament roll it appears that the statute of *Winton* gives only forty days to the country, and that the statute 28 E. 3. is but a confirmation thereof; and accordingly it was adjudged, where the plaintiff brought an action on the statute of *Winton*, and declared that he was robbed, and none of the robbers taken within forty days, according to the said statute; and with this the modern precedents agree, as *Rait. Ent. 406. Co. Ent. 351. Herne 215. The. Brev. 141. 2 Sand. 376.*

The (a) statute of *Winton* (b) gives the action against the hundred; but by subsequent statutes, such as 27 *Eliz. cap. 13.* 8 *Geo. 2. cap. 16.* several alterations and additions have been made therein, which we shall consider under the following heads.

[In 2 Will. 92., it is said by Mr. J. Ba'hurst, that "it was his

" opinion, that this statute did not create damages, but only gave the party a different remedy from " that which he had before, for the party robbed, before that statute, might have laid an action " against the hundred for not keeping watch and ward." But in the case of *Jackson v. Calesworth*, 2 Term Rep. 72. the court of King's Bench inclined to think that no such action ever had been brought, or would have lain against the hundred before the statute, they not being a corporation.] (a) That this is not a penal law, so that the statutes of jeofails extend to actions brought thereupon, but is a law made for the peace of the kingdom, and advancement of justice, Cro. Jac. 496. 12 Mod. 242. (b) And therefore the best way for the plaintiff to conclude his declaration is *contra formam statuti*, because the statute of *Winton* only gives the action, Cro. Jac. 187. 118. Yelv. 116. Noy 125. Show. 94. Andr. 115. 117. Comb. 160, 161.

1. What Kind of Robbery it must be so as to make the Hundred liable, and how far it is necessary that it be committed on the Highway.

It seems to be admitted, that no kind of robbery will make the hundred liable, but that which is done openly, and with force and violence; and that therefore the (c) private stealing or taking of any thing from the party, does not come within the statutes which make the hundred liable, for the hundred is not liable because they did not prevent the robbery, but because they did not apprehend the robbers, which in private felonies, of which they had no notice, it would be difficult, if not impossible for them to do.

7 Co. 6, 7. 2 Salk. 614. pl. 4. (c) Where a carrier's son and servant conspired to rob him. Styl. 427.

Also, it hath been adjudged and is admitted in all the books which speak of this matter, that a robbery in a house, whether it be by day or by night, does not make the hundred liable: The reasons whereof are, that every man's house is in law esteemed his castle, which he himself is obliged to defend, and into which no man can enter, to see what is doing there, without his leave; also, being done in a house, the inhabitants of the hundred cannot be presumed to have notice of it, so as to be able to apprehend the offenders.

7 Co. 6, 7. Sendill's case, Moor, 620. 3 Leon. 262. Cro. Jac. 496. Cro. Eliz. 753. Bulf. 146. 2 Inst. 569. 2 Salk. 614. pl. 4.

But if a person be assaulted in the highway, and carried into a house, and there robbed, it seems the hundred shall be liable; for otherwise the provision made by the statute would be eluded*.

Sid. 263. & vide Salk. 614. pl. 4.

7 Mod. 157. * The case in Sid. does not warrant the text, neither does Salk. yet there is some mention of such a case in 7 Mod. 160. supposing it to be an empty waste house, but no opinion as to this point. [In 2 Ld. Raym. 828. it is said by Holt C. J. that the hundred in such case shall not be liable.]

Also, it does not seem necessary that the robbery should be committed in the highway, nor alleged to have been so by the plaintiff in his declaration.

7 Mod. 159. may be in a private way, —may be in

a coppice; and in both cases the hundred shall be chargeable. 2 Salk. 614. pl. 4.

Therefore, where upon the statute of hue and cry the plaintiff declared, *quod quædam persone ignota, &c. apud quendam locum ex australi parte cujusdam Januæ vocat. Fair-mile Gate, infra parochiam, &c. vi & armis* assaulted him, and robbed him of so much money,

Carth. 71. 3 Mod. 253. Show. 60. Comb. 150. S. C. adjudged between

Young and the Inhabitants of the Hundred of Tulfcomb.

money, and there was a verdict for the plaintiff; it was moved in arrest, that *apud quendam locum* might be meant of a robbery committed in a house, garden, or wood, for which the hundred is not liable, being only obliged to guard the highways: But it was holden, that the declaration was good, especially after verdict, because it must be intended that this was given in evidence, otherwise the plaintiff would have been nonsuited: Also the court held, that without the help of a verdict, this declaration had been good, and that it was not necessary for the plaintiff to allege, that the robbery was committed on the highway, more than that it was committed by day, and not by night; and that all the ancient precedents were accordingly.

2. On what Day or Time of the Day it must be committed.

Cro. Jac. 496. Waite v. the Hundred of Stoke. Brown, 156. S. P. admitted.

It hath been resolved by three judges against one, that a robbery on the Sabbath-day should charge the hundred, and that the pursuing of robbers who violate the Sabbath was so far from being a profanation of that day, that it was a work of charity and justice; also that several persons, such as physicians, chirurgions, midwives, &c. were necessitated to travel on that day, and it was but reasonable that they should be protected in their journey.

(a) * This statute does not extend to persons in the country going to church, nor to physicians, chirurgions, &c. who are under a necessity of travelling on this day. Stra. 406. Comyns, 345. pl. 175.

But now by the 29 *Car. 2. cap. 7. § 5.* it is enacted, "That if any person or persons whatsoever, which shall (a) travel upon the Lord's day, shall be then robbed, that no hundred, or the inhabitants thereof, shall be charged with, or answerable for, any robbery so committed; but the person or persons so robbed shall be barred from bringing any action for the said robbery; any law to the contrary notwithstanding. Nevertheless the inhabitants of the counties and hundreds (after notice of any such robbery to them or some of them given, or after hue and cry for the same to be brought), shall make or cause to be made fresh suit and pursuit after the offenders with horsemen and footmen, as by the 27 *Eliz. cap. 13.* is provided; upon pain of forfeiting to the king's majesty, his heirs and successors, as much money as might have been recovered against the hundred by the party robbed, if this law had not been made."

7 Co. 6. b. Milborn's case, 2 Inst. 569.

It is clearly agreed, that for a robbery committed in the night, the hundred is not chargeable, because they cannot be presumed to have notice thereof, so as to be able to apprehend the robbers.

7 Co. 6. a. Ashpole's case. Cro. Jac. 126. And. 158. Leon. 57. Savil, 83. Carth. 71. Comb. 150. 3 Mod. 258. and see the

But yet it is not necessary that the robbery should be committed after sun-rise, and before sun-set; and therefore if there be as much day-light at the time that a man's countenance might be discerned thereby, though it be before sun-rise or after sun-set, the hundred shall be liable.

Also, it is not necessary for the plaintiff to allege in his declaration, that the robbery was committed in the day-time, and not in the night: But it seems, that if upon the evidence at

turns out to have been committed in the night, he cannot have a verdict. authorities to third paragraph

above. Show. 62. S. P. admitted. [Though a special verdict should not state the robbery to have been committed in the day, yet if it do not find that it was in the night, the hundred will be liable. 2 Ld. Raym. 829.]

Also, it hath been holden, that if robbers drive or oblige the waggoner to drive his waggon from the highway by day, but do not rob or take any thing till night, that yet this is a robbery in the day-time so as to charge the hundred. Sid. 263.
7 Mod. 157.
3 Mod. 258.
Comb. 150.
Carth. 71.

3. What Hundred shall be said to be liable.

By the statute of *Winton* it is enacted, "That if the robbery be done within the division of two hundreds, both the hundreds and the franchises within them shall be answerable." (a) An action may be brought against the inhabitants in *dimidio hundredi de W.* and this half hundred the court will intend a hundred of itself, especially after verdict; and that if it were otherwise, it should have been so pleaded or given in evidence; and that it is the same thing as an action brought against the Inhabitants of the Hundred of W., commonly called the Half Hundred of W. Hob. 246. pl. 310. Constable's case. Brown. 156. S. C.

If robbers assault a person with an intent to rob him in one hundred, and he escapes and flies into another, whither he is pursued by the robbers, and there robbed, the last hundred shall be liable. Hutton, 125. Dean's case, per Cur.

So, where by special verdict it was found, that the plaintiff was travelling in the highway in the hundred of *A.* where he was set upon and carried into the hundred of *B.* and robbed in a copse in the highway of this hundred; it was adjudged that the hundred of *B.* should be liable, for that there the robbery was committed, and not before. 2 Salk. 614. pl. 4. 7 Mod. 157. S. C. Cowper v. the Hundred of Basingstoke, 2 Ld. Raym. 826. S. C.

If one be taken in the hundred of *A.* and carried into the hundred of *B.* into a house there, *viz.* a mansion-house, and robbed, or taken in the day-time in *A.* and carried to *B.* and there robbed in the night, it is said that there is no remedy against either hundred; these cases not being provided for by the statute. 2 Salk. 615.

By the 27 *Eliz. cap. 13. § 2.* reciting that the inhabitants of hundreds do not prosecute the hue and cry brought to them, because those hundreds only are liable in which the robberies have been committed, it is enacted, "That the inhabitants and residents of every or any such hundred (with the franchises within the precinct thereof), wherein negligence, fault, or defect of pursuit and fresh suit after hue and cry made shall happen to be, shall answer and satisfy the one moiety or half of all and every such sum or sums of money and damages, as shall be recovered or had against or of the said hundred, with the franchises therein, in which any robbery or felony shall at any time hereafter be committed or done; and that the same moiety shall and may be recovered by action of debt, bill, plaint, or information in any of the queen's majesty's courts of record at *Westminster*, by and in the name of the clerk of the

“ the peace for the time being, of or in every such county within
 “ this realm, where any such robbery and recovery by the party
 “ or parties robbed shall be, without naming the christian name
 “ or surname of the said clerk of the peace; which moiety so
 “ recovered shall be to the only use and behoof of the inhabitants
 “ of the said hundred where any such robbery or felony shall be
 “ committed or done.”

4. What Person is to bring the Action, and make Oath of the Robbery.

Cro. Car. 37. If a servant be robbed, in the absence of his master, of his master's money, it is clear that the master may maintain an action for it against the hundred; but then the servant must make oath that he knew not any of the robbers.

S. P. adjudged, and that the servant was the proper person to make the oath. Styl. 156. S. P. admitted. Latch 127. S. P. and that the master or servant may bring the action. But the oath must be by the servant, when robbed in the absence of his master. Cro. Eliz. 142. Green's case adjudged. Leon. 3. 25. S. C. adjudged. — For the statute of 27 Eliz. c. 13. which requires that the party robbed shall make oath within twenty days next before the action brought, that he knew not the robbers, &c. was made, 1st. That the person robbed should enter into a recognizance to prosecute the robbers, if he knew them, or any of them. 2dly. That the hundred might be excused upon the conviction of such person or persons. 3dly. To prevent a robbery by fraud. 3 Mod. 288. — For if the robbery be by combination, the party cannot recover. Show. 94. Carth. 145. Holt, 460. pl. 1.

2 Salk. 613. Also the servant, being robbed in his master's absence, may pl. 1. himself maintain an action against the hundred, and may (a) declare that he was possessed *ut de bonis suis propriis*, &c. And 4 Mod. 303. though the jury find that he was robbed of his master's money, 11 Mod. 8. yet he shall recover; for the servant is possessed *ut de bonis propriis* against all, and in respect of all, but him that hath the very pl. 3. right. 12 Mod. 54. 2 Ld. Raym. 904. Comb. 263. S. C. Combs v.

the Hundred of Eradley, S. C. 2 Sid. 45. The same law if a carrier be robbed. (a) Where a carrier being robbed declared of goods and chattels taken out of his possession; and for want of alleging that he had a property in them, adjudged that as to those goods he could not recover. 2 Sand. 379. Pinkney v. the Inhabitants of East Hundred, in Com. Rotcl.

Brown. 155. The servant being robbed, may bring an action against the hundred: And though the jury find that part of the things belonged 3 Mod. 289. to the master, and part to the servant, yet shall he recover for the S. C. cited. whole.

2 Salk. 613. If a servant be robbed in the presence of the master, the master must sue; and the oath of the master is sufficient. pl. 1. per Cur.

Carth. 145. By special verdict it was found, that the plaintiff sent his servant to Smithfield market with fat cattle, where he sold them for 108*l.* and sealed up 106*l.* in four bags, and delivered them to J. S. a Quaker, who travelled with him towards home, and they were both robbed; that the servant made oath of the robbery, according to the statute; but that the Quaker refused to be sworn; and in an action brought by the master it was holden, that as to the 40*s.* taken from the servant, he should recover; but that as to the 106*l.* taken from the Quaker, he could not, for want of an oath

oath according to the statute; and that the oath being enjoined merely for the benefit of the hundreds, who were oppressed by pretended robberies, the court could not depart from the express words of the statute.

But it seems, the servant who delivered the 106 *l.* to the Quaker, and was present at the robbery, might maintain the action in his own name for all the money; and that his own oath would be sufficient; and that he might declare upon the taking away the money from the Quaker as his servant, who, in truth, was so for this time.

Carth. 146. *per Holt, C. J.* which in Carth. is said to have been done according to the Chief Justice's advice; but in 3 Mod. 288-9., though the S. P. is admitted, yet it is said that it could not have been done, because the year was expired within which the action must be brought.

One Jones, and his wife and servant, travelling together, were all robbed of his money, and Jones alone brought the action for the whole money against the hundred, as well for what was taken from his wife and servant as from his own person, and he alone, without his wife or servant, made oath of the robbery; all which matter being found on a special verdict, it was adjudged, that his oath alone was sufficient within the intent of the statute; and although it was further found, that the servant of Jones, who was robbed with his master, knew one of the robbers, whose name was Lense, yet Jones had his judgment.

Carth. 146. Jones v. Hundred of Bromley cited.

So, where one Bird, a laceman of Colliton in Devonshire, and his servant, were coming to London, and leaving the usual great road between Brentford and Hammersmith, rode through a by-lane near Serjeant Maynard's house to avoid the dust, and in that lane the servant was robbed, in the presence of his master, of a box of lace which was behind him on the back of the horse, to the value of 1200 *l.* and Bird the master alone made oath of the robbery, and brought the action; by the opinion of the C. J. Holt, the oath of the master was sufficient, because being present the goods were in his possession; for the possession of the servant in the presence of his master is the master's possession; and in this case Bird recovered 1000 *l.* and had execution.

Carth. 147. Bird v. Hundred of Ossulstone cited.

If A. and B. travelling together are robbed of a sum of money to which they are both jointly entitled, they may both join in an action against the hundred; *secus*, if they had separate and distinct interests.

Dyer, 370. 2. pl. 59. Com. Rep. 327. pl. 166. It ought to

appear that the plaintiff has the whole property in the money, of which the robbery was committed.

5. Of the Notice to be given of the Robbery.

By the 27 Eliz. cap. 13. § 11. it is enacted, "That no person or persons, that shall happen to be robbed shall have or maintain any action, or take any benefit of the statutes which make the hundred liable, except the same person and persons so robbed shall, with as much convenient speed as may be, give notice and intelligence of the said felony or robbery so committed unto some of the inhabitants of some town, village or hamlet, near unto the place where any such robbery shall be committed."

In the construction of this clause of the statute it hath been holden,

Cro. Jac. 675. Foster v. the Hundreds of Speckor and Ilsworth, adjudged. That if a person be robbed in the highway *in divisis hundredorum*, he need not give notice to the inhabitants of each hundred, but notice to either of them is sufficient.

Cro. Car. 41. adjudged. (a) Or in a different hundred. That alleging notice to have been given at a village near to where the robbery was committed is sufficient, though such village happens to be in a different (a) county; for that strangers are not obliged to take notice of the division of counties. Cro. Car. 379. adjudged.

Cro. Car. 41. adjudged. That though it be the best course to allege, that notice was given at the place where the robbery was committed, or at some village near the place, yet that notice near the hundred, or near the division of the hundreds where the robbery was committed, is sufficient; and that this shall not be intended the most remote part of the hundred, especially after a verdict.

Show. 74. If several persons are in company at the time of the robbery, it is said, that notice given by any one of them is sufficient.

March, 11. Sir John Compton's case. It hath been resolved, that though the notice given be five miles from the place where the robbery was committed, yet it is sufficient; the reason whereof is, because that the party, who is a stranger to the country, cannot have conuzance of the nearest place or town.

(b) March, 11. 2 Leon. 82. S. P. agreed per Cur. Also, if the party robbed give notice with as much convenient speed as may be, though he be otherwise remiss in (b) not pursuing the robbers, or refuse to lend his horse for that purpose, yet shall he not lose his action for this, nor the hundred be excused.

And now by the 8 Geo. 2. cap. 16. it is further enacted, "That no person shall have or maintain any action against any hundred, or take any benefit by virtue of the statutes of *Winton*, or 27 Eliz. cap. 13. or either of them, unless he, she, or they shall, over and besides the notice already required by the last of the abovementioned statutes to be given of any robbery, with as much convenient speed as may be, after any robbery on him, her, or them committed, give notice thereof to one of the constables of the hundred, or to some constable, borougher, headborough, or tithingman of some town, parish, village, hamlet, or tithing, near unto the place wherein such robbery shall happen, or shall leave notice in writing of such robbery at the dwelling-house of such constable, &c. * describing in such notice to be given or left as aforesaid, so far as the nature and circumstances of the case will admit, the felon or felons, and the time and place of the robbery, and also shall, within the space of twenty days next after the robbery committed, cause publick notice to be given thereof in the *London Gazette*, therein likewise describing, so far as the nature and circumstances of the case will admit, the felon or felons, and the time and place of such robbery, together with the goods and effects whereof he, she, or they was or were robbed."

* The action lies, though the plaintiff, after the robbery, passes by a place where there are two constables, without giving notice, if he did not know of them, though

though he did not inquire. Semb. Wilf. 105. 109. — If a man is robbed soon after six, rides through a village without giving notice, tells men on the road, at seven gives notice to an inn-keeper at a town two miles and an half off, and then gives notice to the high-constable three miles off between eight and nine o'clock, it is good notice within 8 Geo. 2. c. 16. Sta. 1170. If a material description of one of the robbers is not mentioned in the Gazette, as that he had *particular large red eye-brows*, it seems the action will not lie. 2 Wilf. 105. 109. So it seems, if the whole sum of which the plaintiff is robbed is not mentioned in the Gazette. *Ibid.*

6. Where the Party must give Bond for Payment of Costs, in case he does not prevail.

To this purpose by the 8 Geo. 2. cap. 16. it is enacted, "That before any action commenced the party shall go before the chief clerk, or secondary, or the filazer of the county wherein such robbery shall happen, or the clerk of the pleas of that court wherein such action is intended to be brought, or their respective deputies, or before the sheriff of the county wherein the robbery shall happen, and enter into a bond to the high constable or high constables of the hundred in which the robbery shall be committed, in the penal sum of 100*l.* with two sufficient sureties to be approved of by such chief clerk, secondary, filazer, or clerk of the pleas, or their respective deputies, or the sheriff of the said county, with condition for securing to such high constable or high constables (who are hereby empowered and required to enter or cause to be entered an appearance, and also to defend such action) the due payment of his or their costs, after the same shall be taxed by the proper officer, in case that he, she, or they (the plaintiff or plaintiffs in such action) shall happen to be nonsuited, or shall discontinue his, her, or their action, or in case that judgment shall be given against such plaintiff or plaintiffs on demurrer, or that a verdict shall be given against him, her, or them."

*Where the bond is set out to be given before S. C. secondary of E. V. chief clerk to enrol pleas: this is a good description, though this statute uses the word (secondary) only. Andr. 115. Ca. temp. Hardw. 409. It is sufficient to say, that the bond was given to J. H. high constable, without *Id.*

And it is further enacted by the said statute, "That when any such bond as abovementioned shall be entered into before the said sheriff, such sheriff shall immediately certify the same in writing to the chief clerk or secondary in the court of King's Bench, or his or their deputy, or to the filazer of that county wherein such robbery shall be committed, or his deputy, in case the action be intended to be brought in the court of Common Pleas; or, if in the court of Exchequer, to the clerk of the pleas, or his deputy; which certificate shall be delivered by the party or parties robbed, to the said chief clerk or secondary, or his or their deputy, or to such filazer, or his deputy, before any process shall issue for the commencement of such suit as aforesaid; and such chief clerk, secondary, filazer, or clerk of the pleas, or their respective deputies, or the said sheriff, shall not take any greater fee or reward for making such bond than five shillings over and above the stamp-duties; nor shall any sheriff take any greater fee or reward for making, nor shall any such chief clerk, secondary, filazer or clerk of the pleas, or their respective deputies, take any greater fee or reward for receiving and filing such certificate, than two shillings and sixpence; and

“ such chief clerk, secondary, filazer, or clerk of the pleas, or
 “ their respective deputies, and sheriff as aforesaid, are hereby re-
 “ quired to deliver over *gratis* (upon reasonable request made for
 “ that purpose) all and every such bonds to be by them respectively
 “ taken pursuant to this present act, to the high constable or high
 “ constables to whose use the same shall be taken as aforesaid.”

7. Of the Oath to be taken of the Robbery, and before whom the same must be.

By the 27 *Eliz. cap. 13.* § 11. it is enacted, “ That the party
 “ robbed shall not have any action except he or they shall first,
 “ within twenty days next before such action to be brought, be
 “ examined upon his or their corporal oath, to be taken before
 “ some justice of the peace of the county where the robbery was
 “ committed, or near unto the same, whether he or they do know
 “ the parties that committed the said robbery, or any of them;
 “ and if, upon examination, it be confessed that he or they do
 “ know the parties that committed the said robbery, or any of
 “ them, that then he or they so confessing shall, before the said
 “ action be commenced or brought, enter into sufficient bond by
 “ recognizance before the said justice before whom the said
 “ examination is had, effectually to prosecute the same person or
 “ persons so known to have committed the said robbery, by in-
 “ dictment or otherwise, according to the due course of the laws
 “ of this realm.”

In the construction of this clause of the statute the following points have been holden.

March, 11. That if the party does not know the robbers at the time of the robbery committed, though he happens to know them afterwards, it is not material.

Noy, 21. It was holden by three judges against one, that the party's swearing
 Pateman's case, 3 Lev. 328. S. P. that he did not know the robbers, without adding, nor any of
 by J. Powell them, is not sufficient, because not pursuant to the statute, and
 v. J. Rokel- because on such equivocal oath the party cannot be punished for
 ly, who perjury.

held, that if a person swears that he was robbed by four persons unknown to him, all the four must be unknown to him.

Lake v. [Though the robbery were 20 miles from the place where the
 Hundred of justice lived, and though it were proved that there were many
 Croydon, justices lived nearer, yet *Abney J.* held it sufficient on a case re-
 Bail. Nt. served, saying, the act was only directory in that respect.]
 Pri. 186.

Cro. Car. It hath been adjudged, that the oath may be taken before a
 211. pl. 3. justice of the county, though not in the county at the time of ad-
 Jones, 230. ministring it; as where a robbery was committed in *Berks*, and a
 Helier v. justice of that county residing in *London*, the party was sworn be-
 Hundred de fore him according to the statute, in *London*, and it was holden
 Benhuist. sufficient; for the justice acts only as (a) a ministerial officer, and
 (a) And as as appointed by the statute, and not in a judicial capacity as a
 his office justice of the peace.
 herein is purely mi-
 nisterial, it

is said, that if he refuses to take the oath of examination of the party, an action on the case will lie against him. Leon. 323. Sid. 209.

If in an action on the statute of hue and cry it be alleged, that the oath was taken before a justice of peace of *Yorkshire*; this will be sufficient, although objected, that there is no such justice, because that in every riding they have several commissions. *7 Ide 2 Sid. 45.*

[It is sufficient for the plaintiff to prove, that he who took the affidavit acts as a justice of the peace, and it shall be read upon proof that it was delivered by his clerk to the person producing it, without proving the justice's hand. *Per Parker, C. J. at Hertford, 17. 2. Bull. N. Pri. 186.*

It is not necessary for the justice to take the examination in writing; but if he appear at the trial, and depose the substance of the usual affidavit, it is sufficient. *Graham v. Hundred of Becontree, N. Pri. 186.*

But if the justice has taken the substance of the usual affidavit in writing, and that is produced in evidence, he shall not be permitted to give evidence at the trial of any thing else the plaintiff said on his examination, viz. any description of the robbers or robbery different from what he shall give on the trial.] *Kemp v. Hundred of Stafford, Tr. 19 G. 2. C. B. Bull. N. Pri. 186.*

8. At what Time the Action is to be brought.

By the 27 *Eliz. cap. 13. § 9.* it is enacted, "That no person or persons robbed shall take advantage of the statutes, to charge any hundred where any such robbery shall be committed, except he or they so robbed shall commence his or their suit or action within (a) one year next after such robbery committed." *(a) By 8 G. 2. c. 16. § 14., no action can be brought but within six months.*

In the construction whereof it hath been holden, That if a person be robbed the 9th of *October 13 Jac.* and so laid, and the teste of the writ be the 9th of *October, 14 Jac.* that this is not pursuant to the statute; and that in this action, which is penal against the hundred, there is no reason to exclude the day on which the fact was done, nor to make such construction as is done in protections and the enrolment of deeds, which have always received a benign interpretation. *Hob. 139, 140. Moor, 878. pl. 1233. Brownl. 156. S. C. Norris v. Hundred of Dougl. 465.]*

In an action on the statute of hue and cry, the plaintiff made oath according to the statute, and within twenty days brought a writ, and because it was vicious, let it fall; and after the twenty days took out a new one, without making any oath a-new, or entering any continuances between the said writ and that; and the court held clearly, that the second writ was not brought according to the statute; for so they said, that provision in the statute would be to no manner of purpose. *Sid. 139. pl. 12. Keb. 495. S. C. Newman v. Inhabitants of Strafford.*

An action was brought by the master, on the statute of *Winton*, for a robbery committed on his servant, in which he declared of an assault and battery done to himself, (though then fifty miles from the place,) also that he made oath that he did not know any of the persons; the issue was entered of record, and the jury appeared at the bar ready to try it; but being for other business adjourned to another day, the plaintiff, observing his mistake, moved to amend, by declaring of a robbery on his servant, &c., and it appearing that the year in which the action must be brought was expired, *3 Lev. 347. Bearecroft v. Hundred of Burnham and Stone.*

[(a) Upon this ground an original hath been

allowed to be filed in this action, after a writ of error brought for the want of it. 1 P. Wms. 412. So, an original bespoken within the year, and tested on that day, is good, though it do not pass the great seal, till after the year has expired. Price v. Hundred of Chewton, *id.* 347.]

Owen, 70.
Per Holt,
5 Ann. at
Maidstone,
Bull. N.
Pri. 187.

[The plaintiff need not prove the robbery in the place or in the parish alleged in the declaration, if it be proved within the same hundred. So, hue and cry need not be proved by the plaintiff though alleged in his declaration, for it is the part of the hundred to levy it.]

9. What Evidence will maintain the Action; and therein of the Witnesses for and against it.

2 Leon. 12.
30 Mod. 193.
Fortesc. Rep.
246. Gild.
Caf. 113.
12 Vin.
Abr. 13.
Vent. 351.
713. pl. 92.
Mod. 73.

It seems that from the necessity of the case, the party himself that was robbed is to be admitted as a witness, but then his testimony must be corroborated by collateral proof and circumstances, and such as may induce a jury to believe that a robbery was actually committed, that the party lost what he declared for.

But it was holden, that in an action against the hundred, no inhabitant of the hundred could be a witness, because he was concerned in interest.

But now by the 8 Geo. 2. cap. 16. reciting, that by the laws then in being, the person or persons robbed may be admitted, in any action to be brought against the hundred, as a witness to prove the robbery, and the money, goods or effects whereof he, she, or they, was or were robbed; and yet no person inhabiting within the said hundred can be admitted as a witness for or on behalf of the said hundred, by reason of the interest he or she may have in the consequences of the said action, which is commonly very inconsiderable; therefore it is enacted, "That in any action already brought, or to be brought, against any hundred, any person inhabiting within the said hundred, or any franchise thereof, shall be admitted as witness for or on behalf of the said hundred, in the same manner as if he or she were not an inhabitant thereof, but resided in any other hundred whatsoever."

10. What shall excuse the Hundred; and therein of apprehending the Robbers.

2 Inst. 569.
3 Lev. 320.
Dyer, 370.
a. 7 Co. 7.
Sid. 11.

By the statutes of *Winton* 13 E. 1. cap. 1. and 28 E. 3. cap. 11. the robbers must be taken within forty days after the robbery committed; also by the former act it was necessary that all the robbers should be taken, to excuse the hundred.

But now as to this latter matter, by the 27 Eliz. cap. 13. § 8. it is enacted, "That where any robbery is or shall be hereafter committed by two or a greater number of malefactors, and that it happen any one of the said offenders be apprehended by pursuit, to be made according to the said former mentioned laws and statutes, or according to this act, that then, and in such case,

"no

“ no hundred or franchise shall in any wise incur or fall into the
 “ penalty, loss, or forfeiture mentioned either in this present act,
 “ or in any the said former statutes, although the residue of the
 “ said malefactors shall happen to escape, and not be apprehend-
 “ ed; any thing in this statute, or in the said former statutes, to
 “ the contrary notwithstanding.”

If a robbery be committed, and hue and cry made, and afterwards, within the forty days, an inhabitant of the hundred find one of the robbers in the presence of a justice of the peace, who charges him with the robbery, and the justice promises that he shall appear and be forth-coming, this is a taking within the statute; for being in the presence of the justice, it must be understood that he was in his custody and power, and therefore not necessary to lay hold on him.

If hue and cry be made towards one part of the county, and an inhabitant of the hundred apprehend one of the robbers within another, this is a taking within the statute.

By the 8 Geo. 2. cap. 16. it is enacted, “ That no hundred, or
 “ franchise therein, shall be chargeable, by virtue of any of the
 “ statutes, if any one or more of the felons, by whom such robbery
 “ shall be committed, be apprehended within the space of
 “ forty days next after publick notice given in the *London Gazette*,
 “ as by the statute is provided.”

And by the said statute 8 Geo. 2. to the intent that hue and cry may be made with more diligence and effect, and other persons encouraged to take such felon or felons, it is enacted, “ That any
 “ person or persons who shall apprehend such felon or felons within
 “ the time herein before limited for that purpose, whereby the
 “ hundred hath been actually indemnified or discharged from any
 “ such action as aforesaid, shall, upon due proof thereof, upon
 “ oath made before two justices of the peace, (which oath the said
 “ justices are hereby also empowered and required to administer,)
 “ be entitled to the reward of 10*l.* which sum shall be raised upon
 “ the hundred by a taxation and assessment, to be made and to be
 “ levied, and collected in the same manner as the other sums of
 “ money, by this present act appointed to be raised upon the
 “ hundred, are directed to be assessed, levied and collected; and
 “ such sum of 10*l.* which shall be so rated, assessed, levied and
 “ collected as aforesaid, shall be paid unto such two justices of the
 “ peace, within ten days next after the same shall be so levied and
 “ collected, to the use of the person or persons who shall be there-
 “ unto entitled, as a reward for having so apprehended such felon
 “ or felons, as aforesaid; and such justices shall, upon reasonable
 “ request made for that purpose, pay over and deliver the said
 “ sum to such person or persons accordingly, in such shares and
 “ proportions as the said justices shall think reasonable; provided
 “ always, that such person or persons, so entitled to such reward,
 “ shall not thereby be rendered incapable to be a witness in any
 “ such action.”

Vent. 118.
 325. Raym.
 221. 2 Lev.
 4. S. C.
 Medwin v.
 Hundred of
 Thistle-
 worth.

Vent. 118,
 119., per
 Hale, C. J.

But this
 must be
 pleaded, and
 not given in
 evidence on
 the general
 issue.

11. How the Money is to be levied, and each Hundredor to contribute to the Charges.

By the 27 *Eliz. cap. 13.* § 4. reciting, that although the whole hundred, where robberies and felonies are committed, with the liberties within the precinct thereof, are charged by the former statutes with the answering to the party robbed his damages; yet nevertheless the recovery and execution, by and for the party or parties robbed, is had against one or a very few persons of the said inhabitants, and he and they so charged have not heretofore had any means or ways to have any contribution of or from the residue of the said hundred where the said robbery is committed, to the great impoverishment of them against whom such recovery or execution is had:

By § 5. of the said statute it is enacted, “That, after execution
“ of damages by the party or parties so robbed had, it shall and
“ may be lawful (upon complaint made by the party or parties so
“ charged) to and for two justices of the peace (whereof one to be
“ of the *quorum*) of the same county, inhabiting within the said
“ hundred, or near unto the same where any such execution shall
“ be had, to assess and tax rateably and proportionably according
“ to their discretions, all and every the towns, parishes, villages
“ and hamlets, as well of the said hundred where any such robbery shall be committed, as of the liberties within the said
“ hundred, to and towards an equal contribution, to be had and
“ made for the relief of the inhabitant or inhabitants, against
“ whom the party or parties robbed before that time had his or
“ their execution; and that after such taxation made, the constables or constable, headboroughs or headborough, of every such
“ town, parish, village and hamlet, shall, by virtue of this present
“ act, have full power and authority, within their several limits,
“ rateably and proportionably to tax and assess, according to their
“ abilities, every inhabitant and dweller in every such town, parish,
“ village and hamlet, for and towards the payment of such taxation and assessment, as shall be so made: and that if any inhabitant shall obstinately refuse and deny to pay the said taxation
“ and assessment, so taxed and assessed, that then it shall and may
“ be lawful to and for the said constables and headboroughs, and
“ every of them, within their several limits and jurisdictions, to
“ distrain all and every person and persons so refusing and denying,
“ by his and their goods and chattels, and the same distress to sell,
“ and the money thereof coming to retain to the use aforesaid;
“ the surplus, if any, shall be delivered unto the said person or
“ persons so distrained.”

And it is further enacted, by § 6. “That all and every the
“ said constables and headboroughs, after that they have, within
“ their several limits and jurisdictions, levied and collected their
“ said rates and sums of money so taxed, shall, within ten days
“ after such collection, pay and deliver the same over unto the
“ said justices of peace, or one of them, to the use and behoof of
“ the said inhabitant or inhabitants, for whom such rate, taxation,
“ and

“ and assessment shall be had or made, as aforesaid; which money
 “ so paid shall, by the justices or justice so receiving the same, be
 “ delivered over (upon request made) unto the said inhabitant or
 “ inhabitants, to whose use the same was collected.”

And it is further enacted, § 7. “ That the like taxation, assess-
 “ ment, levying by distress, and payment as aforesaid, shall be
 “ had and done within every hundred where default or negli-
 “ gence of pursuit and fresh suit shall be, for and to the benefit
 “ of all and every inhabitant and inhabitants of the same hun-
 “ dred where such default shall be, that shall at any time here-
 “ after, by virtue of this present act, have any damages or mo-
 “ ney levied of them, for or to the payment of the one moiety,
 “ or half of the money recovered against the said hundred where
 “ any robbery shall be committed.”

It hath been adjudged, that a person occupying lands in an
 hundred, although he hath no house or dwelling there, is an in-
 habitant within the meaning of the statute, for that otherwise the
 statute might be eluded. 2 Saund.
423. Leigh
v. Chap-
man.

It is said that a person, though not an inhabitant at the time of
 the robbery committed, but becoming one before the judgment,
 shall contribute to the charges. March, 11.
but Hut.
125. S. P.
cont.

And now, for the more equal rating and levying the money,
 for which the hundreds are chargeable, by the 8 Geo. 2. cap. 16.
 it is enacted, “ That no process for appearance in any action
 “ brought upon the said statutes, or either of them, against any
 “ hundred, shall be served on any inhabitant thereof, save only
 “ upon the high constable, or high constables, of the hundred
 “ wherein the robbery shall happen, who is and are hereby re-
 “ quired to cause publick notice thereof to be given in one of the
 “ principal market-towns within such hundred, on the next
 “ market-day, after he or they shall be served with such process;
 “ or if there shall happen to be no market-town within such
 “ hundred, then in some parish church within the hundred, im-
 “ mediately after divine service, on the *Sunday* next after his or
 “ their being served with such process; and he or they is and are
 “ also empowered and required to enter, or cause to be entered,
 “ an appearance in the said action, and also to defend the same
 “ for and on behalf of the inhabitants of the said hundred, as
 “ he or they shall be advised; and in case the plaintiff or plain-
 “ tiffs in such action shall recover and obtain judgment therein,
 “ that then no process of execution shall be served on any parti-
 “ cular inhabitant or inhabitants of the said hundred, or any
 “ franchise within the precincts thereof, nor on the said high
 “ constable or high constables; but the sheriff, or his officer, shall,
 “ upon the receipt of any writ or writs of execution to him di-
 “ rected, in pursuance of the said judgment, (instead of serving
 “ the said writ or writs on any inhabitant or inhabitants) cause
 “ the same to be produced, and shewn *gratis*, unto two justices
 “ of the peace of the county, riding, or division, (whereof one
 “ to be of the *quorum*) and residing within the said hundred, or
 “ near unto the same, who shall thereupon, with all convenient
 “ speed,
By stat. 22
Geo. 2.
c. 46. § 4.
no writ of
execution
against the
inhabitants
of any hun-
dred, on any
judgment
obtained by
virtue of any
act of par-
liament,
shall be le-
vied on any
particular
inhabitant
of such hun-
dred; but
the sheriff
shall, on re-
ceipt of any
such writ,
cause the
same to be
produced to
two justices
of the peace,
as is direct-
ed by 8 G. 2.
c. 16. § 4.
and there-
upon the said
justices
shall, as is
directed by
the said act,
cause a taxa-
tion to be
made and

collected for
paying the
costs and da-
mages reco-
vered by the
plaintiff,
and all such
necessary
expences as
any inha-
bitant of
such hun-
dred shall
have been at
in defending
such action;
the same be-
ing first
proved on
oath, and
the attor-
ney's bill
being first
taxed; and
the sums so
collected
shall, within
the time by
the said act
limited, be
paid to the
sheriff, and
by him paid
over to the
persons en-
titled to the
same, with-
out deduc-
tion or fee.

“ speed, cause such taxation and assessment to be made, and to
“ be levied and collected in such manner as is prescribed in and
“ by the statute 27 *Eliz. cap. 13.* in which taxation and assess-
“ ment there shall be provided for and included, over and above
“ what the costs and damages, recovered by the plaintiff or plain-
“ tiffs in such action, shall amount to, all such just and neces-
“ sary expences which any high constable or high constables of
“ any hundred, hath or have been or shall be at, in having de-
“ fended any such action as aforesaid, claim being made thereto by
“ such high constable or high constables, before the said justices,
“ upon due notice being given to him or them by the said justices
“ for that purpose; and the sums of money so to be levied and
“ collected shall be paid over and delivered, (by such officer or
“ officers as by the said statute 27 *Eliz. cap. 13.* are to levy and
“ collect the same), within ten days after such collection, to the
“ sheriff of the county wherein the robbery shall happen, to the
“ use and behoof of the plaintiff or plaintiffs in such action,
“ for so much as the costs and damages by him, her, or them
“ recovered shall amount to, and to the use and behoof of the
“ said high constable or high constables, for so much as his or
“ their expences in defending the said action shall amount to, of
“ which the said high constable or high constables shall give in
“ an account, and make due proof upon oath, to the satisfaction
“ of the said justices, before any such taxation and assessment
“ shall be made for the reimbursing such high constable or high
“ constables, (which oath the said justices are hereby impowered
“ and required to administer), and shall in such expences have
“ no further allowance towards paying an attorney to defend the
“ said action, than what such attorney's bill shall be taxed at by
“ the proper officer of that court where such action shall be
“ brought, which the said high constable or high constables shall
“ cause to be taxed for that purpose.”

And it is further enacted by the said statute, “ That the sum-
“ or sums of money which shall be paid over and delivered to the
“ sheriff of the county, as herein before mentioned, shall (upon
“ reasonable request made) be by him paid and delivered over to
“ the several parties who shall be entitled to receive the same,
“ without any deduction, fee, or reward whatsoever.”

And that sufficient time may not be wanting for such taxation
and assessment to be duly made, and for the money to be collect-
ed and levied thereupon, after such writ or writs of execution
shall be shewn to such justices, and before the sheriff shall be
obliged to make a return thereof, it is enacted, “ That no sheriff
“ shall be called upon or required to make any return to any such
“ writ or writs of execution, as shall issue or be made out upon
“ any judgment which shall be recovered in any action brought
“ against any hundred by virtue of the above mentioned statutes,
“ or either of them, until after the expiration of sixty days next
“ after the day whereupon such writ or writs shall be delivered
“ to the said sheriff, who is hereby required to endorse on the
“ back thereof the day on which he received the same.”

And

And whereas it is reasonable that the said high constable or high constables should be indemnified as to all charges, which he or they shall necessarily expend in defending any suit in pursuance of this present act, and that provision should be made for reimbursing him or them not only such expences as shall be over and above the taxed costs to be paid by the plaintiff or plaintiffs, in case of a nonsuit, discontinuance, or judgment on demurrer against him, her, or them, or verdict for the defendants as aforesaid, but even such taxed costs also, in case the plaintiff or plaintiffs, and his, her, or their sureties who shall be bound for the payment thereof, shall happen to become insolvent; it is therefore enacted, "That if any plaintiff or plaintiffs in an action to be brought against any hundred shall be nonsuited, or shall discontinue his, her, or their action, or shall have a judgment on demurrer given, or a verdict pass against him, her, or them, it shall and may be lawful for any two justices of the peace, (such as herein before mentioned) upon complaint to them made for that purpose, and upon an account given in by such high constable or high constables, and proof made upon oath, to the satisfaction of the said justices, of the expences necessarily laid out as aforesaid, (which oath the said justices are hereby empowered and required to administer), to make and cause such taxation and assessment to be made, and to be levied and collected in such manner as is directed in and by the above mentioned statute of 27 *Eliz. cap. 13.* in order thereby to reimburse such high constable or high constables all such charges, as he or they shall have necessarily expended in defending such action, wherein such plaintiff or plaintiffs shall have been nonsuited, or shall have discontinued his, her, or their action, or against whom judgment shall have been given upon demurrer, or a verdict shall have been given, over and above the costs in those cases to be taxed as aforesaid; and in case it shall be made appear upon oath to the said justices of the peace, (which oath the said justices are hereby also empowered and required to administer), to their satisfaction, that such plaintiff or plaintiffs, and also his or their sureties, is and are insolvent, so that the said high constable or constables can have no relief as to such taxed costs by them expended in such defence as aforesaid, (save only by the power herein after given to the said justices), it shall and may be lawful to and for such two justices of the peace to make and cause a taxation and assessment to be made, and to be levied and collected in the same manner as is directed in and by the aforesaid statute made 27 *Eliz. cap. 13.* in order thereby to reimburse such high constable or high constables such taxed costs, as by reason of such insolvency he or they shall not be able to recover and receive of and from the plaintiff or plaintiffs in the action, or his or their sureties as aforesaid."

And it is further enacted, "That the several sum or sums of money, which shall be so rated and assessed, and levied and collected as aforesaid, for the reimbursement of the expences
" necessarily

See Fitzgib.
296. pl. 4-

“ necessarily sustained by any high constable or high constables in
 “ defence of any action brought against the hundred upon the sta-
 “ tutes above mentioned, or either of them, in case of any judg-
 “ ment given against the plaintiff or plaintiffs, shall be paid with-
 “ in ten days after such collection, unto the said justices, or one
 “ of them, to the use and behoof of such high constable or high
 “ constables, to whom the said justices shall, upon request, pay
 “ and deliver over the same.”

And it is further enacted, “ That the justices of peace, by
 “ whom such taxations and assessments as aforesaid shall, in pur-
 “ suance of the said statute made 27 *Eliz. cap. 13.* and also of
 “ this present act, be made, shall limit and appoint, at their dis-
 “ cretion, some certain reasonable time within which such taxa-
 “ tions and assessments shall be levied and collected, which time
 “ shall not exceed thirty days; and also, that if any officer or
 “ officers, who are to levy and collect such taxations and assess-
 “ ments as aforesaid, shall refuse or neglect to levy and collect
 “ the same within such time as shall be limited and appointed by
 “ the said justices of the peace for their doing thereof, or shall re-
 “ fuse or neglect to pay and deliver over the sums of money so
 “ levied and collected to the said sheriff, and also to the said jus-
 “ tices, in such manner as the same in the several cases herein
 “ before mentioned are respectively directed to be paid, within the
 “ respective times herein before limited for such payment thereof,
 “ every such officer shall, for every such refusal or neglect, for-
 “ feit double the sum appointed to be by him levied and collected
 “ as aforesaid.”

(a) The case
 of Chandler
 an attorney
 at law, who
 sued the
 Hundred of
 Sunning in

Beiks, in the year 1748, which was attended with many suspicious circumstances, and for a very large sum of money, occasioned this act. (b) By stat. 30 Geo. 2. c. 3. § 11. & 4 Geo. 3. c. 2. § 118., receivers of the land-tax shall not sue the county for a robbery, unless there were three persons in company carrying the money.

Fitzgib.
 296.

[Here let it be observed, that as the statute of *Winton* incor-
 porates the hundred so as to subject them to be sued, it, by con-
 sequence, gives them the capacities attaching upon the character
 of defendants: they may therefore sue the plaintiff (c) for the
 costs of a nonsuit; they may bring a *scire facias*, or an action of
 debt upon the judgment; or proceed against the sheriff for an
 escape.]

(c) See as
 to this, stat.
 22 G. 2.
 32 fr.

Idiots and Lunaticks.

- (A) What Persons are esteemed such, so as to come within the Protection of the Law.
 - (B) How they are to be found such.
 - (C) Who hath an Interest in, and Jurisdiction over them: And herein of appointing them proper Curators and Committees, and the Power and Duty of such Committees.
 - (D) How far their Want of Understanding shall be said to be prejudicial to them in Civil Respects.
 - (E) How far the Want of Understanding will excuse in Criminal Cases.
 - (F) How far their Acts are good, void, or voidable.
 - (G) How they are to sue and defend.
-

- (A) What Persons are esteemed such, so as to come within the Protection of the Law.

THE more general description of a person, who, from his want of reason and understanding, comes within the protection of the law, is that of *non compos mentis*. Co. Lit. 246.
4 Co. 124.
Skin. 177.
pl. 7. [The
 same rules of judging of insanity prevail at law and in equity, *Osmond v. Fitzroy*, 3 P. Wms. 130. Bennet v. Vade, 2 Atk. 327. though Sir. Wm. Blackstone in 1 Comm. 304. seems to point at a difference. For if a return to an inquisition state the party to be incapable of managing himself and his affairs from the weakness of his mind, a commission of lunacy will not issue, the court of Chancery having never gone further from the ancient returns, which were, *lunaticus vel non*, than in allowing returns of *non compos mentis*, or *insanæ mentis*, or since the proceedings have been in English, of unsound mind, which amounts to the same thing. *Non compos mentis* is now indeed a proper technical term, being legitimated by several acts of parliament. *Ex parte Barnesley*, 3 Atk. 163. Lord Donegal's case. 2 Vez. 407.]

There are, says my Lord Coke, four kinds of men who may be said to be *non compos*: 1. An idiot, who is *non compos* from his nativity. 2. One made such by sickness. 3. A lunatick, *quia aliquando gaudet lucidis intervalis*, who is *non compos* only for the time Co. Lit. 247.
4 Co. 124.
Vide 1 Hale
Hist. P. C.
30 to 37.

(a) Plow.
19. *Omne
crimen ebrie-
tas incendit
& detegit.*

Dyer, 25.
Moor, 4.
pl. 12. Bro.
Idiot, 1.
F. N. B.
233. * See
the stat.
17 Ed. 2.
stat. 1. c. 9.
as to the
king's pre-
rogative

with respect
3 Mod. 43,
44.
2 Vez. 208.
S. C. cited.
2 Chan.
Caf. 70.
Skin. 5.
177. pl. 7. S. C. Prodders and Lady Frazier.

time that he wants understanding. 4. One that is drunk; which last is so far from coming within the protection of the law, that his drunkenness is an (a) aggravation of whatever he does amiss.

1. An idiot is a fool or madman from his nativity, and one who never has any lucid intervals; therefore, the king has the protection * of him, and his estate, during his life, without rendering any account; because it cannot be presumed that he will be ever capable of taking care of himself or his affairs: And such a one is described a person that *cannot number twenty*, tell the days of the week, does not know his father or mother, his own age, &c. But these are mentioned as instances only; for idiot or not, being a question of fact, must be tried by jury, or inspection.

with respect to the custody of the lands of idiots; and c. 10. as to the providing for lunaticks. *Vide infra.*

But though an idiot must be so *a nativitate*, yet if by inquiry it be found that *A.* is an idiot, not having any lucid intervals *per spatium octo annorum*, this is a sufficient finding; for the inquiry having found the party an idiot, the adding *per spatium octo annorum* is surplusage, and shall be rejected.

Hale's Hist.
P. C. 30.

2. One made such by sickness, which my Lord Hale calls *dementia accidentalis vel adventitia*, and which he again distinguishes into a total and a partial insanity, from its being more or less violent, is such a madness as excuseth in criminal cases; and though the party, in every thing else, be entitled to the same protection with an idiot, and though his disorder seem permanent and fixed, yet as he had once reason and understanding, and as the law sees no impossibility but that he may be restored to them, it makes the king only a trustee for the benefit of such a one, without giving him any profit or interest in his estate.

4 Co. 125.
Co. Lit. 247.
Hale's Hist.
P. C. 31.
[a] This
notion of the
influence of
the moon

3. A lunatick; this is also *dementia accidentalis vel adventitia*, and takes its name from the great influence which the moon has in all disorders of the brain (a); and though such a one hath intervals of reason, yet during his phrenzy he is entitled to the same indulgence as to his acts, and stands in the same degree with one whose disorder is fixed and permanent.

hath been exploded by the sounder philosophy of modern times. However, a classic reader will have pleasure in an elegant Latin treatise, *De imperio solis ac lunæ in humana corpora, et morbis inde oriundis*, by the late Dr. Mead.]

Plow. 19. a.
Crompt. Just.
29. a.
Co. Lit. 247.
Hale's Hist.
P. C. 32.

4. One made mad by drunkenness, which is called *dementia affectata*; and though, as hath been said, such a person be not entitled to the protection of the law, yet if a person by the unskilfulness of his physician, or by the contrivance of his enemies, eat or drink such a thing as causeth phrenzy, this puts him in the same condition with any other phrenzy, and equally excuseth him; also, if by one or more such practices an habitual or fixed phrenzy be caused, though this madness was contracted by the vice and will of the party, yet this habitual and fixed phrenzy thereby caused, puts the man in the same condition, as if the same was contracted involuntarily at first.

But

But though this subject of madness may be spun out to a greater length, and branched into several kinds and degrees, yet it appears that the prevailing distinction herein, in law, is between idiocy and lunacy; the first, a fatuity *a nativitate, vel dementia naturalis*, which excuseth the party as to his acts, and entitles the king to the receipt of the rents and profits of his estate during his life, without being obliged to render any account for the same; the other, accidental or adventitious madness, which, whether permanent and fixed, or with lucid intervals, goes under the name of lunacy, and (a) equally excuseth with idiocy, as to acts done during the phrenzy; but herein they differ, that in the latter case the king, as hath been said, is only a trustee for the lunatick, and accountable to him, if he happens to be restored to his understanding, or to his representatives, if it happens otherwise: But in what things they further differ, will be seen by that which follows.

* If a man loses his speech by an apoplectick fit, though he shews some signs of sense, a commission may be granted against him. Pitt's case cited by Lord Hardwicke, Ca. temp. Hardw. 52. 2 Barnard. 457.

(B) How they are to be found such.

EVERY person of the age of discretion is in law presumed to be of sound mind and memory, unless the contrary appear; and this rule holds as well in civil, as criminal cases. Hale's Hist. P. C. 33.

The trial of idiocy, madness, or lunacy, in civil cases, and in order to the commitment or custody of the person and his estate, which belongs to the king, either to his own use and benefit, as in case of idiocy, or to the use of the party, in case of accidental madness or lunacy, is by writ or commission to the sheriff, or escheator, or particular commissioners (b), both by their own inspection and by inquisition, to inquire and return their inquisition into the Chancery; and thereupon a grant or commitment of the party and his estate ensues: And in case the party, or his friends, find themselves injured by the finding him a lunatick or idiot, a special writ may issue to bring the party before the chancellor, or before the king, to be inspected; and if, on examination, it appear that the party is no (c) idiot, the whole commission and office shall be discharged without any traverse or *monstrans de droit*. 9 Co. 31. a. 4 Co. 126. And for this writ of *idiotia inquirendo*, vide Fitz. N. B. 232, 3. [(b) These latter are now mostly in use. And as the authority under these commissions is not in the commissioners only, but in the

jury too, they cannot be executed abroad, as in case of a commission to appoint a guardian. Ambl. 112.]
(c) That idiocy may be tried by inspection, because it may be discerned; but not lunacy without taking out a commission of lunacy. Skin. 5.

Also, the party found an idiot or lunatick may traverse (d) the inquisition, as may any other person having a title to the land; and therefore it is said that by the statute 18 H. 6. cap. 7. there ought to be a month's time between the return of the inquisition and the grant of the custody and the lands, in order for the parties to come in and tender such traverse. Skin. 178. [(d) This traverse is given by st. 2 Edw. 6. c. 8. § 6. which provides, "that

if any person shall be untruly founden lunatick or idiot, every person grieved by such office or inquisition, shall

shall and may have his or their traverse to the same immediately, or after, at his or their pleasure, and proceed to trial therein, and have like remedy and advantages, as in other cases of traverse upon untrue inquisitions or office founden." Though the statute gives the right to traverse to all persons aggrieved by the inquisition, yet the heir cannot traverse it, but is bound upon the traverse by the lunatick, or his alienee, who may both traverse it. *Ex parte Roberts*, 3 Atk. 312. In the case of a lunatick, the traverse may be by attorney, but an idiot must traverse in person. 3 Atk. 7. However, if there be an application to traverse or supersede the commission, the lunatick must appear to be examined *coram rege in concilio*, which words have been considered to mean, the court of Chancery. Ambl. 112. And in the mean time, till the point of lunacy is determined, the court will make a provisional order as to the lunatick's effects. 3 Atk. 635. It hath been doubted, notwithstanding the above statute, whether the party aggrieved by the inquisition must not apply to Chancery, Ley. 26, 27. And it is certain that he must apply, in order to suspend the grant of the custody of the person, which regularly is immediate upon the return of the inquest. He must apply too for permission to traverse, which the court will not grant to a *second* inquisition clearly finding the party *non compos*, as it would spin out the proceedings to a very great length and infinite expence. *Ex parte Barnley*, 3 Atk. 185. And none of these inquisitions are conclusive; for the parties dissatisfied with them, may litigate the point again either by bringing actions at law, or by bill in equity. *Id. ibid.*]

2 Sid. 124.
Susan Thom
v. Coward.

If by inquisition a person be found a lunatick, and the custody granted to *J. S.* and the party thus found bring a *scire facias* to set aside the inquisition, the committee of the lunatick cannot plead, nor join issue in such *scire facias*; for he can have no interest in the estate of the lunatick, being only in the nature of a bailiff to the king; and therefore his duty is to inform the king's attorney general of the nature of the affair, who is the proper person to contest the matter in behalf of the king.

56 Aff. pl.
27. Bro.
Cor. 101.
And. 107.
154. Sav.
50. 57.
Hawk. P.C.
2. Hale's
Hist. P.C.

35.
* *See qu.* If
the jury,
who try the
indictment,
may not in-

As to idiocy, lunacy, or madness, which excuses in capital cases, it is not necessary that it was found by inquisition that the party was a madman, idiot, or lunatick, previous to the commitment of the fact; for if he was actually mad at the time of the fact committed, this shall excuse; and this regularly is to be tried by an inquest of office to be returned by the sheriff of the county wherein the court sits for the trial of the offence; and if it be found that he was actually mad, he shall be discharged without any other trial; but if they find that the party only feigns himself mad, and he refuses to answer or plead, he shall be dealt with as one who stands mute*.

quire of the fact of lunacy, on the prisoner's defence, and acquit him, if actually mad, without the form and trouble of an inquest of office? See the next case.

Hale's Hist.
P.C. 35,
36.

Also, in case a man in a phrenzy happen by some oversight, or by means of the gaoler, to plead to his indictment, and is put upon his trial, and it appears to the court upon his trial that he is mad, the judge in discretion may discharge the jury of him, and remit him to gaol to be tried after the recovery of his understanding, especially in case any doubt appear upon the evidence touching the guilt of the fact, and this *in favorem vite*; and if there be no colour of evidence to prove him guilty, or if there be a pregnant evidence to prove his insanity at the time of the fact committed, then upon the same favour of life and liberty, it is fit it should be proceeded in the trial, in order to his acquittal and enlargement.

Hale's Hist.
P.C. 36.

So, if a person during his insanity commit a capital offence, and recover his understanding, and being indicted and arraigned for the same, plead not guilty, he ought to be acquitted; for, by reason of his incapacity, he cannot act *felles animo*.

(C) Who hath an Interest in, and Jurisdiction over them: And herein of appointing them proper Curators and Committees, and the Power and Duty of such Committees.

IT seems to be agreed at this day, that the king as *parens patriæ* hath the protection of all his subjects, and that, in a more peculiar manner, he is to take care of all those who, by reason of their imbecility and want of understanding, are incapable of taking care of themselves; this, in some books, is called a prerogative in the crown, and in others a *regium munus*, or duty which the king owes his subjects in return for their subjection and allegiance to him (a).

Stanf. Pre-rog. c. 9. f. 33. 2 Inst. 14. 4 Co. 126. a. Dyer, 25. [(a) This branch of the prerogative is gene-

ally, but not necessarily, exercised by the person who has the custody of the great seal, to whom it is delegated by warrant under the sign manual, countersigned by the two secretaries of state. But the warrant confers no jurisdiction, only a power of administration, and if that power be abused or any erroneous orders be made under it, as it is derived under the sign manual, the appeal is to the king in council. 2 Vez. jun. 7. 72. 3 Atk. 635. 3 P. Wms. 104. 6 Br. P. C. 329. But the court of Chancery, if it sees cause, may vary its own orders. *Ex parte Grimstone*, Ambler 706. This power appears to have been exercised in the court of Chancery prior to the erection of the courts of Wardship, upon the dissolution of which courts it again reverted to the Chancery. 2 Atk. 553. And that court will exercise it where the person of the lunatick is amenable, but the property is out of the jurisdiction, *Ex parte Marchioness of Annandale*, Ambler 80. and also where the lunatick is abroad; for the jury may be satisfied without an inspection. *Ex parte Southcote*, *Id.* 109.]

My Lord Coke in his 2 *Inst.* is of opinion, that by the common law the king had no prerogative in the custody of an idiot's lands, but that the same belonged to the lords of whom the lands were holden, and that the same was given to the king by some act of parliament after the making of *magna charta*, and before the statute *de prerogativa regis*, 17 E. 2. cap. 9. but in 4 Co. *Beverley's* case he says, that this prerogative was by the common law, and that the statute *de prerogativa regis* is only declarative thereof (b).

2 Inst. 14. 4 Co. 126. [(b) It is clear that the statute was not introductive of any new right of the crown; the words of it

put this past all doubt. But whether the king had this prerogative by the common law, or by force of some non-existing statute, seems not so clear. Bracton makes no mention of it; but Fleta tells us, that certain persons, called *tutores*, used to have the custody of the lands *idiotarum et stultorum*; and that this trust having been greatly abused, an act was made in the reign of Edw. 1. giving to the king the custody of the persons and inheritances *idiotarum et stultorum*, being such *anativitate*; with a reservation to the lord of all his lawful claims for wards, relief, and the like. Fleta, pa. 6. § 10. Fleta however mentions only *natural fools*: but the very introductory words of the stat. of 17 Ed. 2. c. 10. "*habet providere*" shew a pre-existent right in the crown to the custody of the lands of lunaticks.]

But however that may be, now, by the statute *de prerogativa regis*, or 17 E. 2. cap. 9. it is enacted, "That the king shall have the custody of the (c) lands of natural fools, taking the profits of them, without waste or destruction, and shall find them their necessities of whose fee soever the lands be holden; and after the death of such idiots, he shall render it to the right heirs, so that such idiots shall not alien, nor their heirs shall be disinherited."

(c) And also of their goods and chattels. 4 Co. 148.

And cap. 10. of the said statute, "Also the king shall provide when any (that before time hath had his wit and memory) happen to fail of his wit, and there are many *per lucida intervalla*, that their lands and tenements shall be safely kept without waste

“ and destruction, and that they and their household shall live and
 “ be maintained competently with the profits of the same, and
 “ the residue, besides their sustentation, shall be kept to their use,
 “ to be delivered unto them when they come to right mind ; so
 “ that such lands and tenements shall in no wise be aliened, and
 “ the king shall take nothing to his own use ; and if the party die
 “ in such estate, then the residue shall be distributed for his soul,
 “ by the advice of the ordinary.”

(*π*) Bro.
 Idiot, 4, 5.
 Dyer, 25.
 Moor, 4,
 pl. 12.

And. 23.
 4 Co. 127.
 Co. Lit. 247.
 (b) 3 Mod.

43-4.

Skin. 5, 177, pl. 7. 2 Show. 171. pl. 164. Vern. 9. Prodders and Lady Frazier. (c) But the king cannot grant the custody of the body and lands of a lunatick to one, to take the profits to his own use. Moor. 4. pl. 12. adjudged. [Though the king or great seal cannot grant a lunatick's estate without account; yet they may allow as great a salary for the maintenance of the lunatick, as the income of the estate amounts to. Sheldon v. Fortescue Aland, 3 P. Wms. 110.]

4 Co. 127.
 2 Chan.
 Ca. 239.

But though a lunatick is by commission to be under the care of the publick, and the lord chancellor is to appoint a committee for him whose acts are subject to the controul and correction of the court of Chancery ; yet such a one, whether so appointed, or whether he of his own head take upon him the care and management of the estate of a lunatick, is but in nature of a bailiff or trustee for him, and accountable to him, his executors or administrators.

Vern. 262.
 Foster v.
 Merchant.
 * The com-
 mittee of a
 lunatick
 cannot

And as the committees of a lunatick have no interest, but an estate during pleasure, it hath been ruled, that they cannot make leases, nor any ways incumber the lunatick's estate, without a special order from the court of Chancery, where the profits are not sufficient to maintain the lunatick *.

make a lease of the lunatick's lands at law. Knife v. Palmer. 2 Will. 130. [Nor can he present to a vacant benefice. The right of presentation belongs to the great seal, and was first asserted by Lord Talbot. 1 Wooddes. 409.]

Vern. 262,
 3.

Also, where a lunatick, before he became such, made a mortgage of good part of his estate for 50 *l.* and the committee transferred this mortgage, and took up 3 or 400 *l.* more upon it ; it was holden by my lord keeper, that the mortgage should stand as a security for the 50 *l.* only.

Vern. 263.
 [But the
 committees
 of the real
 estate of a
 lunatick,

And as to improvements and buildings on the lunatick's estate, it has been holden, that upon his death the heir must be let into the estate without making any allowance for such improvements.

may exercise the same power over it in regard to cutting timber for repairs, as any discreet person who was the absolute owner of the soil might do. *Ex parte Ludlow*, 2 Atk. 407.]

2 Vern 192.
 Awdley v.
 Awdley.

The committees of a lunatick having invested part of the lunatick's personal estate in a purchase of lands, made in the lunatick's name to him and his heirs, the question was, whether the committees

mittees had not exceeded their power by changing the personal estate into a real estate, and thereby defeating the next of kin, in favour of the heirs at law; and after great debate, and upon reading the statute made touching the granting the custody of the lunatick, whereby it is provided, that the surplus shall be safely kept and delivered to him, if he recover; if not, upon his death to be employed for the benefit of his soul, &c. the court decreed an account of the personal estate, and the lands purchased to be sold, and the money to go and be divided, as personal estate, amongst the next of kin.

[It is a rule, stated indeed by Lord *Hardwicke* as never departed from, not to vary or change the property of a lunatick, so as to effect any alteration as to the succession to it. But Lord *Apsey*, C. decreed (a) incumbrances paid off in the lifetime of the lunatick out of savings of the estate, to be assigned to attend the inheritance, and not in trust for the next of kin, the ruling principle in the management of a lunatick's estate, being the doing that which is most beneficial to the lunatick. It is upon this principle that the court will order part of the lunatick's personal estate to be laid out in repairs (b), or even upon improvements of his real estate, if the interest of the lunatick requires it, and the next of kin cannot shew good cause against it. So, if the interest of the lunatick requires it (c), the court will order timber upon his estate to be cut and sold, and the produce of it will go to his personal representatives. The immediate interest of the lunatick is the only object which the court attends to; the eventual interests of the succession are not regarded: There is no equity as between mere, absolute, real, and personal representatives; they must take the property as they find it; and therefore (d) a charge upon the estate falling into the lunatick as the representative of the person for whose benefit the charge was made, shall sink for the benefit of the heir.

- Where the custody of the lunatick's estate was granted to husband and wife, the wife being next of kin to the lunatick, Lord *Talbot* held, that the husband's right was determined by the death of the wife, it being a joint grant, and a mere authority without any interest. But it is not usual to grant the custody to two, it being attended with inconveniencies, nor was the husband necessarily joined in this grant, for it had been holden by Lord *Parker*, in *Ex parte Kingsmill*, *Mich.* 1720, that a feme covert was capable of such a grant.

Where two persons equally a-kin to a feme lunatick, the one a man, the other a woman, applied for the commitment, the woman was preferred, as being of the same sex, and better knowing how to take care of her.

The next heir is seldom permitted to be committee of the person of the lunatick, because it is his interest that the party should die: but there lies not the same objection to the next of kin, for it is his interest to preserve the lunatick's life, in order to increase the personal estate by savings, which he or his family may be entitled to enjoy. It is usual therefore to grant the custody of the

Ex parte
Marchioness of An-
andale,
Annl. 31.
(a) *Ex parte*
Grimstone,
id. 706.

(b) *Sergeant*
v. Sealey,
2 Atk. 414.
(c) *Ex parte*
Bromfield,
3 Br. Ch.
Rep. 510.
Lord Compton v. Lord
Oxenden,
4 Br. Ch.
Rep. 231.
2 Vez. jun.
69.
(d) *4 Br.*
Ch. Rep.
397. *2 Vez.*
jun. 261.

Ex parte
Lyne, Ca.
temp. Talbot,
143.

2 P. Wms.
638.

Ex parte
Ludlow, *2 P.*
Wms. 638.

1 Bl. Com.
305.

person to the latter, and to commit the management of the estate to the former, it being clearly his interest, by good management, to keep it in condition.]

Preced. Also, the care and management of all affairs relating to idiots and lunaticks is so peculiarly under the power and direction of the court of Chancery, that all abuses in relation to them, as taking them out of the custody of their committees, marrying them, &c. (a) are punishable as contempts to that court.
 producing them, when required. Lord Wenman's case, 1 P. Wms. 701. *Ex parte* Ludlow, 2 P. Wms. 638.]

Ex parte [Although the guardianship of the king may be said to be determined by the death of the lunatick, yet it hath been holden, Grimstone, that the chancellor may make an order in the lunatick's affairs after his death.]
 Ambler, 706.
Ex parte Armistrong, 3 Br. Ch. Rep. 238.

4 Co. 126. But it seemeth, that the 17 E. 2. stat. 1. cap. 9. which giveth the wardship of idiots lands to the king, he finding them convenient maintenance out of the profits thereof, extends not to copyhold lands, for the prejudice that would thereby ensue to the lord; but yet all alienations made by an idiot of his copyhold lands after office found, shall be avoided by the king.

Noy, 27. And yet it hath been holden, that though the king cannot have the custody of an idiot or lunatick copyholder, by reason of the prejudice that might accrue to the lord thereby, that yet the lord of a manor *de communi jure* hath not the custody of a lunatick's lands, but that there must be a custom to warrant it.
Hob. 215.
per Hobart.

Cro. Jac. 105. But it hath been resolved, that the lord shall have the custody of one that is *mutus & surdus*, without alleging any custom for it; and the reason given why the lord shall have the custody is, because otherwise he would be prejudiced in his rents and services, which reason extends as well where there is no custom, as where there is; and if the custody of one that is *mutus & surdus* of common right belongs to the lord, by the same reason of one that is a lunatick.
Evers and Skinner.

2 Roll. And though the king, as hath been said, has the sole direction and management of idiots, &c. yet a private person may confine a friend who is mad, and bind and beat him, &c. in such manner as is proper in such circumstances.
Abr. 546.

Also, by the 12 Ann. cap. 23. reciting, that whereas there are sometimes in parishes, towns, and places, persons of little or no estates, who, by lunacy or otherwise, are furiously mad, and dangerous to be permitted to go abroad, and, by the laws in being, the justices of peace and officers have not authority to restrain and confine them, it is enacted, "That it shall and may be lawful for any two or more justices of the peace where such lunatick, or mad person, shall be found, by warrant under their hands and seals, directed to the constables, churchwardens, and overseers of the poor of such parish, town, or place, or some of them, to cause such person to be apprehended and kept safely locked up in such secure place within the county where such parish or town shall lie, as such justices shall, under their hands

"hands and seals, direct and appoint; and (if such justices find it necessary) to be there chained, if the last legal (a) settlement of such person shall be in any parish, town, or place within such county; and if such settlement shall not be there, then such person shall be sent to the place of his or her legal settlement, as vagrants by this act are directed to be sent, (whipping excepted) and shall be kept safely locked up or chained as aforesaid; and the charges of keeping and maintaining such person during such restraint, (which shall be for and during such time only as such lunacy or madnefs shall continue) shall be satisfied and paid by order of two or more justices of the peace for the county, town, or place where such settlement shall be, out of the estate of such person, if such person hath an estate to pay and satisfy the same over and above what shall be sufficient to maintain his wife and children, if he hath any; and if he hath not such an estate, then the charges of keeping and maintaining such person, during such restraint, shall be satisfied and paid by such ways and means as the poor of such parish, town, or place, are by the laws in being, to be provided for."

(a) That an idiot gains a settlement like any other poor child, and that the father ought to maintain him; but if he cannot, the parish or place where he is settled.
2 Salk. 427. pl. 1.

"Provided that this act, or any thing contained therein, shall not extend, or be construed to extend, to restrain or abridge the prerogative of the queen, or the power or authority of the lord chancellor, lord keeper, or commissioners of the great seal for the time being, or of the chancellor, or vice-chancellor of the county palatine of *Lancaster* for the time being, or of the chamberlain, or vice-chamberlain of the county palatine of *Chester* for the time being, touching or concerning the premises *."

* See also the stat. 17 Geo. 2. c. 5. § 20. power given to two justices to confine a lunatick, if his settlement in the county, otherwise to send him to his settlement.—[Private mad-houses are required to be licenced, and are otherwise regulated, by stat. 14 Geo. 3. c. 49., continued by stat. 19 G. 3. c. 15., and made perpetual by stat. 26 G. 3. c. 91.]

wife to send him to his settlement.—[Private mad-houses are required to be licenced, and are otherwise regulated, by stat. 14 Geo. 3. c. 49., continued by stat. 19 G. 3. c. 15., and made perpetual by stat. 26 G. 3. c. 91.]

(D) How far their Want of Understanding shall be said to be prejudicial to them in Civil Respects.

AN idiot, or person *non compos*, may inherit, because the law, in compassion to their natural infirmities, presumes them capable of property. Co. Lit. 2. 8.

Also an idiot, or person of *non sane* memory, may purchase, because it is intended for their benefit; and if after recovery of their memory they agree thereto, they cannot avoid it; but if they die during their lunacy, their heirs may avoid it, for they shall not be subject to the contracts of persons who wanted capacity to contract; so if, after their memory recovered, the lunatick, or person *non compos*, die without agreement to the purchase, their heirs may avoid it. Co. Lit. 2. 2 Vent. 203.

If an idiot or lunatick marry, and die, his wife shall be endowed; for this works no forfeiture at all, and the king has only the custody of the inheritance in one case, and a power of providing for him and his family in the other; but in both cases the

Co. Lit. 31. a. 4 Co. 124. 125.

freehold and inheritance is in the idiot or lunatick; and therefore (a) if lands descend to an idiot or lunatick after marriage, and the king, on office found, takes those lands into his custody, or grants them over to another, as committee, in the usual manner; yet this seems no reason why the husband should not be tenant by the curtesy, or the wife endowed, since their title does not begin to any purpose till the death of the husband or wife, when the king's title is at an end.

Perk. 365. A lunatick shall be tenant by the curtesy, and shall have dower; so though a woman, being a lunatick, kill her husband, or any other, yet she shall be endowed, because this cannot be felony in her, who was deprived of her understanding by the act of God.

Lit. § 405. If a person *non compos* be disseised, and a descent cast, this, it is said, takes away his entry, but not the entry of his heir; for regularly, the *non compos* in this case cannot allege the disability in himself, because he cannot be supposed conscious of it, nor is he allowed ever, at any time, to allege it, for when he is once *non compos*, there is no certain time when he can be adjudged to recover that disability, unless where he is legally committed, and then the acts during his lunacy will be set aside and discharged, and afterwards the commission superseded; for in no other way can the *non compos* be legally restored to his right, and to his capacity of acting.

4 Co. 23. b. A person *non compos*, being lord of a copyhold manor, may make grants of copyhold estates; for such estates do not take their perfection from any power or interest in the lord, but from the custom of the manor, by which they have been demised and demiseable time out of mind.

Godolph. Idiots and lunaticks are both by the civil law, and likewise by Orph. Leg. 86. the common law, incapable of being executors or administrators; for these disabilities render them not only incapable of executing the trust reposed in them, but also by their insanity, and want of understanding, they are incapable of determining whether they will take upon them the execution of the trust, or not.

Salk. 36. Therefore it hath been agreed, that if an executor become *non compos*, that the spiritual court may, on account of his natural disability, commit administration to another.

2 Inst. 713. An idiot, or person *non compos*, being robbed, shall be (b) bound by a sale of his goods in a market-overt.

(b) Not bound by a sale and non-claim, *vide* tit. *Fines and Recoveries*, and 2 Inst. 516. — Cannot bring an appeal of the death of his ancestor. 2 Hawk. P. C. c. 23. § 32.

Kernot v. Norman, 2 Term Rep. 390. [If a defendant become insane after an arrest at law, it is now settled, that this is no reason for discharging him out of custody, upon filing common bail. Nor will the court interpose, though he be insane at the time of the arrest.]

Lord Galsworthy, 6 Term Rep. 132. *Moff v. Verney*, 4 Term Rep. 121.]

(E) How far the Want of Understanding will excuse in Criminal Cases.

IT is laid down as a general rule, that idiots and lunaticks, being by reason of their natural disabilities incapable of judging between good and evil, are punishable by no criminal prosecution whatsoever. Hawk. P. C. 2.

And therefore a person, who (a) loses his memory by sickness, infirmity, or accident, and kills himself, is not a *felo de se*. 3 Inst. 54.
(a) But if a lunatick in
a lucid interval kills himself, he is a *felo de se*. Hal. Hist. P. C. 412.

So, if a man gives himself a mortal stroke while he is *non compos*, and recovers his understanding, and then dies, he is not *felo de se*; for though the death complete the homicide, the act must be that which makes the offence. Hal. Hist. P. C. 412.

But it is not (b) every melancholy or hypochondriacal distemper that denominates a man *non compos*, for there are few who commit this offence, but are under such infirmities; but it must be such an alienation of mind that renders them to be madmen, or frantick, or destitute of the use of reason. Hal. Hist. P. C. 412.
(b) In 3 Mod. 100.
nion, that a person who kills himself must be *non compos* of course; on this supposition, that it is impossible a man in his senses should do a thing so repugnant to reason and nature. But in Hawk. P. C. c. 27. § 3. this notion is exploded. And so in *Comb. 2, 3.*

And as a person *non compos* cannot be a *felo de se* by killing himself; so neither can he be guilty of homicide in killing another, nor of petit treason: also, if one who has committed a capital offence become *non compos* before conviction, he shall not be arraigned; and if after conviction, he shall not be executed. Hal. Hist. P. C. 30.
Hawk. P. C. 2. vide supra, letter (B), 80, 81.

It seems to have been (c) anciently holden, in respect of that high regard which the law has for the safety of the king's person, that a madman might be punished as a traitor for killing or offering to kill the king; but this is now (d) contradicted by better and later opinions. (c) Fitz. Coron. 351.
Regist. 309.
4 Co. 124. b.
2 Roll. Rep. 324.
(d) 3 Inst.

46. Co. Lit. 247. H. P. C. 10. 43: Hawk. P. C. 2., and herewith my Lord Hale seems to agree, Hal. Hist. P. C. 36, 37. For he says, that the reason is the same between homicide and treason, and that he that cannot act *felonick*, or *animo felonico*, cannot act *proditorie*. — But as this exception laid down by my Lord Coke, 4 Co. 124., though contradicted by himself, 3 Inst. 46., tends so much to the safety of the king's person, he is not willing to question it.

The great difficulty, in these cases, is to determine where a person shall be said to be so far deprived of his sense and memory, as not to have any of his actions imputed to him; or where, notwithstanding some defects of this kind, he still appears to have so much reason and understanding as will make him accountable for his actions, which my Lord Hale distinguishes between, and calls by the names of total and partial insanity; and though it be difficult to define the indivisible line that divides perfect and partial insanity, yet, says he, it must rest upon circumstances, duly

to be weighed and considered both by the judge and jury, lest on the one side there be a kind of inhumanity towards the defect of human nature, or on the other side too great an indulgence given to great crimes; and the best measure he can think of is this: Such a person, as labouring under melancholy distempers, hath yet ordinarily as great understanding as ordinarily a child of fourteen years hath, is such a person as may be guilty of treason or felony.

vide supra,
(B).

It hath been already observed, that he who is guilty of any crime whatsoever through his voluntary drunkenness, shall be punished for it as much as if he had been sober.

Keil. 53.
Dalt. c. 95.
Hawk. P.C.
2.

Also, he who incites a madman to do a murder, or other crime, is a principal offender, and as much punishable as if he had done it himself.

2 Roll. Abr.
547.
Hob. 134.
Co. Litt.
247. Hawk.
P. C. 2.
Hal. Hist.
P. C. 15,
16. 33.

And here we must observe a difference the law makes between civil suits, that are terminated in *compensationem damni illati*, and criminal suits, or prosecutions, that are *ad pœnam* & *in vindictum criminis commissi*; and therefore it is clearly agreed, that if one who wants discretion commits a trespass against the person or possession of another, he shall be compelled in a civil action to give satisfaction for the damage.

(F) How far their Acts are good, void, or voidable: And of the late Provisions by Statute-Law.

4 Co. 124.
2 And. 145.
Co. Lit. 247.
(a) A purchase at a great undervalue by deed, fine, and recovery, obtained from

HERE we must first distinguish between acts done by idiots and lunaticks *in pais*, and in a court of record; that as to those solemnly acknowledged in a court of record (a), fines and recoveries, and the uses declared on them, they are good, and can neither be avoided by themselves nor their representatives; for it is to be presumed, that had they been under these disabilities, the judges would not have admitted them to make these acknowledgments.

a lunatick, but previous to his being found such, said to be set aside in Chancery. 2 Vern. 678. [A court of equity is indeed reported in one case to have relieved a remainder-man against a fine levied by an idiot, even against a purchaser. Tothill's Transactions, 42. That it would relieve in this case in the same manner as it relieves against fines levied in the case of fraud, Mr. Fonblanque thinks is inferable from the argument in Day v. Hungat, 1 Ro. Rep. 115. Eq. Tr. 48.

4 Co. 124.
2 Inst. 483.
Bro. tit.
Fines, 75.
Co. Lit. 247.
12 Co. 123.

Therefore if a person *non compos* acknowledges a fine, it shall stand against him and his heirs; for though the judges ought not to admit of a fine from a madman under that disability, yet when it is once received it shall never be reversed, because, the record and judgment of the court being the highest evidence that can be, the law presumes the conusor at that time capable of contracting; and therefore the credit of it is not to be contested, nor the record avoided by any averment against the truth of it.

2 And. 193.
4 Co. 124.

So, in case of a fine, levied by an idiot, it shall stand against him and his heirs; for no averment of idiocy can vacate the fine; nor will

will an office, finding him an idiot *a nativitate*, be sufficient to reverse the fine, for that were to lessen the credit of judgments in courts of record, by trying them by other rules than themselves.

As to acts done by them *in pais*, they are distinguished into void and voidable, though as to themselves they are regularly unavoidable, because no man is allowed to disable himself, for the insecurity that may arise in contracts from counterfeit madness and folly: besides, if the excuse were real, it would be repugnant that the party should know or remember what he did; but the heirs and executors may avoid such acts *in pais*, by pleading the disability; for there is no such repugnancy in their pleading it.

Boen, 2 Str. 1104.] Bro. tit. *Fait*, 62. F. N. B. 202.

The feoffment of an idiot, or *non compos*, is not void, but voidable; but it cannot be avoided by himself by entry, &c. and the reason hereof given in some books is, as before observed, because no man by law is permitted to disable himself; but the better reason in this case seems to be, that anciently these feoffments were made not only for the benefit of the parties, but of the realm, being annually paid for by the attendance of the tenants in military service, or in tillage, and so were presumed to be equally for the benefit of the lord and tenant, and therefore they were not holden to be void in themselves; and though an infant, at the age of discretion, defined by the law, might avoid them, and choose which is most for his benefit; yet as to a person of *non sane memory*, there being no time defined when he recovers his senses, he cannot avoid such acts of his own by any subsequent act of his; but the king, who is the universal curator of all madmen, may by writ *de idiota inquirendo* avoid such alienation, on office found; for the office, being of equal or greater solemnity than the feoffment, gives notice to all men in whom the freehold is vested; and after such office, if the commission of lunacy be discharged, the lunatick is restored to his lands, because the king is the proper person to judge whether such alienations are for the benefit of the lunatick, or at what time he is to be looked upon to be restored to his senses: also, the heir may avoid such alienations by entry or writ of *dum fuit non compos*, for the reasons before given: but the fine or recovery of a lunatick cannot be avoided, because they are acts of record, and the judges are supposed to take care that no such alienations be allowed, and if they be, there is no way of rectifying the error by a matter of equal notoriety.

But though the king, or heir, may avoid the feoffment of a *non compos*, yet if such a one be, by inquisition, found an idiot *a nativitate*, or a lunatick from such a time, though the inquisition hath relation to the nativity, or time of his becoming a lunatick, so as to avoid mesne acts, yet it shall not have relation to these times to entitle the king to the mesne profits, for these the tenant is entitled to in consideration of the services which he is obliged to do to those of whom the land is holden: (a) also, the king's title must appear by matter of record, which cannot be before the inquisition found.

4 Co. 124.
5. Bever-
ley's case,
Stroud v.
Marshall,
Cro. El.
398. *Smb.*
[contr. And
so 2 El.
Comm. 291.
Yates v.

4 Co. 123.,
&c. Show.
P. C. 152.
Carth. 211.
435. Ld.
Raym. 313.
3 Mod. 301.
2 Salk. 427.
pl. 2.
Show. 296.
Comyns, 45.
pl. 30.
Comb. 468.
12 Mod.
174. 3 Salk.
300. pl. 10.
2 Salk. 576.
pl. 2. 618.

Ley, 25, 26.
8 Co. 170.
Touffon's
case.

(a) *Vide*
Plow. 488.
b.

Also,

4 Co. 124.

Also, such heirs and representatives, as can take advantage of the voidable acts of those they represent, must be privies in blood, as heirs are, or by representation, as executors; but privies in estate, as those in remainder or reversion, or by tenure, as the lord by escheat, cannot take advantage of the disability of him who made the feoffment.

2 Roll.

Abr. 728.

4 Co. 124.

125.

But the release, surrender, letter of attorney to give livery, warranty, or any other deed or writing obligatory, though they regularly at law, as hath been said, bind the *non compos*, are mere nullities with respect to others, and differ from a feoffment, which is a matter of greater solemnity, being anciently transacted *coram paribus curiæ*, who signed their attestation to the same, which, it is presumed, they would not have done, had the indiscretion been apparent.

Carth. 435.

2 Salk. 427.

pl. 2. 576.

pl. 2.

Show. Par.

Ca. 152, 3.

3 Mod. 301.

Comb. 468.

3 Lev. 284.

S. C.

Thompson

v. Leach,

adjudged in

B. R. and

affirmed in

the House

of Lords.

(a) There-

fore if a

man of *non**sane* memo-

ry, being

seised of a

carve of

land, grant a

rent issuing

out of the

same land in

fee, and die,

and his heir

enter, and

the grantee

distrain for

the rent be-

hind, the heir shall have an action of trespass; but if the grantee had distrained in the life of the

grantor for the rent behind, the grantor should not have an action of trespass; for he cannot avoid his

deed by disabling himself. Perk. § 21.

4 Co. 124. a.

10 Co. 42. b.

2 Inst. 483.

Bro. Fait.

Inrol. 14.

Therefore, where a person *non compos* being tenant for life, with remainder to his first and other sons, remainder over, did before the birth of any son surrender to him in remainder, with an intent to destroy the contingent remainders, and died, leaving issue a son; in this case it was holden, 1st, That the surrender was void *ab initio*, and not barely voidable; for had it been voidable only, yet if at any time it had been effectual to merge the estate for life before the birth of a son, it could not have been revived again by any act *ex post facto*. 2^{dly}, That the surrender being void *ab initio*, the son, though he did not claim as heir, but by way of remainder, may take advantage of it: and this resolution seems agreeable to the strictest rules of reason and law; for if the surrender had been allowed good or voidable only, it would have been prejudicial to all his sons after born, who were strangers, and third persons, and there could no use be made of the surrender but to do them mischief, which the acts of a madman ought not to be allowed to do, when by a reasonable construction, it is in the power of the court to help them: and in this case a difference was taken between a feoffment and livery made *propriis manibus* of an idiot, and the bare execution of a deed by sealing and delivery thereof, as in cases of surrenders, grants, releases, &c. which have their strength only by executing them, and in which the formality of livery and seisin is not so much regarded in the law; and therefore the feoffment is not merely void, but voidable; but surrenders, (a) grants, &c. by an idiot are void, *ab initio*.

If an idiot or lunatick enter into a recognizance, or acknowledge a statute, neither they themselves, nor their heirs nor executors can avoid them; for these are securities of a higher nature than specialties and obligations, which yet they themselves cannot avoid, and being matters of record, and equivalent to judgments of the superior courts, neither they themselves, their heirs nor executors, can avoid them.

Co. Lit.

166. a.

If parceners of *non sane memory* make partition, unless it be equal, it shall only bind the parties themselves, but not their issue: and the reason

reason it binds the parties themselves is the same for which all other contracts bind them, *viz.* because no man is admitted to stultify himself: and the reason their issue may avoid such partition is the same likewise for which they may avoid all other contracts made by such ancestors during their insanity, *viz.* because they may be admitted to shew the incapacity of their ancestor, and so avoid all acts done by them during that time. 4 Co. 125.

And although, as hath been observed, according to the strict rules of law no person is allowed to stultify himself, yet it seems that even at law the contracts of idiots and lunatics, after office found, and the party legally committed, are void, and it must be at the peril of him who deals with such a one; and that if afterwards the commission of lunacy be superseded or discharged, the *non compos* shall be restored to his legal right: but this it seems, must be at the suit and application of his committee.

Also, there are frequent instances in equity, where not only idiots and lunatics, who come within the protection of the law, but also persons of weak understandings have been relieved, when they appeared to have been imposed upon in their dealings; and unreasonable purchases, and securities obtained from them have been set aside in their favour. But for this *vide* Chan. Ca. 113. 153. Vern. 155. 2 Vern. 189. 414. 678. & *vide* tit. Agreements.

A bill was brought by a lunatick and his committee, to set aside a settlement which had been obtained from him by the defendant before the issuing out of the commission of lunacy, but subsequent to the time wherein by the commission he was found to have been a lunatick, and the bill charged several acts of insanity and distraction previous to the making of the settlement, and the issuing out of the commission; and charged likewise, that the commission of lunacy was still in force: to this bill the defendants demurred, for that it was against a known maxim in law, that any person should be admitted to stultify himself; because during the continuance of the lunacy he cannot be supposed to know what he did. But my lord chancellor over-ruled the demurrer, and said, that rule was to be understood of acts done by the lunatick to the prejudice of others, that he should not be admitted to excuse himself on pretence of lunacy, but not as to acts done by him to the prejudice of himself; besides, here, the committee is likewise plaintiff, and the several charges of lunacy are by him in behalf of the lunatick; and it has been always holden, that the defendant must answer in that case; and so he was ordered to do here, though the settlement was not unreasonable in itself, being only to limit the estate in question to the defendants the uncles, in case of failure of issue male of the lunatick, with power for the lunatick to charge the same with considerable portions for his three daughters, with a power of revocation. Abr. Eq. 279. Ridler v. Ridler.

Idiots and lunatics, during their lunacy, are incapable of making (a) any will or testament; as are also persons grown childish by reason of extreme old age: so, one actually drunk, if he be so drunk as to have lost the use of his reason: but though a person who wants understanding cannot make a will, yet the rule herein is not to be taken Swinb. 71. Godolph. Orph. Leg. 25. (a) The statute of 32 H. 8. c. 1. gives a

power to dispose of lands by will, except infants, idiots, feme covert, and persons of *non sane* memory.

taken from his not being able to measure an ell of cloth, tell twenty, or the like; but whether he have sense enough to dispose of his estate (a) with understanding.

(a) That it is sufficient that he be able to answer to familiar and usual questions. Cro. Jac. 497. 6 Co. 23. a.

Swinb. 72.
Godolph.
25. Dyer,
203. 8 Co.
147. [For the rules of determining what shall be considered a lucid interval, where previous lunacy hath been proved or admitted, see Attorney-General

But every person making a will is presumed to be of sound understanding, until the contrary be proved; so that the *onus probandi* lies on the other side: if the testator used to have fits and lucid intervals, and it cannot appear whether the will be made in the one or the other time, it shall be presumed to be made in the lucid intervals, if there be no argument of folly in the will; nay, though the testator had no lucid intervals, yet if it cannot be proved that he was mad at the time of making the will, it shall be presumed there was an intermission of madness at the time of making the will, if the will be a sensible, orderly will; but the least word of folly in such a will will overthrow it: on the other hand, if one be a very idiot, and make a good sensible will, yet the will shall not stand.

v. Panther, Fonbl. Eq. Tr. 65. n. x. 3 Br. Ch. Rep. 441.]

Godolph.
26. 4 Co.
61. b.
(b) Vern.
105.

If a person of sound memory makes his will, and afterwards becomes *non compos*, this is no revocation of the will; yet (b) a bill will not lie in the lifetime of the *non compos*, to establish the testimony of the witness in *perpetuam rei memoriam* to such a will.

Owen v.
Davis,
1 Vez. 82.
Fonbl. Eq.
Tr. 46.

[Courts of equity will not only sustain contracts completed by the lunatick whilst sane; but, under some circumstances, will enforce performance of such as were entered into before, but were not complete at the time of the lunacy: "for the change of the condition of a person entering into an agreement, by becoming lunatick, will not alter the rights of the parties, which will be the same as before, provided they can come at the remedy; as, if the legal estate be vested in trustees, a court of equity ought to decree a performance; but if the legal estate be vested in the lunatick himself, that may prevent the remedy in equity, and leave it at law."]

[By Stat.
15 Geo. 2.
c. 30. the marriage of a person duly found a lunatick shall be null and void, unless he be previously declared sane by the lord chancellor or his trustees.]

By the 4 Geo. 2. cap. 10. it is enacted, "That it shall and may be lawful to and for any person or persons, being idiot, lunatick, or *non compos mentis*, or for the committee or committees of such person or persons, in his, her, or their name or names, by the direction of the lord chancellor of Great Britain, or the lord keeper, or commissioners of the great seal for the time being, signified by an order made upon hearing all parties concerned, on the petition of the person or persons for whom such person or persons, being idiot, lunatick, or *non compos mentis*, shall be seised or possessed in trust, or of the mortgagor or mortgagors, or of the person or persons entitled to the monies secured by or upon any lands, tenements, or hereditaments, whereof any such person or persons, being idiot, lunatick, or *non compos mentis*, is or are, or shall be seised or possessed by way of mortgage, or of the person or persons entitled to the redemption

“ redemption thereof, to convey and assure any such lands, tene-
 “ ments, or hereditaments, in such manner as the lord chancel-
 “ lor, &c. shall by such order so to be obtained direct, to any
 “ other person or persons; and such conveyance or assurance, so
 “ to be had and made as aforesaid, shall be as good and effectual
 “ in law, to all intents and purposes whatsoever, as if the said
 “ person or persons, being idiot, lunatick, or *non compos mentis*,
 “ was or were, at the time of making such conveyance or assur-
 “ ance, of *sane* mind, memory, and understanding, and not idiot,
 “ lunatick, or *non compos mentis*, or had by him, her, or them-
 “ selves executed the same; any law, &c.”

And it is further enacted, “ That all and every such person
 “ and persons being idiot, &c. and only trustee or trustees, mort-
 “ gagee or mortgagees as aforesaid, or the committee or com-
 “ mittees of all and every such person and persons being idiot,
 “ lunatick, or *non compos mentis*, and only such trustee or mort-
 “ gagee as aforesaid, shall and may be empowered and com-
 “ pelled, by such order so as aforesaid to be obtained, to make
 “ such conveyance or conveyances, assurance or assurances as
 “ aforesaid, in like manner as trustees or mortgagees of *sane* me-
 “ mory are compellable to convey, surrender or assign their trust-
 “ estates or mortgages.”

[It is doubtful whether the words of this act include all luna-
 ticks, as well such as are at large, as those of whom custody hath
 been granted by the great seal.] *Ex parte*
Marchio-
nells of An-
nandale, Amb. 80.

By the stat. 29 Geo. 2. c. 31. lunaticks are enabled to surren-
 der leases under the direction of a court of equity for the pur-
 pose of renewing them.

(G) How they are to sue and defend.

WHEN an idiot doth sue or defend he shall not appear by
 guardian, (a) *prochein amy*, or attorney, but he must be ever
 in proper person. *Co Lit.*
 135. b.
 F.N.B. 27.
 2 Init. 390.

(a) The statute West. 2. c. 15. extends not to an idiot.

But otherwise of him who becomes *non compos mentis*; for he
 shall appear by guardian, if within age, or by attorney, if of full
 age. *4 Co. 124. b.*
Palm. 520.
Et vide 2
Saund. 235.

If a trespass be committed in the lands of a lunatick who is
 legally committed, (b) the committee cannot bring an action of
 trespass; but this must be brought in the name of the lunatick.
 to be relieved against a debt assigned by the lunatick without consideration; it was holden
 that the lunatick should be made a party. [For this would have been to stultify himself. *1 Ch. Caf. 113.*
 But he may be party to a suit to enforce an agreement entered into before his lunacy, for there that ob-
 jection doth not arise. *1 Ch. Ca. 153.*]

2 Sid. 125.
 (b) Where a
 suit was
 commenced

If a lunatick be sued, he must have a committee assigned to
 him to defend the suit. *Vern. 106.*

[So, if a person who is in the condition of an idiot or luna-
 tick, though not found such by inquisition, is made a defendant,
 the *Mitt. Eq.*
Pl. 95. 3 P.
Wms. 111.

the court of Chancery, upon proper information of his incapacity, will direct a guardian to be appointed.

1 Ch. Ca.

312. 153.

4 Br. P. C.
559.

Informations are sometimes exhibited by the attorney-general, on behalf both of idiots and lunatics, considering them as under the peculiar protection of the crown.]

Indictments.

2 H. P. C.
209.

2 Burr.
1088.

(a) A presentment is a more comprehensive term than indictment; for, regularly an indictment is an accusation given in

AN indictment is defined an accusation at the suit of the king, by the oaths of twelve men [at least, and not more than twenty-three] of the same county wherein the offence was committed, returned to inquire of all offences in general in the county, determinable by the court in which they are returned, and finding a bill brought before them to be true: But when such accusation is found by a grand jury, without any bill brought before them, and afterwards reduced to a formed indictment, it is called (a) a presentment: And when it is found by jurors returned to inquire of that particular offence only which is indicted, it is properly called an inquisition.

against a person by the grand inquest for some misdemeanour, whereunto he is put to answer; but presentments not only include such indictments, but also some other informations, whereunto the party is not put to answer; as presentments of *felo de se*, of *fugam fecit*, of *deadands*, of deaths *per infortunium*, &c. 2 Hal. Hist. P. C. 152-3.—That regularly all presentments and indictments are traversable, and conclude not the party, or those claiming under him. 2 Hal. Hist. P. C. 153-4.

For the better understanding the law herein, the same hath been reduced to the following heads.

(A) Of the Nature of an Indictment, and how far it is considered as a Prosecution at the Suit of the King.

(B) Where it is necessary, or the Party may be tried for a Capital Offence without it.

(C) By whom it is to be found: And therein who may and ought to be Indictors.

(D) Whether the Indictors or Grand Jury may find Part of a Bill brought before them true, and Part false.

(E) What Matters are indictable.

(F) Within

(F) Within what Place the Offence inquired of must arise.

(G) What ought to be the Form of the Body of an Indictment at Common Law: And herein,

1. How the Body of an Indictment at Common Law ought to set forth the Substance and Manner of the Fact.
2. How, the Persons mentioned or referred to in it.
3. How, the Thing wherein the Offence was committed.
4. How, the Circumstances of Time and Place.
5. Where the Offence indictable may be laid jointly, and where severally, and where both jointly and severally, and where the Offences of several Persons may be laid in one Indictment.
6. Whether the Words *Vi & Armis* be in any Case necessary.
7. Whether it be necessary to lay the Words *contra Pacem*.
8. Whether it be necessary to lay it *contra Coronam & Dignitatem Regis*.
9. Whether it be necessary to lay it in *Contemptum Regis*.
10. Whether necessary to lay it *illicitè*.
11. Whether a Defect in any of these Particulars be amendable.

(H) What ought to be the Form of an Indictment upon a Statute: And herein,

1. Whether it be necessary that such Indictment recite the Statute whereon it is grounded.
2. What Misrecitals of such Statutes are fatal.
3. How far it is necessary to bring the Offence indicted within the very Words of the Statute.
4. Whether an Indictment grounded on a Statute that will not maintain it, may be good as an Indictment at Common Law.
5. How far it is necessary to conclude *Contra Formam Statuti*.

(I) What ought to be the Form of a Caption of an Indictment.

(K) Where an Indictment may be quashed.

(A) Of

(A) Of the Nature of an Indictment, and how far it is considered as a Prosecution at the Suit of the King.

2 Hal. Hist.
P. C. 169.

AN indictment is a brief narrative of an offence committed by any person, which the publick good requires should be punished; and therefore it is said to be a prosecution at the suit of the king merely.

2 Hawk.
P. C. c. 25.
§ 3.

Hence also, from its being the king's suit, it is every day admitted that the party, who prosecutes it, is a good witness to prove it.

Roll. Abr.
220. 2 Roll.
Abr. 83.
Cro. Car.
531. 558.
2 Hawk.
P. C. c. 25.
§ 3.

And from its being the king's suit it is agreed, that no damages can be given the party grieved upon an indictment, or any other criminal prosecution; notwithstanding the king, by his commission erecting a new court, expressly direct that the party shall recover his damages by such a prosecution.

Jones, 380.
Cro. Car.
448. Roll.
Abr. 220.
2 Hawk.
P. C. c. 25.
§ 3.

Also, where by statute damages are given to the party grieved by the offence intended to be redressed, it seems that they cannot be recovered on an indictment grounded on such statute, unless such method of recovering them be expressly given by the statute; but that they ought to be sued for in an action on the statute, in the name of the party grieved.

2 Hal. Hist.
P. C. 171.
Et vide
Castle's case,
Cro. Jac.
643-4. [and
the distinction
taken
by the court
in the case

But if a statute prohibit any act to be done, and by a substantive clause give a recovery by action of debt, bill, plaint, or information, but mention not indictment, the party may be indicted upon the prohibitory clause, and thereupon fined, but not to recover the penalty, as upon the statute of 3 Jac. cap. 5. prohibiting recusants to baptize their children by a popish priest: but then it seems the fine ought not to exceed the penalty.

of the King v. Robinson, 2 Burr. 805. "that where the offence intended to be guarded against by a statute was punishable *before* the making of such statute prescribing a particular method of punishing it, there, such particular remedy is cumulative, and does not take away the former remedy: but where the statute only enacts, that the doing any act *not punishable before*, shall for the future be punishable in such and such a particular manner, there, such particular method, by such act prescribed, must be specifically pursued; and not the common law method of an indictment." Rex v. Balme, Cowp. 650. S. P. Yet the doctrine in the text will hold in respect of a new offence created by a statute, if the penalty be annexed to it by a separate and substantive clause; for in that case, it is not necessary for the prosecutor to sue for the penalty, but he may proceed on the prior clause on the ground of its being a misdemeanour. Rex v. Harris, 4 Term Rep. 202. Rex v. Wright, 1 Burr. 543.]

2 Hal. Hist.
P. C. 171.

But if the act be not prohibitory, but only that if any person shall do such a thing, he shall forfeit 5 l. to be recovered by action of debt, bill, plaint, or information, he cannot be indicted for it; but the proceeding must be by action, bill, plaint, or information.

Keb. 487.
2 Hawk.
P. C. c. 25.
§ 3.

And although damages cannot be recovered on an indictment, yet the court of King's Bench, having the king's privy seal for that purpose, may give to the prosecutor the third part of the fine assessed on a criminal prosecution for any offence whatsoever.

Also, it is every day's practice of that court to induce defendants to make satisfaction to prosecutors for the costs of the prosecution, and also for the damages sustained by the injury, whereof the defendants are convicted, by intimating an inclination on that account to mitigate the fine due to the king. 2 Hawk.
P. C. c. 25.
§ 3.

(B) Where it is necessary, or the Party may be tried for a capital Offence without it.

IN all criminal causes the most regular and safe way, and most consonant to the common law, and the statutes of *Magna Charta*, cap. 29. 5 E. 3. cap. 9. 25 E. 3. cap. 4. 28 E. 3. cap. 3. and 42 E. 3. cap. 3. is by presentment or indictment of twelve sworn men; yet, at common law, there were several means of putting the party to answer for a criminal offence without any indictment, some whereof are still in force, and others either grown obsolete, or wholly taken away by statute. 2 Hal. Hist.
P. C. c. 20.

1. If a thief or robber had, on fresh pursuit, been taken with the manour, and the goods found upon him brought into the court with him, he might have been tried immediately, without any indictment: And this is said to have been the proper method of proceeding in such manors which had the franchise of ingangtheft, but is (a) obsolete at this day. 2 Hawk.
P. C. c. 25.
§ 3.
(a) This proceeding upon the manour is wholly

taken away by the statutes 25 E. 3. c. 4. 28 E. 3. c. 3. 42 E. 3. c. 3. 2 Hal. Hist. c. 20.

2. Another kind of proceeding in cases capital without indictment is, where an appeal is brought at the suit of the party, and the plaintiff is (b) nonsuit upon that appeal, yet the offender shall be arraigned at the king's suit upon such appeal; and so it is in case the appellant die or release; and in such case, although the party be indicted as well as appealed, yet, upon the nonsuit of the plaintiff, the proceeding for the king shall not be upon the indictment, but upon the appeal. 2 Hal. Hist.
P. C. c. 20.
(b) That such nonsuit, &c. must be after the appellant has declared, and that such appeal

must have been well commenced: But for this *vide* 2 Hawk. P. C. c. 25. § 9.

3. If a person indicted of treason or felony confesses the fact, and accuses others of being guilty of the same offence with him, by which he becomes and is admitted an approver, the parties accused may, on his appeal, be tried without other indictment or presentment. 2 Hal. Hist.
P. C. c. 20.
But for the learning hereof *vide* 2 Hawk.
P. C. c. 24. 2 Hal. Hist. P. C. c. 225, &c.

4. There were before the statute of 1 H. 4. cap. 14. appeals by particular persons, especially of treason, in parliament, which are said to have been very frequent in ancient times, and especially in the reign of Rich. 2. but are now wholly taken away by the said statute; and therefore (c) where in the reign of Char. 2. the Earl of Bristol preferred articles of high treason, and other misdemeanours, against the Earl of Clarendon, it was resolved by all the judges, that such articles were within the said statute 1 H. 4. 2 Hale's Hist. P. C. c. 20.
(c) State Tri. vol. 2. p. 550.— And note, that though in all capital offences a peer is to be

tried by his peers, yet it must regularly be upon an indictment found against him by a grand jury of commoners. 2 Hawk, P. C. c. 44. § 14.

2 Hal. Hist. But impeachments by the House of Commons of high treason,
P. C. c. 20. or other misdemeanours, in the Lords' House, have been fre-
[But in the quently in practice, notwithstanding the statute of 1 H. 4. and
case of com- are neither within the words nor intent of that statute; for it is
moners, im- a presentment by the most solemn grand inquest of the whole
peachments kingdom.
are now con- fined to mis-
demefnours, though perhaps it was formerly otherwise. Fitzharris's case, 1681. 8 Grey's Debates, 332.
Seld. jud. parl.—Parl. hist. temp. Rich. 2.]

2 Hawk. 5. If in a civil action in the King's Bench *de muliere abductâ*
P. C. c. 25. *cum bonis viri*, upon not guilty pleaded, the defendant be convicted
§ 6. : and and found guilty of having carried away the woman and goods
several au- with force and feloniously, he may be put to answer the felony
thorities without farther accusation; for such a charge, by the oaths of
there cited. twelve men on their inquiry into the merits of a cause, in a court
2 Hal. Hist. which has jurisdiction over the crime, is equivalent to an indict-
c. 20. ment; and the king being always, in judgment of law, present
in court, may take advantage of any matter therein properly
disclosed for his benefit.

2 Hawk. So, if upon a special verdict, in a common action of trespass
P. C. c. 25. brought in the King's Bench, it be found that the defendant
§ 6. 2 Hal. took the goods feloniously, this may serve for an indictment.
Hist. c. 20.

2 Hal. Hist. So, if in an action of slander, for calling a man thief, the de-
P. C. c. 20. fendant justify that he stole goods, and issue be thereupon taken,
and it be found for the defendant; if this be in the King's Bench,
and for felony in the same county where the court sits, or if it be
before justices of assize, who have also a commission of gaol-
delivery, he shall be forthwith arraigned upon this verdict as on
an indictment; and the reason is, because here is a verdict of
twelve men in these cases, and so the verdict, though in a civil
action, serves the king's suit as an indictment, and is not contrary
to the acts of 25 E. 3. cap. 4. 28 E. 3. cap. 3. and 42 E. 3. cap. 3.
which enact, that no man shall be put to answer, &c. but by in-
dictment or presentment.

2 Hawk. But such a finding, in a court which hath not criminal jurisdic-
P. C. c. 25. tion, is of no force.
§ 6.

2 Hawk. Neither shall a jury's finding *A.* guilty on the trial of an indict-
P. C. c. 25. ment against *B.* amount to an indictment against *B.*, because the
§ 6. finding of one man guilty on the trial of another is extrajudicial,
except only in the case of a coroner's inquest of death, taken on
view; for the finding of a stranger guilty, upon the acquittal of
a defendant, on the trial of such an inquest, is not wholly extra-
judicial, because the jury acquitting the man on such an inquest,
must inquire what other person did the fact.

2 Hawk. Also, if on a declaration in the King's Bench against *A.* for
P. C. c. 25. having been guilty of a misdemeanour *simul cum B.* the jury find
§ 6. *B.* guilty; it is said, that such a finding is equivalent to an in-
dictment, because it is not wholly extrajudicial.

2 Hal. Hist. 6. If the sheriff return a rescue of a prisoner taken for felony,
P. C. c. 20. or breach of prison by one arrested for felony, this is not suffi-
2 Hawk. cient

cient to arraign the party, nor doth it (a) countervail an indictment, for it is not by the oath of twelve men. P. C. c. 25. § 14.
 abuse offered to the process of a court, is such a contempt as is punishable by imprisonment; for though by the statute of *magna charta*, &c. no man is to be imprisoned *sine judicio parium*, *vel per legem terræ*; yet it is one part of the law of the land to commit for contempts, not taken away by any statute; *vide tit. Attachments.* (a) But an

And although informations are practised oftentimes in the Crown-office in cases criminal, and by many penal statutes, the prosecution upon them is by the acts themselves limited to be by bill, plaint, information, or indictment, yet the method of prosecution of capital offences is still to be by indictment, except in the cases above-mentioned. 2 Hal. Hist. P. C. c. 20. vide 5 Mod. 459. &c.

(C) By whom it is to be found: And herein who may and ought to be Indictors.

EVERY indictment is to be found by (b) twelve lawful liege freemen of the (c) county wherein the crime was committed, returned by the proper officer, without the nomination of any other person. But for this vide head of Juries. (b) That if it appears by the caption

of the indictment, or otherwise, that it was found by less than twelve men, the proceedings upon it will be erroneous. 2 Hawk. P. C. 215. [Nor ought there to be more than twenty-three. 2 Burr. 1008.]
 But if there be thirteen, or more, of the grand jury, and twelve agree, it is sufficient, though the rest dissent. 2 Hal. Hist. P. C. 161. (c) For they are sworn *ad inquirendum pro corpore comitatus*, and cannot regularly inquire of a fact done out of that county for which they are sworn, unless specially enabled by act of parliament. 2 Hal. Hist. P. C. 163.

They must be *probi & legalis homines*; therefore it is a good exception to one returned on a grand jury, that he is an alien or villain, attainted in a conspiracy, or *decies tantum*, or of perjury, or (d) outlawed, or attaint of felony or *præmunire*. 2 Hal. Hist. P. C. 155. (d) Though it be in a personal action. 2 Hal. Hist. P. C.—But this is left a *quare* in 2 Hawk. P. C. c. 25. § 18.

(D) Whether the Indictors, or Grand Jury, may find Part of a Bill brought before them true, and Part false.

IT seems to be generally agreed, that a grand jury must find either *billa vera*, or *ignoramus* for the whole; and that if they take upon them to find it specially or conditionally, or to be true for part only, and not for the rest, the whole is void, and the party cannot be tried upon it, but ought to be indicted anew (e). 2 Roll. Rep. 52. 3 Bull. 206. Roll. Rep. 407. 2 Hawk. P. C. c. 25.

§ 2. [(e) This doctrine relates only to cases where the grand jury take upon themselves to find part of the *same* indictment true, and part false; for there they neither affirm nor deny the fact submitted to their inquiry. But where there are two distinct counts, *viz.* one for an assault, and the other for a riot, they may find a true bill as to the one, and indorse *ignoramus* as to the other, for this finding leaves the indictment as to the count found, just as if there had been originally only that one count. *Rex v. Fieldhouse*, Cowp. 325.]

Hence it hath been holden, that if a grand jury indorse a bill of murder, *billa vera se defendendo*, or *billa vera* for manslaughter, 3 Bull. 206. 2 Roll. Rep. 52.

Sid. 23.
2 Keb. 180.
Keil. 50.

and not for murder, the whole is void; and the reason hereof given, is, that the grand jury are not to distinguish betwixt murder and manslaughter, for it is only the circumstance of malice that makes the difference, and that may be implied by the law without any fact at all, and so it lies not in the judgment of a jury, but of the judge: also, the intention of their finding indictments is, that there may be no malicious prosecution; and therefore if the matter of the indictment be not framed of malice, but is *verisimilis*, though it be not *vera*, yet it answers their oaths to present it.

Vide 2 Hal.
Hist. 161.
& vide tit.
Juries.

But it seems to be now agreed, that the grand jury may, without subjecting themselves to any punishment, find part of a bill true, and part false, and that against the direction of the court.

2 Hal. Hist.
162.

And it is said by *Hale*, that if a bill of indictment be for murder, and the grand jury return it *billa vera quoad* manslaughter, and *ignoramus quoad* murder, the usual course is, in the presence of the grand jury, to strike out *malitiosè*, and *ex malitiâ suâ præcogitatâ*, and *murdravit*, and leave in so much as makes the bill to be but bare manslaughter.

2 Hal. Hist.
162.

But yet the safest way is to deliver them a new bill for manslaughter, and they to indorse it generally *billa vera*, for the words of the indorsement make not the indictment, but only evidence the assent or dissent of the grand inquest; it is the bill itself is the indictment, when affirmed.

2 Hal. Hist.
158.

But notwithstanding this discretionary power in the grand jury, yet, by the same author, if *A.* be killed by *B.* so that it *constat de personâ occisi & occidentis*, and a bill of murder be presented to them, regularly, they ought to find the bill for murder, and not for manslaughter, or *se defendendo*; because otherwise offences may be smothered without due trial, and when the party comes upon his trial, the whole fact will be examined before the court and the petty jury; and in many cases it is a great disadvantage to the party accused; for if a man kill *B.* in his own defence, or *per infortunium*, or possibly in executing the process of law, upon an assault made upon him, or in his own defence upon the highway, or in defence of his house against those who come to rob him, (in which three last cases it is neither felony nor forfeiture, but upon not guilty pleaded, he ought to be acquitted;) yet if the grand inquest find *ignoramus* upon the bill, or find the special matter, whereby the prisoner is dismissed and discharged, he may nevertheless be indicted for murder seven years after.

Yelv. 99.
2 Hawk.
P. C. c. 25.
§ 2.

If the grand jury indorse an indictment on the statute of news *billa vera*, but whether *ista verba prolata fuerunt malitiosè, seditiosè, vel contra, ignoramus*; or if they indorse an indictment of forcible entry and forcible detainer, *billa vera* as to the forcible entry, and *ignoramus* as to the forcible detainer; or if they indorse, that if the freehold were in *J. S.* or the possession were in *J. S.* then they find *billa vera*, the whole is void.

(E) What Matters are indictable.

NOT only capital offences, such as treasons and felonies, are indictable, but likewise all other crimes being of a publick nature, and *mala in se*, though of an inferior kind; as misprisions, and all other contempts, all disturbances of the peace, all oppressions, and all other (a) misdemeanours whatsoever of a publick evil example against the common law, may be indicted.

master of the rolls, and for wearing a sword with an intent to kill the master of the rolls, &c., or to that effect, it was moved in arrest, that an attempt only is not punishable in our law, *Et non efficit conatus nisi sequatur effectus*; but the court held clearly, that though in cases of felony the law be not as it was heretofore, when *voluntas reputatur pro facto*, yet, as to matters of misdemeanours, attempts and conspiracies are punishable. Sid. 230. Lev. 146. Keb. 809. Bacon's case, [and see further Rex v. Kinnerley, 1 Str. 193. Rex v. Rispal, 3 Burr. 1320. Indictments also lie for refusing a publick office, or neglecting duties imposed by the law. Rex v. Lone, 2 Str. 920. Rex v. Jones, Id. 1146. Rex v. Boyall, 2 Burr. 832. Rex v. Bootie, Id. 854; for disobeying an order of sessions, Rex v. Robinson, Id. 799. for words in defamation of a magistrate spoken in his presence and in the execution of his office, Rex v. Revel, 1 Str. 420. but *quæ* whether for such words spoken in his absence? and see Rex v. Pocoke, 2 Str. 1157. Rex v. Darby, 3 Mod. 139. Comb. 45. 69. Indictments have been also allowed for nuisances, in making great noises in the street, Rex v. Smith, 2 Str. 704; for carrying on offensive (though it could not be proved that they were unwholesome) manufactories, as preparations of aqua fortis, or the like, Rex v. White, 1 Burr. 333. for offences against common decency, as for taking up dead bodies, though for anatomical purposes, Rex v. Lynn, 2 Term Rep. 733. for a great immorality in publick, Rex v. Sir Charles Sedley, 1 Sid. 168. 2 Str. 790. So, for using false weights and measures, for producing false tokens, and for any attempts to cheat and deceive, provided they be such as people cannot by any ordinary care or prudence be guarded against; for where common prudence may guard persons from not suffering by them, the offence is not indictable. Rex v. Wheatly, 2 Burr. 1129. Indictments will not lie for an accidental injury in a publick way in the doing of a lawful act, Rex v. Gill, 1 Str. 190. nor for impeding the publick intercourse by distributing hand-bills in the streets, Rex v. Sarmon, 1 Burr. 516.]

But no injuries of (b) a private nature, unless they some way concern the king, can be punished by way of indictment at common law.

Carth. 277. Presentment, 26. (b) And therefore where one was indicted for these words, *viz.* The justices of peace have no power to set up a watch-house where the old one stood; the indictment was quashed, because the words are not indictable, for it is a question touching a right. Trin. 27 Car. 2. Captain Cane's case. — [Selling short measure, Rex v. Combrune, 1 Wils. 301. Rex v. Wheatly, 2 Burr. 1125. Rex v. Dunage, Id. 1130. Rex v. Osborn, 3 Burr. 1697. excluding commoners by inclosing, Willoughby's case, Cro. El. 90. entering a yard, erecting a shed, unthatching a house, or by numbers keeping another out of possession, if unattended with violence or riot, Rex v. Storr, 3 Burr. 1698. Rex v. Atkins, Id. 1706. Rex v. Blake, Id. 1731. disobeying a bye-law, Rex v. Sharples, 4 Term Rep. 777. all these are offences of a private nature, and of course, not punishable by indictment.]

Also, generally, where a statute either prohibits a matter of publick grievance, or commands a matter of publick convenience, as repairing the common streets of a town, &c. every such disobedience of such statute is indictable; but if the party hath once been fined in an action on the statute, such fine is, it seems, a good bar to the indictment, because by the fine the end of the statute is satisfied.

doing of it wilfully, although without any corrupt motive, is indictable. Rex v. Sainsbury, 4 Term Rep. 457.]

Also, if a statute extend only to (c) private persons, or if it extend to all persons in general, but chiefly concern disputes of a private nature, (d) as those relating to distresses made by lords on their

2 Hawk.
P. C. c. 25.
§ 4.
(a) Where
one was in-
dicted for
hiring a man
to kill the

27 Ass.
pl. 20.
Bro. Indict-
ment, 16.

2 Inst. 55.
163. Cro.
Jac. 577.
Mod. 34.
Sid. 209.
[Where a
statute for-
bids the do-
ing of a
thing, the

(c) Sid. 209.
(d) Mod. 71.
288. Lev.
299. Raym.

205. Vent. their tenants, it is said, that offences against such statute will
 104. 2 Inst. hardly bear an indictment.
 121. 232.
 2 Hawk. P. C. c. 25. § 4. 2 Keb. 687. 697.

Show. 398. Also, where a statute makes a new offence, which was no way
 3 Keb. 34. prohibited by the common law, and appoints a particular pro-
 273. Cro. ceeding against the offender, as by commitment, or action of
 Jac. 643, debt, or information, &c. without mentioning an indictment, it
 644. seems to be settled at this day, that it will not maintain an indict-
 3 Mod. 79. ment, because the mentioning of the other methods of proceed-
 Palm. 388. ing only, seems impliedly to exclude that by an indictment.
 Sid. 434.
 6 Mod. 86.
 2 Roll.
 Rep. 247. 398. 2 Hawk. P. C. c. 25. § 4. 2 Str. 679.

Trin. 3G.1. Yet it hath been adjudged, that if such a statute give a reco-
 Rex v. very by action of debt, bill, plaint, or information, or otherwise,
 Dixon, it authorizes a proceeding by way of indictment.
 2 Hawk.
 P. C. *ubi supra*.

2 Hawk. Also where a statute adds a new penalty to an offence prohib-
 P. C. *ubi* ited also by the common law, it is in the election of the prosecu-
supra and tor to proceed either at common law, or on the statute; and if
infra. (13.) he conclude his indictment *cont. formam statuti*, and cannot make
 it good as an indictment on the statute, yet if the indictment be
 good as an indictment at common law, it shall stand as such, and
 the words *contra formam statuti* shall be rejected.

(F) Within what Place the Offence inquired of must arise.

2 Hal. Hist. THE grand jury are sworn *ad inquirendum pro corpore comitatus*,
 P. C. 163. and therefore, by the common law, cannot regularly indict or
 2 Hawk. present any offence which does not arise within the county or pre-
 P. C. c. 25. cinct for which they are returned.
 § 34. [The
 King cannot
 by charter, authorize the trial of offences out of the county where they are committed, *ibid*. Dougl. 796.]

2 Hawk. And therefore, it is a good exception to an indictment, that
 P. C. *ibid*. it doth not appear that the offence arose within such county or
 and several precinct.
 authorities
 there cited.

Hawk. P. C. Also, it hath been holden, that the finding of a collateral matter
ibid. expressly alleged in the indictment, in a different county or pre-
 cinct, is void.

2 Hawk. Also, it hath been generally holden, that the want of an express
 P. C. *ibid*. allegation of the precinct where the offence happened, is not sup-
 plied by putting it in the margin of the indictment, unless it go
 farther, as by adding *in comitatu prædicto*, &c., which seems to be
 sufficient, where in the body of the indictment no other county is
 named before.

Cro. Jac. Also, if a fact be alleged in *B.*, *juxta D. in comitatu E.*, it is said,
 41. Baud's that hereby it sufficiently appears that *B.* is in the county of *E.*
 case.

So,

So, if an arrest be alleged in the county of *A.*, and one be indicted for rescuing the party arrested, without saying in what county, it shall be intended to have been in the county of *A.* where the arrest was. 2 Hawk. P. C. c. ubi supr.

It seems also, that by the common law, if a fact done in one county prove a nuisance to another, it may be indicted in either. 2 Hawk. P. C. c. 25. § 37.

So, if *A.*, by reason of tenure of lands in the county of *B.*, be bound to repair a bridge in the county of *C.*, if the bridge be in decay, he may be indicted in the county of *C.*, that he is bound *ratione tenuræ* of lands in the county of *B.*, to repair the bridge. 2 Hal. Hist. P. C. 164.

Also, by the common law, if one guilty of a (*a*) *larceny* in one county carry the goods stolen into another, he may be indicted in either. 2 Hawk. P. C. 221. (*a*) But if *A.* rob *B.*

in the county of *C.*, and carry the goods into the county of *D.*, *A.* cannot be indicted of robbery in the county of *D.*, because the robbery was in another county; but he may be indicted of *larceny*, or *theft*, in the county of *D.*, because it is theft wherever he carries the goods; the like law in an appeal. 7 Co. 2. a. 2 Hal. Hist. P. C. 163.

If a man marry two wives, the first in a foreign country, and the second in *England*, he may be indicted and tried for it in *England* upon the statute of 1 Jac. 1. cap. 11. which makes it felony, because the second marriage alone was criminal, and the first had nothing unlawful in it, and was merely of a transitory nature; and by (*b*) *Hawkins*, if the second marriage had been in a foreign country the party might have been indicted here within the purview of the said statute 1 Jac. 1. 2 Hawk. P. C. c. 25. § 39. (*b*) 1 Hawk. P. C. c. 43. § 7. But for this *vide* Sid. 171. Kel. 79.

Also, if a woman be taken by force in one county, and carried into another, and there married, the offender may be indicted, &c. in the second county on the statute of 3 H. 7. cap. 2. because the continuance of the force amounts to a forcible taking. 2 Hawk. P. C. c. 25. § 40.

But if an offence in stealing a record, &c. contrary to 8 H. 6. cap. 12. be committed, partly in one county, and partly in another, so as not to amount to a complete offence within the statute in either, it is said, that the party cannot be indicted for a felony in either, but only for a misprison. 2 Hawk. P. C. ubi supr.

But notwithstanding the above instances, it seems agreed as a general rule, that, let the nature of the offence indicted be what it will, if it appear, upon not guilty, to have been committed in a different county from that in which the indictment was found, the party shall be acquitted. 2 Hawk. P. C. c. 25. § 35.

And therefore at the common law, if a man had died in one county of a stroke he received in another, it was holden that the homicide was indictable in neither, because the offence was not complete in either; but to remedy this inconvenience, it is enacted by 2 & 3 E. 6. cap. 24. "That where any one shall be feloniously stricken or poisoned in one county, and die thereof in another, an indictment thereof found by the jurors of the county where the death shall happen, whether before the coroner, on view of the body, or whether before justices of the peace, or other justices, &c., shall be as (*c*) effectual, as if the stroke, &c. had been 2 Hawk. P. C. c. 25. § 36. (*c*) The offender must be tried where the death happened but an appeal may be brought in either

county.
7 Co. 2.
Bulwer's
case. 2 Hal. Hist. P. C. 163.

"been in the county where the party shall die, or where the
"indictment shall be so found."

[And by stat. 2 Geo. 2. c. 21. if the stroke happens in *England*, and the death out of *England*; or *vice versa*, an indictment thereof found by the jurors of the county in which either the death or stroke shall respectively happen, shall be as effectual against both principals and accessaries, as if the offence had been completed in that county.]

2 Hal. Hist.
P. C. 163.

So, if *A.* had committed a felony in the county of *D.*, and *B.* had been accessary before or after in the county of *C.*, *B.* could not have been indicted as accessary in either county at common law; but by the above statute of 2 & 3 E. 6. he is indictable, and shall be tried in the county where he so became accessary.

2 Hal. Hist.
P. C. 163.
2 Hawk.
P. C. c. 25.
§ 48, 9.

It appears to have been a great doubt at common law, how treason done out of the realm was triable; some holding, that it was only triable by appeal before the constable and marshal; others that it was indictable in any county where the king pleased; and some that it was indictable where the offender had lands: but for a plain remedy, order, and declaration of this matter, it is enacted by 35 H. 8. cap. 2. "That all offences then or after made
"or declared to be treasons, misprisions of treason, or conceal-
"ments of treasons, done out of this realm of *England*, shall be
"inquired of, heard, and determined, by the King's Bench, by
"lawful men of the shire where the same bench shall sit; or else
"before such commissioners, and in such shire of the realm, as
"shall be assigned by the king's commission, and by lawful men
"of the same shire, in like manner, to all intents and purposes, as
"if such treasons, &c. had been done within the same shire,
"where they shall be so inquired of, &c."

In the construction hereof it hath been resolved,

2 Hawk.
P. C. c. 25.
§ 50.
(a) 3 Inst.
34. H. P. C.
204. Stanf.
P. C. 90.
Dyer, 286.
3 Inst. 11.
2 Hawk.
P. C. c. 25.
§ 51.

1. That if after an indictment has been taken in pursuance to this statute, the court, or commissioners appointed by the king, remove into a different county, the trial shall be by jurors returned from the first county, (a) being most agreeable to the general course of the common law, which requires that indictments shall be tried by jurors of the same county in which they were found.

2. That the commissioners and county for the trial are well assigned by the king's writing his name to the commission, or by his signing the warrant for it.

2 Hawk.
P. C. c. 25.
§ 52.
[(b) So re-
solved by
three judges,

3. That an offence in *Ireland*, that is treason here as well as there, is triable here by virtue of this statute, unless it were committed by a peer of *Ireland*; in which case it is not triable here, because the party would lose the benefit of a trial by his peers (b).

Dy. 360. See also O'Rourke's case, 1 Andw. 262. But in Lord Macguire's case, 1 St. Tr. 950. 1 H. H. P. C. 155, 284., it was ruled, that an *Irish* peer might be tried by a common jury in *Eng-land* for a treason committed in *Ireland*. See Pryn's argument, 8 St. Tr. 341.]

4. That this statute is not repealed by 1 & 2 Ph. & M. cap. 10. 2 Hawk.
 § 7. which enacts, that all trials for treason shall be according to P. C. c. 25.
 the common law. § 53.
 2 Hale's Hist. P. C. 164.

By the 28 H. 8. cap. 15. it is enacted, "That treasons, felonies, But for this
 " and robberies, &c. upon the sea, &c., shall be inquired, &c., wide tit.
 " in such places in the realm as shall be limited by the king's com- Piracy, &
 " mission, in like manner as if such offences had been committed 11 & 12
 " on the land." W. 3. c. 7.
 § 1., which
 enacts, that
 all piracies and felonies upon the sea, &c. may be tried in any place at sea, or upon the land in his Majesty's
 plantations. [And § 14. of the same statute enacts, that the commissioners, &c. shall have power to try
 pirates in all the colonies, &c. in America, and to grant warrants, in order to their being apprehended and
 tried there, or sent into England for trial.]

" By the 26 H. 8. cap. 6. for the punishment and speedy trial, * (a) This
 " as well of the counterfeiters of any coin current within this statute ex-
 " realm, as of all felonies and accessories of the same, and other tends as well
 " offences feloniously done within any (a) lordship marchers of to the old
 " Wales, the justices of gaol-delivery and of the peace in the shire Welsh coun-
 " or shires of England, where the king's writ runneth, next ad- ties, as to
 " joining to the lordship marchers, or other place in Wales, where the lordship
 " such counterfeiting, &c. shall be committed, shall have power, marchers.
 " at their sessions and gaol-delivery, to enquire by verdict of Pasch.
 " twelve men of the same shire, &c., in England, there to cause 12 Geo. 1.
 " all such counterfeiters, &c., to be indicted, &c., in like man- Athoro's
 " ner as if the same petit treasons, &c. had been done within any case, Stra.
 " of the said shires within the said realm: also, such justices shall 553.
 " try all foreign pleas pleaded by such offenders; neither shall an 8 Mod. 135.
 " acquittal, &c. or fine making in the lordships marchers, be (b) But an
 " bar for a person indicted in the said shire within two years after acquittal at
 " the felony." the grand
 sessions is a
 good bar of
 an indict-
 ment for the
 same crime
 c. 25. § 42.

[By stat. 26. Geo. 2. c. 19. § 5. offences against ships in distress, The county
 committed in Wales, are triable in the next adjoining English of Chester is
 county.] lyb county under this act. Parry v. Roberts, 1 Hawk. P. C. 6 Ed. 220. note.

By the 27 Eliz. cap. 2. treasons by priests or jesuits coming into 2 Hale's
 England, and felony for receiving them, are inquirable and deter- Hist. P. C.
 minable where the offender is apprehended. 164.

(G) What ought to be the Form of the Body of an Indictment at Common Law: And herein,

1. How the Body of an Indictment at Common Law ought to set forth the Substance and Manner of the Fact.

AN indictment, as defined by my Lord Hale, is nothing else but 2 Hal. Hist.
 a plain, brief, and certain narrative of an offence committed 169.
 by any person, and of those necessary circumstances that concur (c) To that
 to ascertain the fact, and its nature, in which, in favour of life, degree as to
 great (c) strictnesses have at all times been required. become the
 the law, 2 Hal. Hist. P. C. 193.—That before the 4 Geo. 2. c. 26., and 6 Geo. 2. c. 14., reproach of
 all

all parts of it ought to be in *Latin*, and how far it was vicious for false or improper *Latin*, vide 2 Hawk. P. C.

Cro. Eliz. 147. 201. 2 Hawk. P. C. c. 25. § 57. And therefore it is laid down as a good general rule, that in indictments, as well as in appeals, the special manner of the whole fact ought to be set forth with such certainty, that it may judicially appear to the court that the indictors have not gone upon insufficient premises.

2 Hawk. P. C. c. 25. § 55., and several authorities there cited. 2 Hal. Hist. P. C. 183, 184., accordingly. (a) And therefore an indictment against *A.*, *quod felonice abduxit unum equum*, without saying *cepit & abduxit*, is not good, for he might have the horse by bailment, and then it is no felony. 2 Hal. Hist. P. C. 184. (b) For if *A.* is indicted, that *furatus est unum equum*, it is but a trespass, for want of the word *felonice*. 2 Hal. Hist. P. C. 184. (c) In petit treason it must be laid *felonice & proditorie*; for though the party be acquitted of the petit treason, he may be convicted of the manslaughter or murder. 2 Hal. Hist. P. C. 184.

2 Hawk. P. C. c. 25. § 56. (d) But an indictment of rape, *quod felonice & carnaliter cognovit*, without the word *rapuit*, is not good, though it conclude *contra formam statuti*, 2 Hal. Hist. P. C. 184.

2 Hawk. P. C. c. 25. § 57. And from this certainty required in indictments, it hath been holden, that an indictment for a felonious breach of prison, without shewing the cause of the imprisonment, is not good.

Allen, 78. Mod. 24. 5 Mod. 96. 129. So, of an indictment for refusing to serve the office of constable, being *legitimo modo electus*, without shewing the manner of the election.

Cro. Eliz. 483. pl. 12. So, it hath been adjudged, that an indictment of burglary is insufficient, without shewing that it was *noctantèr*.

2 Roll. Rep. 345. Palm. 368. 374. Also it is agreed, that an indictment, charging a man with a nuisance, in respect of a fact which is lawful in itself, as the erecting of an inn, &c. and only becomes unlawful from particular circumstances, is insufficient, unless it set forth some circumstances that make it unlawful.

2 Hawk. P. C. c. 25. § 57. So, it hath been adjudged, that an indictment for traiterously coining alchymy like to the king's money, without shewing what money, viz. whether gold, silver, or copper, is insufficient; for as to the latter of these, the offence could not amount to treason.

Cro. Eliz. 137. So, an indictment of perjury not shewing in what manner, and in what court the false oath was taken, is insufficient; because, for aught appears, it might have been extrajudicial.

Sid. 91. 2 Hawk. P. C. c. 25. § 57. But an indictment of extortion, charging *J. S.* with the taking of 50s. as a bailiff of an hundred *colore officii*, without shewing for

for what he took it, is good, at least after verdict; for perhaps he might claim it generally, as being due to him as bailiff, in which case the taking could not be otherwise expressed. But this seems to be a special case.

An indictment charging a man disjunctively is void; as *murdravit, vel murdrari causavit*, or that *A. verberavit B. vel verberari causavit*, or that *A. fabricavit talem chartam, vel fabricari causavit*, &c. for here are distinct offences, and it appears not of which of them the party is accused.

v. Flint, Ca. temp. Hardw. 370. Rex v. Stroughton, 5 Mod. 137, 138. Salk. 371. pl. 8. 2 Hawk. P. C. c. 25. § 58. [Rex 2 Str. 900.]

Also, an indictment accusing a man in general terms, without ascertaining the particular fact laid to his charge, is insufficient; for no one can know what defence to make to a charge which is uncertain; nor can he plead it in bar or abatement of a subsequent prosecution; neither can it appear that the facts given in evidence against a defendant on such a general accusation are the same of which the indictors have accused him; nor can it judicially appear to the court what punishment is proper for an offence so loosely expressed.

Lev. 203. Keb. 278. Show. 389. 2 Hawk. P. C. c. 25. § 59. 4 Mod. 100. 3 Salk. 198. pl. 1. Comb. 193. Carth. 226. Holt, 363. pl. 3.

As where the indictment charges the party with having spoken divers false and scandalous words against *J. S.* being mayor of *A.* &c. or with being a common defamer, vexer, and oppressor, &c. or with being a common disturber of the peace, and having stirred up divers quarrels among his neighbours; or with being a person of evil behaviour, a common deceiver, a common publisher of the king's secrets, &c. or with being a common forestaller, a common thief, a common champertor, &c.

2 Hawk. P. C. c. 25. § 59., and several authorities there cited.

But barrettry being an offence of a complicated nature, consisting in the repetition of frequent acts, all of which it would be too prolix to enumerate, experience has settled it to be sufficient to charge a man in general as a common barretor.

2 Hawk. P. C. c. 25. § 59. vide tit. Barrettry.

And for the same reason an indictment against a common scold is sufficient, without shewing any particulars.

2 Hawk. P. C. c. 25. § 59.

Neither is it necessary for an indictment of either of these two last mentioned offences to conclude *in nocumentum omnium ligeorum*, &c. for it appears from the nature of the thing, that it could not but be so.

2 Hawk. P. C. c. 25. § 59. [Rex v. Cowper, 2 Str. 1246. contr. as to a scold.]

An indictment must lay the charge against the defendant positively, and not by way of recital, as with a *quod cum*, &c. and it must expressly allege every thing material in the description of the substance, nature, and manner of the crime; for no indictment shall be admitted to supply a defect of this kind.

P. C. c. 25. § 60.

Therefore, if an indictment of murder want the words *ex malitia præcogitata*, it is no answer that it has the words *felonice murdravit*, which imply as much.

Salk. 371. pl. 6. Cro. Jac. 20. 4 Co. 42. 5 Co. 150. 2 Hawk. P. C. c. 25. § 60. Dyer, 99. pl. 63. 2 Hawk. P. C. *ibid.*

So, if any indictment of death want an express allegation that the party received the hurt laid as the cause of his death, and also that he died thereof, no implication will help it.

2 Hawk. P. C. *ibid.*

Also, if an indictment for feloniously breaking a prison, and commanding *J. S.* there imprisoned, &c. to escape, do not expressly

Keilw. 87. 2 Hawk. P. C. *ibid.*

pressly allege that *J. S.* did escape, it is no answer that it is fully implied in calling the offence a felonious breaking.

4 Co. 41.
2 Hawk.
P. C. *ibid.*

Yet strained and over-nice exceptions of this kind are not to be regarded; as that an indictment of death, laying the assault to have been with malice prepence, doth not expressly repeat it in the clause immediately following, and joined with a copulative, shewing the giving of the wound at the same time and place.

Cro. Jac.
473.
2 Hawk.
P. C. *ibid.*

Or that an indictment setting forth that *J. S.* was lawfully arrested by virtue of a plaint before such a sheriff, &c. doth not expressly shew that there was a good warrant.

9 Co. 67.
5 Co. 150.
2 Hawk.
P. C. *ibid.*

Or that an indictment setting forth an arrest in such a parish and ward in *London*, by virtue of a warrant, to arrest the party within the liberties of *London*, doth not expressly lay such parish and ward within the liberties of *London*.

Cro. Jac.
610.
2 Mod. 128.
2 Roll.
Rep. 226.
Moor, 606.
2 Lev. 229.
Raym. 378.
Keb. 852.

Or that an indictment finding that *J. S. existens* of such a trade, &c. as will bring him within the law whereon the indictment is founded, committed such a fact, does not expressly allege that he was of such a trade, &c. at the time of the fact; for it fully appears from the natural construction of the participle *existens* going before the verb, to which it is the nominative case.

Cro. Jac.
610. 2 Roll.
Rep. 226.
2 Lev. 229.
2 Mod. 129.
2 Hawk.
P. C. c. 25.
§ 61. Ld.
Raym. 610.

Yet it is a good exception to an indictment of forcible entry, finding that *A.* disseised *B.* of such land *existens liberum tenementum* of *B.* that it is not expressed at what time it was his freehold; for it stands indifferent, according to the common rules of construction, whether it was his freehold at the time of the disseisin, or at the time of finding the indictment, the word *existens* being applied only to the thing which was the subject of the action, and not being the nominative case of the verb, as in the former case.

2 Hawk.
P. C. c. 25.
§ 62., and
several au-
thorities
there cited.

If one material part of an indictment be repugnant to another, or if the fact as laid be impossible or absurd, the indictment is void; as, where one is indicted for having forged a writing, in which *A.* was bound to *B.* which is impossible if the writing were forged; or for having disseised *J. S.* of land; wherein it appears, by the indictment itself, that he had no freehold whereof he could be disseised; or for having entered peaceably on *J. S.* and then and there forcibly disseised him; or for having disseised him of land then being, and for ever since continuing to be, his freehold; or for having murdered *J. S.* at *B.* where by the indictment it appears that *J. S.* was only wounded at *B.* and died at *C.*; or for selling iron with false weights and measures, which is not only absurd, as supposing that iron could be sold by measure, but inconsistent, in supposing that it was so sold, and yet at the same time sold by weight; or for being absent from church six months, between such and such a time, which appears to have contained only the space of eleven days; or for feloniously cutting down trees, &c. Yet where the sense is clear, a small impropriety may be dispensed with; as where one is indicted for having mowed *unam acram feni*, which is said to be sufficient, and

and yet that which was mowed could not, at the time of the mowing, in strictness be called hay, but grass only.

Also, a repugnancy in an indictment in setting forth the offence of the accessory, is as fatal as it is in setting forth that of the principal; as where an indictment of death having laid the stroke on one day, and the death on another, charges the accessory with having abetted the principal at the time of the felony only. 2 Hawk.
P. C. c. 25.
§ 63.

But where several are present and abet a fact, and one only actually does it, an indictment may, in the same manner as an appeal, lay it as done by the one, and abetted by the rest. 9 Co. 67.
Plow. 97.

But if it barely charge a man with having been present, it is void, because a man may be innocently present. 2 Hawk.
P. C. c. 25.
§ 64.

An indictment of *J. S.* as accessory to four by these words, *sciens ipsos quatuor feloniam prædict. fecisse apud B. felonice receptavit*, without adding *eos*, is naught; for it appears not clearly how many of them he is charged to have received. 2 Hawk.
P. C. c. 25.
§ 65.

Also, an indictment of a constable for having voluntarily and feloniously suffered a person arrested by him on suspicion of felony to escape, without shewing what the felony was, and that it was actually committed, is said to be void for the uncertainty: But an indictment for knowingly suffering persons convicted of felony to escape, is said to be good, without finding expressly what the felony was, or that it was committed, if the record of conviction be set forth with convenient certainty; for that shews what the felony was, and that it was committed. 2 Hawk.
P. C. c. 25.
§ 66. [Rex
v. Freeman,
2 Str. 1268.]

It is holden by some, that an indictment finding that *J. S. scienter receptavit J. D.* being a felon, is not good, without expressly finding that he knew him to be a felon; but by others, such indictment is good, because the plain construction of the word *scienter* carries it through the whole sentence *. 2 Hawk.
P. C. *ibid.*
and the au-
thorities
there cited.
* *Sciens*
that, &c.

a sufficient averment. Stra. 904.

2. How the Indictment must set forth the Persons mentioned or referred to in it.

The name and addition of the party indicted ought regularly to be inserted, and inserted truly, in every indictment; but if the party be indicted by a wrong christian name, surname, or addition, and he plead to that indictment not guilty, or answer to that indictment upon his arraignment by that name, he shall not be received after to plead a misnomer or falsity of his addition; for he is concluded and estopped by his plea by that name, and of that estoppel the gaoler and sheriff that do execution shall have advantage. 2 Hal. Hist.
P. C. 175.

But it is said, that an indictment that the king's highway in such a place is in decay, through the default of the inhabitants of such a town, is good without naming any person in certain. 2 Roll. Abr.
79. 2 Hawk.
P. C. c. 25.
§ 68.

Also it is said, that no indictree can take any advantage of a mistaken (a) surname in the indictment, either by plea in abatement, 2 Hawk.
P. C. *ibid.*
(a) But per

Hale, it is the safest way to allow his plea of misnomer, both as to his surname and as to his christian name; for he that pleads misnomer of either, must in the same plea set forth what his true name is, and then he concludes himself; and if the grand jury be not discharged, the indictment may be presently amended by the grand jury, and returned according to the name he gives himself. 2 Hal. Hist. P. C. 176.

2 Hal. Hist. And in this respect an indictment (a) differs from an appeal, P. C. 176. whereof it is certain that a misnomer of a surname may be 2 Hawk. pleaded in an abatement as well as any other misnomer whatsoever. P. C. ubi *supr.* (a) But that every other misnomer of the defendant, as also every defective addition, are as fatal in an indictment as an appeal; for which *vide* 2 Hawk. P. C. c. 25. § 69.

2 Hawk. Not only the misnomer of the name of baptism will abate an P. C. c. 25. indictment, but also the naming of the defendant knight, &c. who § 69. and is a baronet, and no knight, &c. or the omission of a name of several authorities there cited. dignity; as where Garter King at Arms is not named Garter in (b) But an indictment against a peer of the realm is good without an addition, because no process of outlawry lies against him. Cro. Eliz. 148. Lord Dacre's case. 2 Hal. Hist. P. C. 177.

2 Hal. Hist. By the common law the party indicted could not take advantage of a misnomer or the want of addition, because the fact being sworn against the party present, and appearing to their view, there could be no injury by the misnomer: also, as felons generally go by no certain name, and have no fixed habitation, it was thought hard to find out their real names or professions; but this was altered by the statute 1 H. 5. cap. 5. which requires that in all indictments, &c. the party indicted ought to have the addition of his mystery, degree, place, and county.

2 Hal. Hist. The additions required by the statute are, that of his degree, 176. But as *yeoman, gentleman, esquire*; of his mystery, as *husbandman, sailor; for this vide spinster, &c.*; therefore, if the addition be only general, as servant, farmer, citizen, &c. or of crimes and misdemeanours only, 2 Hawk. P. C. c. 25. § 70. as extortioner, vagabond, heretick, &c. these are no good additions.

2 Hal. Hist. The addition ought to be to the substantive name, and not to P. C. 177. that which comes after the *alias dictus*, because regularly the addition refers to the last antecedent. 2 Hawk. P. C. c. 25. § 70.

2 Hal. Hist. If several persons be indicted for one offence, misnomer, or P. C. 177. want of addition of one, quasheth the indictment only against But in him, and the rest shall be put to answer; for they are in law as 2 Hawk. several indictments; and so in trespasses. P. C. c. 25. § 70., it is said that where several are indicted, and there is an omission of an addition as to one, it makes the indictment vicious as to all; for which is cited, 1 Bull. 183.

2 Hawk. Not only the defendant, but regularly all other persons also P. C. c. 25. mentioned in an indictment, must be described with convenient § 71. certainty; and therefore, it seems to be generally agreed at this day, that an indictment for suffering divers bakers to bake, &c. against the assise, or for distraining divers persons without cause, or for taking divers sums of money of divers persons for such a toll,

toll, &c. without naming any bakers, &c. in particular, is insufficient.

But an indictment of murder *cujusdam ignoti* is good; and so, for stealing the goods *cujusdam ignoti*; so, of an assault *in quendam ignotum*; and if the party be acquitted or convicted, and be afterwards indicted for an assault or murder of such a man by name, he may plead the former conviction or acquittal, and aver it to be the same person.

Plow. 85. b.
Dyer, 285. a.
2 Hal. Hist.
181.
2 Hawk.
P. C. c. 25.
§ 71.

But an indictment *quod invenit quendam hominem mortuum, ac felonice furatus est duas Tunicas*, without saying *de bonis & catallis ejusdam ignoti*, is not good.

Hal. Hist.
181.

If the goods of a chapel be stolen, the indictment shall say *bona & catalla capelle in custodia prepositorum*; if it be done in time of vacation, *bona & catalla capelle tempore vacationis*; but if the goods of a parish church be stolen, as the bell, the books, &c. it shall run *bona parochianorum de S. in custodia guardianorum ecclesie*, and shall not suppose them *bona ecclesie*.

2 Hal. Hist.
P. C. 181.

If the goods which *A.* hath as executor of *B.* be stolen, the offender may be indicted *quod bona testatoris in custodia A. executoris ejusdem B.* or it may be general *bona ipsius A.*

2 Hal. Hist.
P. C. 181.

If *A.* dying be buried, and *B.* open the grave in the night-time and steal the winding-sheet, the indictment cannot suppose it the goods of the dead man, but of the executors, administrators, or ordinary, as the case falls out.

2 Hal. Hist.
P. C. 181.

An indictment *quod felonice, &c. cepit quandam peciam panni cujusdam J. S.* without saying *de bonis & catallis ejusdam J. S.* was therefore quashed.

Cro. Eliz.
490.
2 Hal. Hist.
P. C. 182.

There is no need of an addition of the person robbed or murdered, &c. unless there be a plurality of persons of the same name; neither then is it essential to the indictment, though sometimes it may be convenient, for distinction sake, to add it; for it is sufficient if the indictment be true, viz. that *J. S.* was killed or robbed, though there are many of the same name.

2 Hal. Hist.
P. C. 182.

And it hath been adjudged, that an indictment of an assault on *John*, parish-priest of *D.* in the county of *C.* is good without mentioning his surname; for the certainty of the person sufficiently appears.

Keilw. 25.
Dyer, 285.
pl. 38.
2 Hawk.
P. C. c. 25. § 72.

But, it seems, that if such indictment had only described him by his name of baptism without any farther addition, it had been too uncertain; yet the contrary seems to be holden in *(a) Moor*: However, it seems agreed, that a repugnancy or absurdity in the description of the person injured will vitiate an indictment: as where one is indicted for stealing *bona predicti J. S.* where no *J. S.* was mentioned before.

2 Hawk.
P. C. *ibid.*
(a) Moor,
466. pl. 662.

It is not necessary to allege in an indictment of death, that the party killed was in the peace of God.

2 Hawk.
P. C. c. 25.
§ 73.

3. How the Indictment ought to set forth the Thing wherein the Offence was committed.

2 Hawk. An indictment, which doth not with sufficient certainty set
P. C. c. 25. forth the thing wherein the offence was committed, is insufficient;
§ 74. as where one is indicted for having forged a lease of certain lands,
2 Hal. Hist. without naming some one certain parcel; or for having stolen *bona*
P. C. 182. & *catalla* J. S. without shewing any in particular; or for having
accordingly. trespassed on two closes of meadow or pasture, or for having di-
verted *quandam partem aquæ* running from such a place to such a
place, without any farther description; or for having engrossed
magnam quantitatem straminis & feni, or *diversos cumulos tritici*,
without shewing how much of each; or for having carried away
duas centenas casei, without adding *libras* or *uncias*, &c. or for hav-
ing erected several cottages *contra formam statuti*, without shewing
how many.

2 Hawk. It is said to be most proper in indictments of larceny and tref-
P. C. c. 25. pass on a living thing to shew to whom the property of it be-
§ 75. longed, by calling it the ox or horse, &c. of J. S. without using
the words *bona & catalla*: yet there are many precedents in
books of good authority, wherein this nicety is not observed.

2 Hal. Hist. If theft be alleged in any thing, the indictment must set down
P. C. 183. the value, that it may appear whether it be grand or petit lar-
ceny.

2 Hawk. If the thing be moveable, as a horse, cow, &c. it is said to
P. C. c. 25. be most proper to shew its worth by the word *pretium*; but if the
§ 75. thing be immoveable, and consist of divers dead things, it ought
(a) And per to be *ad valentiam*; (a) yet this nicety seems not necessary; nei-
Hale, this is ther is it clear that the worth of the thing stolen is required to be
but clerk- set forth in an indictment of larceny, for any other purpose, than
ship, and not to shew that the crime amounts to grand larceny, and the better
substantial; for if *pretii* to ascertain the crime, in order for a restitution; or in an in-
be set in- dictment of trespass, for any other purpose, than to aggravate
stead of *ad the crime.*
valentiam,
or *e converso*,
it doth not
vitiate the indictment; and so it is, if one *pretii* or *ad valentiam* be added to several things, where in true
clerkship it should be applied severally, it is good if the party be convict of all; but possibly, if the party
be convict but of part, it is not good, because it will be uncertain whether grand or petit larceny. 2 Hal.
Hist. P. C. 183.

2 Hale's An indictment *quod felonice cepit 20 oves, matricēs, & agnos*, or
Hist. P. C. *matricēs & verveces*, is not good, because it doth not appear how
183. many of one sort, and how many of another; but 20 oves gene-
rally might have been good without distinguishing *matricēs &*
verveces, as in case of replevin or trespass.

2 Hal. Hist. But an indictment *de quatuor riscis & cists*, *Anglicè* chests and
P. C. 183. coffers, is good, because synonymous.

said, that regularly the same or more certainty is required in an indictment of goods, than in trespass for
goods.—And note, That it is agreed as a general rule, that if an indictment be uncertain as to some par-
ticulars only, and certain as to the rest, it is void only as to those which are uncertainly expressed, and
good for the residue. 2 Hawk. P. C. c. 25. § 74.—* *Quia male et negligentèr se gessit in executione* of
the office of constable, qualified for being too general. Stra. 2.—So, *De scriptis bonis & catallis* of
Davila *decipiebant et defraudabant*. Stra. 8.—So, *Diverfas quantitates cervisiæ*. Stra. 497.—
On an indictment upon § Eliz. c. 4. if it is averred, a trade used in Great Britain, instead of Eng.
land

land, it is bad. 1 Stra. 552. 2 Str. 788.—*Quod cum* there was such an order, &c. is too uncertain. 2 Ld. Raym. 1363.—An indictment must set out the words spoken of a justice of peace in the execution of his office.—If for obstructing him, it must shew by what act. 2 Stra. 699.—An indictment for a nuisance, that the defendant *sepem levavit vel levare causavit*, adjudged ill for uncertainty. 2 Stra. 900.—An indictment for procuring by false tokens must specify them. 2 Stra. 1127.—[So, by false pretences. 2 Term Rep. 581.]—Indictment for conveying, or causing to be conveyed, a pauper, is too uncertain: such an indictment must also state, that he was unable to maintain himself, Cal. temp. Hardw. 370.—An indictment for carrying a person with the small-pox, from one parish to another, must set forth that the defendant knew the person had the small-pox, and that it was with an ill intent. Andr. 162.

4. How the Indictment must set forth the Circumstances of Time and Place.

It is laid down as an undoubted principle in all the books that treat of this matter, that no indictment whatsoever can be good without precisely shewing a certain year and (a) day of the material facts alleged in it.

2 Hawk.
P. C. c. 25.
§ 77., and
several au-
thorities
there cited.

[See also *Rex v. Holland*, 5 Term Rep. 607.] And this the law requires, not only because the party may be the better prepared to make his defence, but also because that in indictments, on which, upon a conviction, there incurs a forfeiture of lands, it may appear to what day the forfeiture is to have relation; as also, that if it be an indictment of murder or manslaughter, it may appear that the death was within the year and day after the stroke. 2 Hal. Hist. P. C. 179.—But it is not necessary upon the evidence to prove the crime to have been committed on the very day laid in the indictment; but if it be proved to have been at any time before or after, the party is to be convicted. 2 Hal. Hist. P. C. 179. (a) But it is not necessary to mention the hour in an indictment; 2 Hawk. P. C. c. 25. § 76. unless the time of the day is material to ascertain the nature of the offence, and then it must be expressed; as in an indictment of burglary it ought to say, *toli die circa horam decimam in nocte ejusdem diei, felonice & burglariter fregit*; yet it is said that by some opinions *burglariter* carries a sufficient expression that it was done in the night. 2 Hal. Hist. P. C. 179. So, upon breaking a house in the day-time, to oust the offender of his clergy upon the statute of 39 Eliz. c. 15., it is usual to add *tempore diurno*; for the statute expresseth it so; otherwise, though the indictment be good, yet he shall not be ousted of his clergy. 2 Hal. Hist. P. C. 179.

As if an indictment of death laying the assault at a certain time, &c. do not repeat it in the clause of the stroke, or if it do not set forth the time of the death, as well as of the stroke.

2 Hawk.
P. C. c. 25.
§ 77.
2 Hal. Hist.
P. C. 178.

So, if an indictment lay the offence on an impossible day, or on a day that makes the indictment repugnant to itself, or if it lay one and the same offence at different days, it is insufficient.

2 Hawk.
P. C. c. 25.
§ 77.

As, if *A.* be indicted *quod primo die Maii & secundo die Maii apud D.* he made an assault upon *B.* & *quandam togam ipsius B. adtunc & ibidem invent. felonice cepit*, &c.; this indictment is not good, because there are several days mentioned before, and it is uncertain to which the felonious taking shall relate.

2 Hal. Hist.
P. C. 178.

So, if *A.* be indicted that he *Festo Sancti Petri anno 20 Car.* killed *J. S.*; this is not good, because there are two Feasts of *St. Peter*, and neither without addition, *viz. St. Peter ad Vincula*, and *St. Peter in Cathedra*.

2 Hal. Hist.
P. C. 178.

The words *adtunc & ibidem* in the subsequent part of an indictment are as effectual, as if the year and day mentioned in the former part had been expressly repeated.

2 Hawk.
P. C. c. 25.
§ 78.

Also, if it lay the fact on the *Thursday* after the Feast of *Pentecost* in such a year, or on the *Utis of Easter*, &c. (which shall be taken for the very eighth after the feast), or on the 10th of *March* last, (being ascertained by the stile of the sessions, &c.) it is as good as if it had expressly named the day of the month, &c.

2 Hawk.
P. C. *ibid.*

2 Hawk. Also, if an indictment charge a man with an omission, &c. as
P. C. c. 25. not scowring such a ditch, it needs not shew any time.
§ 79.

2 Hawk. So, if an indictment charge a man with having done such a
P. C. c. 25. nuisance such a day and year, and on divers other days, it is void
§ 82. only as to the facts alleged on the days uncertainly set forth: but
if it charge a man generally with several offences at several times
between such a day and such a day, without laying any one at a
certain day, it hath been adjudged to be wholly void.

2 Hawk. Yet it hath been solemnly adjudged, that a conviction of deer-
P. C. *ibid.* stealing, setting forth the offence between the 8th and 12th of
July, &c. is sufficient.

2 Hawk. And in these cases it is said to be most regular to set forth the
P. C. c. 25. year, by shewing the year of the king; yet this may be dispensed
§ 80. with, for special reasons, if the very year be otherwise sufficiently
expressed, for that only is material.

2 Hawk. Every indictment at common law must expressly shew some
P. C. c. 25. (a) place wherein the offence was committed, which must appear
§ 83. to have been within the jurisdiction of the court in which the in-
(a) That re- dictment was taken, and must be alleged without any repug-
gularly the nancy; for if one and the same offence be alleged at two differ-
vill or ham- ent places, or at *B.* aforesaid, where *B.* was not before mentioned,
let and coun- or if the stroke be alleged at *A.* and the death at *B.* and the in-
ty must be dictment conclude that the defendant *sic felonice murtheravit* the de-
expressed in ceased at *A.* the indictment is void.
the indict-
ment, and
where the
time must be repeated upon several acts done, regularly the place also must be repeated, *viz. tunc &*
ibidem. 2 Hal. Hist. P. C. 180.

2 Hawk. So it is also, if it lay not both a place of the stroke and death,
P. C. *ibid.* or if any place so alleged be not such from whence a visne may
9 Co. 66. come; as to which it hath been adjudged, that if a fact be al-
leged in a parish in *London* with some other addition which suffi-
ciently ascertains it, or in the parish of *St. Lawrence Jewry*, it
needs not shew the ward.

2 Hal. Hist. Also in some crimes no vill need be named; as upon an indict-
P. C. 180. ment of barrettry, because a barretor is such every where, and it
[There are shall be tried *de corpore comitatus*.
only two

cases where it is necessary to lay a vill, *viz.* upon the statute of additions, and in an appeal of death, upon
the statute of Gloucester, c. 9. *Rex v. Blower*, Hil. 27 Geo. 2. B. R. cited by *Dennison, J.* in
1 Burr. 337.]

2 Hal. Hist. *Suff.* in the margin, the indictment supposing a fact done *apud*
P. C. 180. *S. in com. predict.* is good; for it refers to the county in the
3 P. Wms. margin.
439.

Cro. Eliz. But if there be two counties named, one in the margin, ano-
739. ther in the addition of any party, or in the recital of an act of
2 Hal. Hist. parliament recited in the premises of the indictment, the fact laid
P. C. 180. *apud S. in com. predict.* vitiates the indictment; because two coun-
ties are named before, and it is uncertain to which it refers.

2 Hal. Hist. Indictment against *A. B.* that he *apud N. in com. predict.* made
P. C. 180. an assault upon *C. D.* of *F. in com. predict.* & *ipsum adunc &*
ibidem cum quodam gladio, &c. percussit, &c. this indictment is not
good, because two places named before; and if it refers to both,

it

it is impossible; and if only to one, it must refer to the last, and then it is insensible.

[An indictment stating the defendant to be late of *W.* and laying the offence to be *at the parish aforesaid*, was holden not to be sufficiently certain.]

It hath been holden, that an indictment on a statute, prohibiting such and such persons to do such a thing, needs not shew where the facts happened which bring the defendant within the prohibition; as where it is enacted, that it shall be treason for a person born within the realm and in popish orders to remain here, &c. in which case it is said, that the indictment needs not shew a visne for the (a) birth or ordination.

to repair a bridge, and that it is in decay, it must be alleged where those lands lie. 2 Hal. Hist. P. C. 181.

Also, a mistake in evidence of the place laid is in no case material, on not guilty pleaded, if the fact be proved in any other place in the county; but if there be no such place in a county, as that wherein an offence is laid in an appeal or indictment, all process thereon is void by the statutes of 9 H. 5. cap. 1. and 18 H. 6. cap. 12.

5. Where the Offence indictable may be laid jointly, and where severally, and where both jointly and severally, and where the Offences of several Persons may be laid in one Indictment.

Although the offence of several persons cannot but be several, because one man's offence cannot be another's, but every man must answer for himself; yet if it wholly arise from (b) a joint act, which is in itself criminal, as where several join in keeping a gaming-house, or in deer-stealing, or maintenance, &c. the defendants may be indicted jointly and severally; as thus, *quod custodiaverunt & uterque eorum custodivit*, or jointly only; for it sufficiently appears, that if all are joined in such act, each must be guilty; and therefore some of them may be convicted, and some acquitted.

gether, and one of them, in the presence of the others, use a false pretence (by words) to obtain money or goods, they may all be indicted jointly. Young v. Regem, in error, 3 Term Rep. 98.]—And as several persons may be joined in the same indictment, so several offences committed by the same party may be joined in one indictment; as burglary and larceny; larcenies committed of several things, though at several times, and from several persons, may be joined in one indictment. 2 Hal. Hist. P. C. 173.—[But in the case of felony, if it appear before the prisoner has pleaded, or the jury are charged, that he is to be tried for *separate* offences, the judge in his discretion may quash the indictment: or, if the judge do not discover it till after the jury are charged, he may put the prosecutor to make his election on which charge he will proceed. 3 Term Rep. 106.]

But where the offence arises from a joint act which in itself is not criminal, but may be so by reason of some personal defect peculiar to each defendant, as where divers follow a joint trade, for which the law requires a seven years apprenticeship, in which case each trader's particular defect, and not the joint act, makes him guilty, it seems most proper to indict them severally, and not jointly, because each man's offence is grounded on a defect peculiar to himself.

Rex v. Mathews, 5 Term Rep. 162.

2 Hawk. P. C. c. 25. § 84.

(a) But if a man be indicted for that *ratione tenuræ* of certain lands he is bound

2 Hawk. P. C. c. 25. § 84.

2 Hawk. P. C. c. 25. § 89.

(b) So, if several commit a robbery, burglary, murder, &c.

2 Hal. Hist. P. C. 173. [So, if several act in concert to-

2 Hawk. P. C. ubi supr.

2 Hal. Hist. P. C. 174. accordingly.

2 Hawk.
P. C. ubi
supr. and
several au-
thorities
there cited.
(a) So, an
indictment
against seve-
ral officers,
quod colore
separalium
officiorum suorum separaliter extorsisse ceperunt, was quashed. 2 Hal. Hist. P. C. 174.

And for this reason indictments have been quashed for jointly charging several defendants (a) for not repairing the streets before their houses, or for taking inmates, or for neglecting a day of fasting appointed by proclamation; and this is agreeable to the rule of law as to bringing actions on penal statutes, wherein several defendants shall not be joined, except it be in respect of some one thing in which all are jointly concerned; as where several join in a suit in the Admiralty on a contract on land, or in procuring or giving an untrue verdict, &c.

2 Hal. Hist.
P. C. 174.

But yet where *A. B. C.* and *D.* were indicted for erecting four several inns *ad commune nocumentum*, it was ruled, that for several offences of the same nature several persons may be indicted in the same indictment; but then it must be laid *separaliter* *erexerunt*, and for want of that word (*separaliter*) the indictment was quashed.

2 Hal. Hist.
P. C. 174.
and in Haw-
kins, that in
some books
we find joint

Also, it is said in *Hale* to be common experience, that twenty persons may be indicted for keeping disorderly houses or bawdy houses, and they are daily convicted upon such indictments; for the word *separaliter* makes them several indictments.

indictments against several persons for several offences; as recusancy, following a trade without serving an apprenticeship, mentioned without any exception on this account; therefore this matter doth not seem to be fully settled. 2 Hawk. P. C. c. 25. § 89.—* Several persons cannot be joined in one indictment for perjury. 2 Stra. 521.—A wife or servant, joining with a stranger in the same murder, may be charged in one indictment, for if it conclude *felonice proditoriè et ex malitiâ premeditata*, &c. it is good for both, *reddendo singula singulis*. Foist. 329.*

6. Whether the Words *Vi & Armis* be in any Case necessary.

Cro. Jac.
473.

2 Lev. 221.
Skin. 426.

2 Hawk.

P. C. c. 25.
§ 90.

(b) As in an
indictment for cheating another *per quendam lusam*, *Angl. vocat.* trick at cards; it was holden, that it need not be laid *vi et armis*, because cheating is clandestine. Keb. 652.

At common law the words *vi & armis* were necessary in indictments for offences which amount to an actual disturbance of the peace, as rescoues and assaults, &c. but it seems that they were never necessary where it would be absurd to use them; as in indictments for conspiracies, slanders, (b) cheats, escapes, and such like, or for nuisances in the defendant's own ground, &c.

But however material these words might have been by the common law, yet now it is enacted by 37 H. 8. cap. 8. "That the words *vi & armis*, viz. *cum baculis, cultellis, arcubus, & sagittis*, shall not of necessity be put in any indictment or inquisition, nor shall the parties indicted have any advantage by writ of error, or plea, or otherwise, to avoid any such indictment or inquisition, for the want of these or the like words; but the said indictments, &c. lacking the said words, or any of them, shall be adjudged as effectual to all intents, constructions, and purposes, as the same indictments, &c. having the same words in them."

2 Hawk.

P. C. c. 25.
§ 91.

Yet since this statute, exceptions to indictments of trespass, and such like, for want of the words *vi & armis*, where they have not been implied by other words, as *rescussit manu forti*, &c. have sometimes

sometimes prevailed; and the necessity of them is (a) said to be owing to this, that without them there can be no *capiatur* entered, nor fine to the king. (a) 2 Lev. 221.

Yet, says *Hawkins*, they have been often over-ruled, and it is not easy to shew how they ever could prevail, since the said statute, consistently with the manifest purpose of it: however, it is certainly safe and adviseable to make use of them where they are proper and pertinent, if it be to no other purpose than to aggravate the offence. 2 Hawk. P. C. ubi *supr.* and herewith 2 Hal. Hist. P. C. 187. seems to agree.

[The words *vi et armis* are implied in an indictment for a riot, in the words *riotose ceperunt, frangerunt, et prostraverunt*. Rex v. Wynd, 2 Str. 334.]

7. Whether it be necessary to lay the Words *contra Pacem*.

In as much as all offences, which are punishable by a publick prosecution, tend to the disturbance of the quiet and peaceable government of the king over his people, it seems a good (b) general rule, that all indictments and criminal informations ought to conclude *contra pacem* of the king, or kings, in whose reign, or reigns, the offence was committed. 2 Hawk. P. C. c. 25. § 92. (b) That every indictment ought regularly to

conclude *contra pacem domini regis*. 2 Hal. Hist. P. C. 188. — And though it conclude *contra pacem*, yet if it be without *domini regis*, it is insufficient. 2 Hal. Hist. P. C. 188. — That though the offence be for using a trade, not having served an apprenticeship, yet it ought to conclude *contra pacem*; for every offence against a statute is *contra pacem*, and ought to be so laid. 2 Hal. Hist. P. C. 188. Yet, *per Hawkins*, there are some precedents without this conclusion, but not warranted by any resolution, 2 Hawk. P. C. c. 25. § 92., except only where the indictment is for a bare non-feasance, as the not performing the order of justices of peace; which hath been resolved to be good, without this conclusion, in Vent. 108. 111.

Therefore if *A.* be indicted for an offence supposed to be committed in the time of a former king, and the indictment conclude *contra pacem domini regis nunc*, it is insufficient; for it must be supposed to be done *contra pacem* of that king in whose time it was committed. 2 Hal. Hist. P. C. 188, 189.

If an offence be supposed to be begun in the time of one king, and continued in the time of his successor, (as a nuisance,) it must conclude *contra pacem* of both kings, else it is insufficient. 2 Hal. Hist. P. C. 189.

As if one be indicted for having erected a wear in the reign of Queen *Elizabeth*, and continuing it in the reign of King *James*, and the indictment conclude, that so it was erected and continued *contra pacem regis*, &c. without adding *contra pacem nuper regine*, it is insufficient, because the commencement of the wrong, which is as much indicted as the continuance, was in the reign of the queen: but it is said, that if the erection had been laid only by way of inducement, and the gist of the indictment had only been the continuance of it, such conclusion, *contra pacem* of the king only, might be good. Yelv. 66. Sir John Winter's case. 2 Hawk: P. C. 243.

If an offence be alleged in the time of Queen *Elizabeth*, and the indictment taken in the time of King *James*, and it conclude *contra pacem nuper regine & domini regis nunc*, it seems good; and *domini regis nunc*, but surplusage, as well as in a count in trespass *. Cro. Jac. 377. 2 Hal. Hist. P. C. 189. Q. * If the crime is charged to

have been committed in the time of the late king, and the indictment concludes against the peace of the present king, it is fatal. Rex v. Lookhup, 3 Burr. 1901.

2 Hawk. P. C. c. 25. § 92. It seems clear, that neither informations *qui tam*, nor informations for an intrusion, or other wrong of a civil nature, done to the king's lands, goods, or revenues, need this conclusion.

8. Whether it be necessary to lay it *contra Coronam & Dignitatem Regis*.

2 Hawk. P. C. c. 25. § 94. and per Hale, an indictment need not conclude *contra coronam & dignitatem ejus*, though it be usual in many indictments. 2 Hal. Hist. P. C. 188. (a) 2 Roll. Abr. 82. It is said in *Hawkins*, that the words *contra coronam & dignitatem regis*, are used in all the precedents in *Coke's Entries*, which lay the offence *contra pacem*, yet that they are omitted in *Rastal's Precedents*; and it hath been (a) resolved, that an indictment for a riot is good without them, nor can he find the contrary to have been adjudged any where.

9. Whether it be necessary to lay it *in Contemptum Regis*.

2 Hawk. P. C. c. 25. § 95. The words *in contemptum regis*, are sometimes used in indictments of superior courts, and in informations of intrusion, and in actions upon statutes, and sometimes omitted; but there is no authority relating hereto, except in the Year-book of 4 H. 6. pl. 7. wherein it seems to be admitted, that it is necessary in an action on a statute.

10. Whether it be necessary to lay it *illicite*.

2 Hawk. P. C. c. 25. § 96. The word *illicite* has been adjudged not to be necessary in an indictment for a riot, because the fact indicted appears to be unlawful; and the same may be said to all other indictments at common law; but if a statute in describing a thing prohibited uses the word *illicite*, an indictment thereon is not good without it.

11. Whether a Defect in any of these Particulars be amendable.

3 Hawk. P. C. c. 25. § 97. & vide tit. Amendment and Jeofail, letter (C). It is clearly agreed, that none of the statutes of amendment extend to criminal prosecutions, and therefore no indictment can be amended in any case wherein an amendment is not allowable by the common law.

2 Hawk. P. C. *ibid*. But it is said, that the body of an indictment from *London* may be amended, because by the city charters the tenor of the record only shall be removed from thence.

2 Hawk. P. C. *ibid*. Also, a coroner may, by rule, amend his inquest by the notes, in matter of form, before it is filed; and the caption of an indictment may, on motion, be amended by the clerk of the assizes, or of the peace, so as to make it agree with the original record, at any time during the term in which it came in, but not in a subsequent term.

2 Hawk. P. C. *ibid*. But it is said, that the caption of an inquisition shall never be amended after it is filed; for being part of, and drawn at the same

same time with the inquisition, greater exactness is required in it than in the caption of an indictment, which is left, as of course, to be drawn up as occasion shall require.

Also, it seems to be settled, that a discontinuance in a criminal prosecution is not amendable, without consent; but it seems, that a mere misprision in the joining of an issue, as where the words *similiter, &c.* is omitted, is amendable at any time; also, the direction of a *venire vicecomitibus* of *B.* which is returned by *J. S. vicecomiti*, may be amended on the oath of *J. S.* that there is but one sheriff of *B.* which is himself: also, it is common practice to amend criminal informations, and the pleadings thereon, while all is in paper.

2 Hawk.
P. C. *ibid.*

And anciently, where an indictment appeared to be insufficient, the practice was, not to put the defendant to answer it; but if it were found in the county in which the court sat, to award process against the grand jury, to come into court and amend it; and it is the common practice at this day, while the grand jury, which found a bill, is before the court, to amend it, by their consent, in matter of form, as the name or addition of the party.

2 Hawk.
P. C. c. 25.
§ 98.

(H) What ought to be the Form of an Indictment upon a Statute: And herein,

1. Whether it be necessary that such Indictment recite the Statute whereon it is grounded.

IT seems to be agreed, that there is no necessity for any indictment or information on a (a) publick statute, to recite such statute, whether the offence be *malum prohibitum*, or *malum in se*, or whether it be prohibited by more than one statute, or by one only; for the judges must, *ex officio*, take notice of all publick statutes; or if there be any more than one, by which an indictment may be maintained, they will go upon that which is most for the king's advantage.

(a) 2 Hawk.
P. C. c. 25.
§ 100.,
and several
authorities
there cited.
2 Hal. Hist.
P. C. 172.
S. P. ac-
cordingly.
And that all

penal statutes that induce a forfeiture to the king, or make a felony or treason, are general statutes, because they concern the king.

2. What Misrecitals of such Statutes are fatal.

Although it be not necessary to recite a publick statute; yet if a prosecutor take upon himself to recite a statute, and materially vary from it, and conclude *contra formam statuti* (b) *predicti*, he vitiates the indictment; because it judicially appears that there is no such foundation as that whereon it is expressly grounded.

Plowd. 79.
83, 84.
Cro. Eliz.
236. 245.
Paim. 565.
4 Cb. 48.
2 Hawk.

P. C. c. 25. § 101. (b) But if it conclude generally *contra formam statuti in hujusmodi casu edit. & provis.*, it is good; for the court takes notice of the true statute, and will reject the misrecital as surplusage. 2 Hal. Hist. P. C. 172, 173. Keb. 662. S. P.

As where in an indictment with such conclusion on the statutes which prohibit entries with strong hand, the word *vi* is put for

2 Hawk.
P. C. c. 25.
§ 101.

manu; or where *nuncia* is put for *mendacia* in an indictment on the statute of *scandalum magnatum*; or where the verb put to express the principal act, wherein the offence consists, is neither classical nor legal *Latin*, &c.

2 Hawk.
P. C. c. 25.
§ 102. Yet the omission of a synonymous word, having no farther meaning than those which are expressly recited, or the joining of words much of the same sense, as *malitiosè* & *contemptuosè* with a copulative, where the statute uses a disjunctive; or the using the singular number for the plural, or the plural for the singular, where the sense is the same, vitiates not an indictment: as where in reciting a statute, speaking of any suits in any courts, or of disturbers of persons in open preaching, the words *in aliquâ curiâ* or *in apertis prædicationibus*, are used.

2 Hawk.
P. C. c. 25.
§ 103.
(a) If a statute be particular, it
Also, no advantage can be taken of a variance from any part of a private statute, without shewing it to the court in (a) a proper manner; because otherwise such statute shall be taken to be as it is recited.
must be recited in the indictment, and proved by an examined copy upon the trial. 2 Hal. Hist. P. C. 172.

2 Hawk.
P. C. c. 25.
§ 104. A misrecital of the place or day whereon the parliament was holden, by which a publick statute was made, on which the indictment is grounded, vitiates the indictment; for the court takes judicial notice of all such statutes, and will not make good a proceeding, which, of the party's own shewing, appears to be commenced on a supposed statute of this kind, where there is no such statute; as if a parliament be summoned to meet on the twenty-third day of *January*, and before the meeting, be prorogued to the twenty-fifth, &c., and a statute made by it be recited as made in a parliament holden on the twenty-third, &c. or if a parliament, first holden in one year be prorogued to another, and a statute made the second year be recited, as having been made at a parliament holden or begun in such second year, which is all one, instead of saying, that it was made at a sessions of parliament then holden, and the indictment conclude *contra formam statuti prædicti*. &c., yet faults of this nature may be helped by the constant course of precedents on a statute, or by concluding *contra formam statuti*, without adding *prædicti*; or, as some say, by the defendant's admittance that there is such a statute as is supposed.

2 Hawk.
P. C. c. 164. Also, a repugnancy in setting forth the time when a parliament was holden is fatal; as, if a statute be recited to have been made in the first and second years of such a king: also, it hath been holden necessary to shew in what county the parliament was holden, but that the omission of the day is no fault.

2 Hawk.
P. C. c. 25.
§ 105. It seems not to be clearly settled, whether the misrecital of the title of an act be material: but it seems more clear, that a variance in reciting it, as commencing after the making, where it is to commence after the end of the sessions, is fatal.

2 Hawk.
P. C. c. 25.
§ 106. A variance no way altering the sense does no hurt; as where in reciting an oath prescribed by statute, the words *see of Rome*, are put for *see of Rome*, and *I do declare in conscience*, instead of *I do declare*

in my conscience; neither is it a material variance to omit or misrecite a branch of a statute no way relating to the present purpose, but put only by way of flourish and *ex abundanti*.

Neither is the misrecital of the preamble of a statute material, where the substance of the purview is well recited; as where, in an action on the statute of hue and cry, the declaration recites the preamble, as speaking of the burning of houses, where the statute speaks of arsons generally, without mentioning houses; or where in an action of *scandalum magnatum*, the declaration, reciting the preamble of the statute, mentions only what relates to Earls, &c. but if an indictment on 8 H. 6. cap. 9. § 6. in reciting the clause, which shews in what actions the party shall recover, after mentioning recoveries by verdict, omit the words, *or in other manner*, or recite the statute as giving the fine on a recovery by action *dicto domino regi*; where there is nothing to make good the word *dicto*; or recite the clause concerning the bringing an action, as saying, *if the party after such entry make a feoffment*, &c. where the words are, *if after such entry any feoffment be made*; or recite it thus, *if any person be put out and disseised*, where the words are *if any person be put out or disseised*, the variances have been adjudged fatal: yet the last has been holden to be immaterial, because though the words above-mentioned are in the disjunctive, they have been always expounded in the copulative; and it seems questionable how far the other variances will be holden fatal at this day; niceties of this kind not having been of late so much regarded as formerly.

2 Hawk.
P. C. c. 25.
§ 107, 108.

The total omission of the clause, which gives the forfeiture, does not hurt; and it may be probably argued, that a misrecital of such clause, in putting the words *admitteret & forisfaceret*, for *amitteret & forisfaceret*, is immaterial; for the variance is in a word wholly nugatory, and the sense is complete without it. But if the variance carries with it a material repugnancy, as where the words *whoever shall do the same shall incur the pain*, &c. are thus recited, *whoever shall do the contrary shall incur the pain*, &c. it will be difficult to make it good.

2 Hawk.
P. C. c. 25.
§ 109.

3. How far it is necessary to bring the Offence indictable within the very Words of the Statute.

It is a general rule, that unless the statute be recited, neither the words *contra formam statuti*, nor any periphrasis, intendment, or conclusion, will make good an indictment which does not bring the offence within all the material words of the statute; as if an indictment of rape omit the word *rapuit*; or an indictment of perjury on 5 Eliz. cap. 9. omit the words *voluntariè & corruptè*; or an indictment for striking in a church on 5 & 6 E. 4. cap. 4. omit the words *to the intent to strike*; or an indictment for forestalling on 5 & 6 E. 6. cap. 14. do not expressly allege that the goods *were then coming to the market to be sold*; or an indictment on the same statute for engrossing, do not allege that the defendant *engrossed*,

2 Hawk.
P. C. c. 25.
§ 110.
[Where the words of a statute are descriptive of the nature of the offence, or the purview of the statute; or are necessary to give a sum-

mary jurisdiction, there it is necessary to specify in the particular words of such statute. *Per* Lord Mansfield, *Rex v. Pemberton*, 2 Burr. 1037.]

2 Hawk.
P. C. c. 25.
§ 111. Neither is it always sufficient to pursue the words of the statute, unless in so doing you fully, directly, and expressly allege the matter wherein the offence consists, without the least uncertainty or ambiguity; and therefore if an indictment of perjury on 5 *Eliz. cap. 9.* setting forth that the party, *tañto per se sacro evangelio falsò deposuit*, do not directly shew that he was sworn; or if an information on 18 *H. 6. cap. 17.* for not abating so much of the price of wine sold as the vessels wanted of the statute-measure, do not expressly shew how much they wanted; or if an indictment on the statute of usury, setting forth that the defendant took more than five in the hundred, do not shew how much, it is insufficient.

2 Hawk.
P. C. c. 25.
§ 112.
[*Rex v. Baxter*,
5 Term
Rep. 83.] If the statute relate only to such and such persons particularly described by it, the indictment must bring the defendant within all such descriptions, unless they carry with them the bare denial of a matter, the affirmation whereof will be a proper natural plea for the defendant; as where it is enacted, that all persons, having no reasonable excuse, shall go to their parish church, &c. in which case there is no need to allege in the indictment, that the defendant had no reasonable excuse; for this will more properly come into question from the plea; neither is there any need, in order to bring a defendant within the description of a statute, to shew where the thing happened which brought him within it; neither is it necessary, where you allege, that the defendant *existens* so and so, as the statute mentions, did the fact, to shew any farther, that he was so at the time of the fact.

2 Hawk.
P. C. c. 25.
§ 113. There is no need to allege in an indictment on a statute, that the defendant is not within any of its provisos, notwithstanding the purview expressly takes notice of them, as by saying, that none shall do the thing prohibited otherwise than in such special cases, &c. as are expressed in the act; but it is said, that a conviction * on a penal statute ought expressly to shew that the defendant is not within any of its provisos; for since the defendant has no remedy against such a conviction, but from a defect appearing on the face of it, it ought to have the highest certainty, and to satisfy the court that the defendant had no such matter in his favour, as the statute itself allows him to plead.

2 Hawk.
P. C. c. 25.
§ 114. If the statute whereon an indictment is founded, be particularly recited, and the substance of the fact, and the time and place, and things and persons concerned, be alleged with sufficient certainty, and a circumstance only omitted, the general conclusion, *contra formam statuti*, seems to help such omission.

4. Whether an Indictment grounded on a Statute that will not maintain it, may be good as an Indictment at Common Law.

It was formerly holden, that no indictment grounded on a statute, and concluding *contra formam statuti*, could be maintained as an indictment at common law, if it were not maintainable as an indictment on some statute, because it appears that the prosecution is grounded on a foundation which will not support it: but the law is now taken to be otherwise; and accordingly it hath been adjudged, that on a special indictment on the statute of stabbing, the defendant may be found guilty of general manslaughter at common law, and the words *contra formam statuti* rejected as senseless.

2 Hawk.
P. C. c. 25.
§ 115.
[Rex v.
Smith,
Dougl. 445.
Rex v.
Mathews,
5 Term
Rep. 162.]

5. How far it is necessary to conclude *Contra Formam Statuti*.

It seems to be agreed, that a judgment on a statute shall never be given on an indictment which doth not conclude *contra formam statuti*; and therefore if the fact indicted be an offence prohibited only by statute, and the indictment conclude not *contra formam statuti*, no judgment can be given upon it; for though an indictment, which is redundant, may be helped by rejecting what is senseless, an indictment that is defective in a material part can be no way supplied: but it seems, that a judgment on 8 H. 6. cap. 9. may be given on a writ of assize of *novel disseisin*, brought in the common law form; but this depends upon a reasonable construction of the statute, which being express that the party may recover by such writ, but giving no new one, may be well intended to give the party a remedy by a writ brought in the old form.

2 Hawk.
P. C. c. 25.
§ 116.

If there be more than one statute concerning the same offence, the latter of which only continues the former, without making any addition to it, or only qualifies the method of proceeding upon it, without altering the substance of its purview, it is safe to conclude an indictment on it *contra formam statuti*; but where the same offence is prohibited by several independent statutes, or a new penalty is added by a subsequent statute to an offence prohibited by a former, it is said to be safer to conclude *contra formam statutorum*, than *contra formam statuti*.

2 Hawk.
P. C. c. 25.
§ 117.

* Facts done by virtue of an act containing a former one, expiring, may be laid to be done by virtue of the original act.

Rex v.
Morgan,
2 Str. 1066.

Though the indictment be *contra formam stat.* it is not necessary that the *certiorari*, *venire*, and *disstringas*, express it.*

Rex v.
Hayes,
2 Str. 843.

Raym. 1518. 1 Barnard. 31. 48. 142. 167.

(I) What ought to be the Form of a Caption of an Indictment.

THE caption of the indictment is no part of the indictment itself, but it is the style of the preamble, or return, that is made from an inferior court to a superior, from whence a *certiorari* issues to remove it, or when the whole record is made up in form;

2 Hal. Hist.
P. C. 165.

(a) And in this form:
Hortf.

Ad generalem sessionem pacis tent.

apud S. in com. prædict. 5 die Octobris anno regni, &c. coram A. B. C. D. & sociis suis justiciariis domini regis ad pacem dicti domini regis in com. prædict. conservand. necnon ad diversas felonias, transgressi, & alia malefacta in eodem comitat. audiend. et terminand. assignatis, per sacrament. E. F. G. H., &c. proboverum & legalium hominum comit. prædict. jurat. & onerat. ad inquirend. pro dicto domini rege & pro corpore comit. prædict. existit præsentatum. 2 Hal. Hist. P. C. 165.

2 Hawk.

P. C. c. 25.

§ 119., &c.

Every caption of an indictment must shew that it was taken before a court which has a proper jurisdiction; and therefore if it shew only that it was taken before J. S. steward, without shewing to whom he was steward, or in what court; or if the caption of an inquisition *super visum corporis*, shew only that it was taken before J. S. mayor of London, without adding that he was coroner; or if it barely call him coroner, without shewing that he was such for the district in which the inquisition was taken, it is insufficient; but if it shew that he was a coroner in the county, it sufficiently shews that he was a coroner for the county; and if the caption of an indictment shew that it was taken at the sessions of the peace of such a county, it sufficiently shews that such sessions was holden for the county; but if it only shew that it was holden in the county, it is said to be insufficient: so it is also, if it omit the clause *nec non ad diversas felonias, &c.* or if it barely shew that the indictment was taken at a sessions of the peace, without shewing before whom, or without naming the justices, or shewing for what place they were justices; or if in describing them as justices *ad pacem, &c. conservand.* it omit the word *assignat.* Yet it hath been adjudged, that it is not necessary for the caption of an indictment taken at a general sessions of the peace, to stile any of them of the *quorum*, if it sufficiently shews that some of them were such, by shewing that the indictment was taken at a general sessions.

2 Hawk.

P. C. c. 25.

§ 124.

The caption of an indictment *ad magnam curiam cum leta tent.* is insufficient; but if it be *ad magnam curiam & ad letam*, or *ad vis. franci. pleg. cum cur. baron. tent.* perhaps it is sufficient; for since the court baron has no jurisdiction over criminal matters, and the caption in these last cases is not express that the indictment was taken at it, as it is in the first case, the court will intend that it was taken at the leet, which alone had power to take it.

2 Hawk.

P. C. c. 25.

§ 125.

The not shewing in the caption of an indictment at a leet, whether the court were holden by charter or prescription, is helped by the multitude of precedents.

2 Hawk.

P. C. c. 25.

§ 126.

Every caption of an indictment ought to shew that the indictors were of the precinct for which the court was holden, and that they were twelve in number, and that they found the indictment on their oaths: also, some indictments have been quashed for an omission of the names of the jurors; and others, for want of the words *proboverum & legalium hominum*; and others, for want of the words *ad tunc & ibidem jurat. & onerat.*; and others, for want of the words *ad inquirend. pro domino rege & pro corpore comitatus*;

comitatus; yet of late years exceptions of this kind have not been much favoured, especially if the indictment were in a superior court, and that which is omitted be, in common understanding, implied in what is expressed.

Every caption must shew a certain day and year when the indictment was found, and must record it in the present tense; but if it describe the court as holden *die Martis & die Mercurii*, or on such a day in such a year of the king, without shewing what king; or if it shew the day and year in figures, which are not *Roman* (a), it is insufficient; yet it needs not add the year of the Lord. And the multitude of precedents have made good the use of *extitit præsentat*. instead of *existit*, &c. (b)

2 Hawk.
P. C. c. 25.
§ 127.
[Where the caption stated the sessions to be holden *ad festum Epiphanii* instead of

Epiphanie, it was adjudged a fatal mistake. *Rex v. Warre*, 2 Str. 698. So, where it stated it on an impossible day. *Rex v. Fearnly*, 1 Term Rep. 316. An indictment taken at an adjourned sessions, must shew when the original sessions began, to bring it within the time prescribed by the statute. *Rex v. Fisher*, 2 Str. 865.] (a) 2 H. H. P. C. 170. 1 Str. 261. Andr. 146. [(b) A conviction may be in the past, as well as in the present tense. *Rex v. Hall*, 1 Term Rep. 320.]

Every such caption must also shew where the indictment was found, that it may appear to have been at a place within the jurisdiction of the court; and therefore if it set forth, that the indictment was taken at a sessions of the peace, holden for such a county at *B.* without shewing in what county *B.* lies, otherwise than by putting the county in the margin, it is insufficient; but if an inquest of death be set forth as taken at *B.* before the coroner of the liberty of *B.* it needs not express that *B.* is within the liberty of *B.* for it cannot but be intended.

2 Hawk.
P. C. c. 25.
§ 128.

(K) Where an Indictment may be quashed.

BY the common law, the judges may, in discretion, quash any indictment for any such insufficiency in the body or caption of it, as will make a judgment given on it against the defendant erroneous; but they are in no case bound so to do *ex debito justitiæ*, but may oblige the defendant to plead or demur; and this they generally do where the offence is of an enormous or publick nature, or where the indictment has been removed by *certiorari*, and a recognizance for procuring the trial of it has been forfeited. *Way*; because they must be very grossly bad to have the court to destroy them at once. 1 Bl. Rep. 275.]

2 Hawk.
P. C. c. 25.
§ 146.
[Between quashing indictments and arresting the judgment, quashing is the strongest

* Indictment against six jointly and severally, for exercising a trade, may be quashed.

Rex v. Weston, 1 Str. 623. *Rex v. Tucker*, 4 Burr. 2046.

The court will not quash an indictment, because not laid *contra formam stat.* but leave defendant to demur.

Rex v. Brotherton, 2 Str. 722.

The court cannot strike counts out of an indictment, for it is the finding of the grand jury.

Rex v. Pewtress, 2 Str. 1026. *Ca. temp. Hardw.* 203.

B. R. will quash an indictment at quarter sessions for perjury at common law, for want of jurisdiction.

Rex v. Bainton, 2 Str. 1088.

[Wherever there is a manifest defect of jurisdiction, the indictment will be quashed. *Rex v. Williams*, 1 Burr. 329.]

But

Rex v.

Wigg,

2 Ld. Raym.

1163.

Rex v.

Leap, Andr.

226.

Rex v.

Bailey,

2 Str. 1211.

Rex v.

King,

2 Str. 1268.

Rex v.

Trevilian,

2 Str. 1268.

Rex v.

Johnfon,

1 Will. 325.

1 Burr. 516.

Rex v.

Wright,

1 Burr. 543.

1 Burr. 651.

3 Burr.

1468.

Ibid.

3 Burr.

1841.

(a) In the construction hereof it hath been settled, that no such exception can be taken after plea pleaded.

But it will not quash an indictment for a nuisance, but put defendant to demur.

Rex v. Bishop, Andr. 220. Rex v. Sutton, 4 Burr. 2116.

Indictment for words spoken to a justice, but not laid to be spoken to him in the execution of his office, quashed.

But the court would not quash an indictment for not attending a mayor to execute his warrant, but left the defendant to demur to it.

Neither would they quash an indictment against overseers for not paying money over to their successors; for quashing is not *ex debito justitiæ*, and this is a growing evil.

The court will quash an indictment for not receiving an apprentice, if it does not appear by the circumstances averred, that it was a binding within the *stat. 43 Eliz. cap. 2.* and *Qu.* Whether an indictment lies?

The court will not, on motion, quash an indictment against several for breaking and entering a mine, and carrying away lead; especially if it is at the time that the judges are trying others in the same county for a like offence.

Indictment for setting a person on the footway to deliver printed bills of defendant's occupation, whereby the way was obstructed, was quashed.

So, against a spiritual person, for occupying lands contrary to 21 H. 8. cap. 13. for the proceeding must be by action or information, and it must be in one of the king's courts, not at sessions.

A motion may be made the last day of term, to quash an indictment, but not to quash an order.

Motion for the prosecutor to quash his own indictment is not of course, especially if the defendant has been put to expence.

If after indictment removed by *certiorari* it is at issue, and jury appointed, prosecutor countermands notice of trial, and defendant chooses to bring it on by proviso, and it stands for trial, and prosecutor in the interim gets a new indictment found, and then moves to quash the first, alleging it to be defective, which was cured by the new, on which it is intended to proceed; the court may (by consent) order the first to be quashed, and the second to be put in its place, and to stand in the same condition.

The court refused to quash an indictment, for selling flower by false weights, though it appeared on the face of it that the *flower-scale* was the lighter, which must tend to the prejudice of the seller, and though it did not say *where* the selling was. *

By the 7 W. & M. cap. 3. "No indictment for high treason or misprision thereof, (except indictments for counterfeiting the king's coin, seal, sign, or signet,) nor any process, or return thereupon, shall be quashed for misreciting, misspelling, false or improper *Latin*, unless exception concerning the same be taken and made in the respective court where the trial shall be, by the prisoner, or his counsel assigned, (a) before any evidence given in open court on such indictment; nor shall any such

“ such misreciting, misspelling, false or improper *Latin*, after conviction on such indictment, be any cause to stay or arrest judgment; but nevertheless any judgment on such indictment shall be liable to be reversed on a writ of error, as formerly.”

² Hawk.
P. C. c. 25.
§ 148.

Infancy and Age.

- (A) Who are Infants: And herein of the several Ages and Periods between which the Law distinguishes as to several Purposes.
- (B) To whom the Privilege of Infancy extends, or who are to be considered as Minors.
- (C) How far the Law regards and takes Notice of Infants in *Ventre sa Mere*.
- (D) How Infancy is to be tried.
- (E) Of what Things an Infant is capable, in relation to the Publick, and in which he shall answer for his Neglect.
- (F) Of what Things capable, being for his own Advantage.
- (G) How far the Law takes Care of his Interest, so as not to let him suffer by his Laches: And herein where he must take Notice of and perform Conditions, &c.
- (H) Where punishable for Crimes and Injuries committed by him.
- (I) Of the Acts of Infants, as they are good, void, or voidable: And herein,
 1. Of his Contracts for Necessaries.
 2. Of judicial Acts, or Acts done by him in a Court of Record.

3. Of

3. Of his Acts in *Pais*, where void or only voidable.
4. Where void, or voidable, as to the Infant, shall yet bind others.
5. At what Time voidable Acts are to be avoided.
6. By whom to be avoided.
7. In what Manner they are to be avoided.
8. Of the Confirmation of voidable Acts.

(K) Of the Privilege of Infants in Suits and Actions by and against them : And herein,

1. How far the Courts take Care of the Interest of Infants.
2. How they are to appear when they sue or are sued.

(L) Of the Privilege of Infancy as to the Parol's demurring : And herein,

1. In what Actions the Parol shall demur.
2. Where the Parol shall demur without any Plea pleaded.
3. Upon what Plea pleaded the Parol shall demur.
4. For the Nonage of what Person the Parol shall demur.
5. In respect to what Estate and Interest the Parol shall demur.
6. Where for the Nonage of the Vouchee.
7. Where for the Nonage of the *Prayee in Aid*.
8. In what Cases if the Parol demur against one it shall against another.
9. In what Cases the Demurrer of the Parol for Part shall be for all.
10. Of the Prayer of Age and Counterplea.

(A) Who are Infants : And herein of the several Ages and Periods between which the Law distinguishes as to several Purposes.

(a) For though the civil law obtains much, being a wife and well calculated law, yet it is not

FROM the observations made on the daily actions of infants, as to their arriving at discretion, the laws and customs of every country have fixed upon particular periods on which they are presumed capable of acting with reason and discretion. Hence in our law the (b) full age of man or woman is (c) twenty-one years.

of any force here, or in any other countries, farther than by custom or acts of parliament it has been admitted. Hal. Hist. P. C. 16. (b) It is the full age of male or female, according to common speech, Lit. § 104. 259. (c) At which age he is capable of contracting, and may alien his lands, goods, and

and chattels; and this period we have fixed upon from the feudal law, for by that law the tenant at this age was presumed capable to attend his lord in the wars, and therefore at this age was out of ward of guardian in chivalry. Co. Lit. 78. b.—But according to the civil law, the complete full age, as to matters of contract, is twenty-five years. Dig. lib. 4. tit. 4. Hal. Hist. P. C. 17.

Therefore if one under the age of (a) twenty-one years makes his (b) will, and thereby devises his lands, and after attains the age of twenty-one years, and dies, without making any new publication thereof, this devise is void.

Dyer, 143.
Raym. 84.
Sid. 162.
(a) If a child be born the

16th day of February, this child will be of full age any part of the 15th day of February twenty-one years after, for the law makes no fractions of a day, and upon the 1st instant of that day he would have completed twenty-one years. Keb. 589. Sid. 162. Raym. 84. S. C. Herbert and Taibol, 2 Mod. 281. S. P. *arguendo*. Salk. 44. S. P. said by Holt to have been adjudged. Ld. Raym. 281. 480. (b) So, if an infant make a deed, and deliver it within age, and afterwards, upon his coming of full age, deliver it again, yet the deed is void; for the deed must take effect from the first delivery, or not at all. 3 Co. 55. b.

But though a person under the age of twenty-one cannot dispose of his lands, yet it is said, that one under that age may, pursuant to the statute of 12 Car. 2. cap. 24. dispose of the custody of his infant child, and that such disposition draws after it the land, &c. as incident to the custody. Vaugh. 178.

Also, it seems, it was agreed, that an infant male at fourteen, and female at twelve, may dispose of their personal estate at those ages: For herein the common law has appointed no time, being a matter cognizable in the spiritual court, which herein proceeds according to the civil law, by which law infants at those ages are presumed to have sufficient discretion to make such disposition; and therefore their testaments in these cases are not set aside, or controuled in Chancery or the temporal courts.

2 Mod. 315.
2 Jones, 210.
Comb. 50.
Vern. 255.
2 Vern. 463.
Preced.
Chan. 316.
—In the Office of Execution. 305.
it is said,

that the common law has not precisely determined at what age a person may make a disposition of his personal estate; but that it is generally allowed it may be made at the age of eighteen.—And my Lord Coke mentions seventeen or eighteen; at which years, he says, an infant may make his testament, and constitute his executors for his goods and chattels. Co. Lit. 89. b. [The opinions upon this point in the books are numerous and irreconcilable, but the doctrine in the text seems to be the most to be relied upon. See note 6. 13 Ed. Co. Litt. 89. b.]

The age of consent to a marriage in an infant male is (c) fourteen, and in a female twelve; (d) but they may marry before, and if they agree thereto when they attain these ages, the marriage is good; but they cannot (e) disagree before then; and if one of them be above the age of consent, and the other under such age, the party so above the age may as well disagree as the other; for both must be bound, or neither.

Co. Lit. 33.
78, 79.
2 Inst. 434.
3 Inst. 88,
89.
6 Co. 22.
7 Co. 47.
Roll. Abr.
340, 341.
(c) That

herein our law and the civil agree, for that before these ages they are said to be *impuberes*. Hal. Hist. P. C. 17.—And though by our law they may agree before, yet if the wife hath a child, begotten after marriage, solemnized *infra annos nuptiales*, and for that cause afterwards divorced, it is a bastard. 7 Co. 42. &c., Keene's case. G. d. 16b Repert. Canon. 484. (d) And they are baron and feme de facto; so that the baron before he attains the age of fourteen, or the wife twelve, may have trespass *de muliere abducta cum bonis viri*. Rol. Abr. 340. Moor 741. 2 And. 208. 6 Co. 22. (e) If they agree by parol, and afterwards agree and live together as man and wife, the disagreement is not binding, but that they may well live together without any new marriage. Rol. Abr. 341. Lee and Ashton.—But if the disagreement had been before the ordinaty, they could never agree again to make it a good marriage. Rol. Abr. 341. per Werberton. If a man within the age of fourteen takes a wife of full age, and after brings a writ *de muliere abducta cum bonis viri*, and after comes to the age of fourteen, if he after makes any continuation of the action, this shall be an agreement to the marriage, so that it cannot after be defeated. Rol. Abr. 341.—[But now the agreement after twelve or fourteen would not be binding on the infant, if

marriage was without *hanns*, or by *deceit without consent of parent or guardian*, and the infant was not widow or widower, for the 26 Geo. 2. c. 33. makes all such marriages void.]

2. Lit. 79.

See *infra*
the case of
Lord Decius.
1. Roll.
Abr. 341.

But though the party above age may as well disagree as the other, yet it is said that he cannot do it before the other arrives at the proper age: * Also, it is said to have been (a) adjudged, that if a man marries a woman that is within the age of twelve years, and after the woman at eleven years of age disagrees to the marriage, and after the husband takes another wife, and hath issue by her, that this is a bastard; for the first marriage continues, notwithstanding the disagreement of the woman; for she cannot disagree within the age of twelve years, and so her disagreement is void †.

See the
next case.

Roll. Abr.
341. Ba-
ngton and
Warner, ad-
judged in
S. R. upon
a writ of
error out of
the C. B.
and the first
judgment

If a man marries a woman that is within the age of twelve years, and after the feme covert within the age of consent disagrees to the marriage, and after the age of twelve years marries another, now the first marriage is absolutely dissolved, so that he may take another wife; for though the disagreement within the age of consent was not ‡ sufficient, yet her taking another husband after the age of consent affirms the disagreement, and so the marriage is void *ab initio*.

Confirmed. Moor, 575. S. C. adjudged, because she cohabited with her second husband at all times after the age of consent. But *note*: it does not appear in the book whether the second marriage was at or before the age of consent. N. Dyer, 15. a. margin, S. C. cited.——† See *infra*. the case of Lord Decius.

21 June,
1699 Car. 2.
before the
delegates at
Serjeant's-
hall, Fleet-
street.

But for the better explication hereof it may not be improper to insert a case determined before the delegates, which was thus:

Mrs. K. *Fitzgerrard* was married to my Lord *Decius*, she being of the age of twelve years and a half, and he of the age of eight; afterwards, she being thirteen years old disagreed from this marriage, and married Mr. *Villers*; and upon suit in the spiritual court the second marriage was affirmed: The Lord *Decius* appealed to the delegates; and it was argued by civilians and common lawyers before the Bishops of *London* and *Rocheſter*. *North*, C. J. *Littleton*, Baron, *Jones* and *Atkins*, Justices, and several doctors of the civil law: The civilians said, that minors could not contract matrimony, but only *sponsalia de futuro*, and therefore though they bind themselves *per verba de presenti tempore*, yet the law, by reason of the incapacity of the parties, would make such a construction that it shall only be a contract *de futuro*. In this case indeed one of the parties is of age of consent, but that makes no diversity; for a contract of matrimony is *utrinque obligatorius*, and and reciprocal in its nature. On the other side it was said, that such a contract as this betwixt persons of unequal ages might as well claudicate as other contracts, which are also *utrinque obligatorii*; they said, that a contract of marriage carries a relation in itself, and is reciprocal, but that in some cases this may fail, by reason of an accident or circumstance in the persons, notwithstanding which the nature of the thing will remain to be *ultra citroque* obligatory, as we see in other contracts; but arguments from the definition of civil affairs are not cogent; for no law can

be framed to meet with all emergencies and circumstances but ought to be differently applied according as the particular circumstances require. The law does not make contracts *per verba de presenti tempore* to be contracts *de futuro*, but in cases of minors, and they cannot shew any texts that contracts *per verba de presenti* by *majors* shall be by construction made contracts *de futuro*. The laws of God and Nature require performance of promises and agreements; and the woman, in the present case, cannot dissent *before the husband come to the age of consent*, because till then he cannot dissent any more than he can assent. Serjeant *Maynard*. In our law, marriage betwixt minors has the effect of a marriage till it be annulled: If the woman be nine years old she shall be endowed, be the husband of what age soever, and dower can never be, but where there was a precedent marriage, *posito effectu ponitur causa*; such a wife shall have an appeal of the death of her husband, and the husband in such a case shall have a writ *de uxore abductâ cum bonis viri*. If tenant by knight's service die, his heir within age of consent, and married, the lord cannot tender him a marriage, [for he cannot disagree to his present marriage, whilst he is within age]. *Lee and Astton*, 5 Jac. 1. where two within age had contracted matrimony, and the parent of one was bound to give so much at their age of consent, if they would agree to this marriage: An action was brought for this money, and it was found that within age they disagreed, but at their full age agreed; and judgment was for the plaintiff, because the disagreement was not material. 1 *Inst.* 79. *Banisters versus Offley*. Our law calls it *matrimonium*, although the term of *sponsalia* is not unknown to us: we find it in *Glanvil*, lib. 6. and *Littleton* calls it an affiancing; to shew what regard our law has to such a marriage, he cited 1 *Inst.* 33. 1 *Roll. Abr.* 340. *Dyer* 369. To prove that before age of consent no agreement or disagreement can be, *Moor* 575. 1 *Roll. Abr.* 341. 1 *Inst.* 79. and the pleadings in 7 *Co. Kenn's Case*, and 6 *Co. Ambrosia George's Case. Thursby. cont.* Our law gives such credit to this inchoate marriage, that, if the parties die before it be avoided, the law will not say that it was null and void; and upon this ground are the cases of dower and appeal which have been cited. The case in *Dyer*, 369. is for the decree; for there, by the opinion of many doctors, *quamvis alia sunt sponsalia de futuro, tamen in causâ dotis extenduntur ad verum matrimonium ratione privilegii*; see too 7 *H. 6.* 11. 6 *Co.* 22. The sentence given in the spiritual court was affirmed.

And as the age of fourteen is the age of consent to a marriage in an infant male; so by law hath he several other ages assigned him to several purposes, *viz.* at the age of twelve to take the oath of allegiance in the tourn or lect, at fourteen to be out of ward of guardian in socage, to choose a guardian; and this also is accounted his age of discretion, fifteen to have had *aîd pur fair fitz chevalier*.

The authority of a guardian in chivalry did not determine till the heir, if a male, came to the age of twenty-one years; because it was presumed that till that age he was not capable of doing

Co. Lit.
78. b.
Hob. 225.

Lit. § 103.
Co. Lit. 75.
2 *Inst.* 235.

(a) Before knight-service, and attending the lord in his wars. The guardianship of an heir female determined at (a) fourteen at common law, but by *Westminster* the 1st, the lord had the wardship till she attained the age of sixteen, to tender her convenient marriage; but the authority of a guardian in (b) soccage, as hath been said, ceases at the age of fourteen, at which age the infant may call his guardian to an account, and may (c) choose a new guardian.

ton, c. 6. Lit. § 108. Co. Lit. So. (b) But the guardianship of the father, which is a guardianship by nature, continues till the son and heir apparent attain to the age of twenty-one years; but that is with respect to the custody of the body only. Carth. 286. per Holt, C. J. (c) In the spiritual court, if the infant be above the age of seven, he chooses his own curator or tutor; but if under that age, they choose one for him.

Co. Lit. One within the age of twenty-one years may do homage, but
65. b. cannot do fealty; because in the doing of fealty he ought to be
2 Inst. 11. sworn, which an infant (d) cannot be.
(d) But an infant at the age of fourteen may be sworn as a witness, at which age he is presumed to have sufficient discretion. 2 Hal. Hist. P. C. 278. Vide tit. Evidence, letter (A).

5 Co. 29. b. An infant at the age of seventeen may be a procurator or (e)
Off. Exec. executor; and in this both the civil and common law agree.
307. Hal. Hist. P. C. 17. (e) And if one under the age of seventeen be made executor, and administration *durante minore etate* be granted to another, such administration ceases when the infant arrives at the age of seventeen. Hob. 250. Yelv. 128. 5 Co. 29. Godolph. 102. [But before he attains such age, he cannot assent to a legacy. Prince's case, 5 Co. 29. b.; and even then, his assent will not bind him, unless he have assets for debts, Chamberlain v. Chamberlain, 1 Ch. Cas. 257. And though he may administer at seventeen, it is said, that he cannot commit a *devisavit* till twenty-one. Whitmore v. Weld, 1 Vern. 326.]—But if administration be granted to one during the minority of a person who is entitled to it as next of kin to the intestate, such administration does not determine till the infant's age of twenty-one; because before that age he cannot give bond to the ordinary to administer faithfully. Carth. 446.

Comp. In- Infancy is a good cause of refusal of a clerk; also by the sta-
cumb. 142. tutes 13 *Eliz. cap.* 12., and 13 & 14 *Car.* 2. on one is to be admit-
214. Gibf. ted a deacon unless he be twenty-three years at least, nor a priest
Cod. 168. unless he be twenty-four.
3 Mod. 67.

Lamb. 624, By the custom of *gavelkind*, an infant at the age of fifteen is
t25. & reckoned at full age to sell his lands; and this seems to have been
vide tit. taken from the civil law, which reckons fourteen the *etas pubertatis*;
Gavelkind. for they reckoned that though the infant had ended his years of guardianship at fourteen, yet he might not have completed his account with his guardian till the age of fifteen, and that was esteemed to be the age when he was completely out of guardianship; and therefore at this age he was allowed to sell the lands descended to him: But in this the customs of *England* differed from the civil law; for the civil law does not allow of his dispositions till the age of twenty-five; and therefore this must have been allowed by the old *Saxon* law, because they thought that a great deal of time was lost, if the infant could only use his own, without being able to dispose of it in a way of traffick, or in marriage, till twenty-five; and therefore they allowed the infant to sell, but under great limitations and restrictions, that he might not be defrauded; and by this means they thought there was sufficient provision made for the necessity of commerce, which in the small divided shares was absolutely necessary.

Also,

Also, by custom, in some places, an infant seised of lands in focage may at the age of fifteen years make a lease for years, which shall bind him after he comes of age; for the custom makes fifteen his full age to that purpose.

Co. Lit.
45. b.

Also, by the custom of *London*, an infant unmarried, and above the age of fourteen, though under twenty-one, may bind himself apprentice to (a) a freeman of *London* by indenture, with proper covenants; which covenants, by the custom of *London*, shall be as (b) binding as if he were of full age.

Moor, 133.
2 Bult. 192.
2 Roll.
Rep. 305.
Palm. 361.
1 Mod. 271.
(a) But this

custom does not extend to one bound apprentice to a waterman under twenty-one; for the company of watermen are but a voluntary society, and being free of that does not make one free of the city of *London*. 6 Mod. 69. (b) And for breach an action may be brought in any other court, as well as in the courts in the city. Moor 136.

As to capital offences, in which the law is the same with regard to the male and female sex, the age of fourteen is the common standard, at which both males and females are, by (c) our law, obnoxious to capital punishments; for this being the *etas pubertatis*, or age of discretion, the law presumes them at those years to be *doli capaces*, and capable of discerning between good and evil; and therefore subjects them to capital punishments as much as if they were of full age.

F. N. B.
202. Co.
Lit. 247. b.
Dalr. ap. 95.
and 104.
Hal. Hist.
P. C. 25.
Hawk. P. C.
2. Forst.
Cr. Law. 70.
(c) But the

civil law, as to capital punishments, distinguished the ages into four ranks: 1. *Ætas pubertatis plena*, which is eighteen years. 2. *Ætas pubertatis* or *pubertas* generally, which is fourteen years, at which time they were likewise presumed to be *doli capaces*. 3. *Ætas pubertatis proxima*; but in this the *Roman* lawyers were divided, some assigning it to ten years and an half, others to eleven, before which the party was not presumed to be *doli capax*. 4. *Infantia*, which lasts till seven years, within which age there can be no guilt of a capital offence. Hal. Hist. P. C. 17, 18, 19.

But though the age of fourteen be the *etas pubertatis*, before which our law does not presume the party to be *doli capax*, and therefore that a party indicted for a capital offence committed before these years, is to be found not guilty; yet hath this general rule the following temperaments:

Hal. Hist.
P. C. 26.

1. That if the party be above twelve, though under fourteen, and appears to be *doli capax*, and could discern between good and evil at the time of the offence committed, he may be convicted and undergo judgment and execution of death, though he hath not attained the age of fourteen: But herein, according to the nature of the offence and circumstances of the case, the judge may or may not in discretion reprieve him before or after judgment in order to the obtaining the king's pardon.

Hal. Hist.
P. C. 26.
[See the case of William York, a boy of ten years of age, convicted before Lord Chief Justice Willes

at *Bury* summer assizes 1748, for the murder of a girl of about five years of age. Foist. Cr. Law. 70.]

2. If an infant be above seven, and under twelve years, and commit a capital offence, *primâ facie* he is to be judged not guilty, and to be found so; because he is supposed not of discretion to judge between good and evil: But yet if it appear, by strong and pregnant evidence and circumstances, that he had discretion to judge between good and evil, judgment of death may be given against him; for *malitia supplet ætatem*; but herein the circumstances must be inquired of by the jury, and the infant is not to be convicted upon his confession: Also herein, my Lord *Hale* says,

Hal. Hist.
P. C. 27.

that it is prudence after conviction to respite judgment, or at least execution; but he says, that if he be convicted, the judge cannot discharge him, but only relieve him from judgment, and leave him in custody till the king's pleasure be known.

Hal. Hist.
P. C. 27.
28 Plow.
19. a.

3. If an infant within age be *infra etatem infantie*, viz. seven years old, he cannot be guilty of felony, whatever circumstances proving discretion may appear; for *ex presumptione juris* he cannot have discretion, and no averment shall be received against that presumption.

(B) To whom the Privilege of Infancy extends, or who are to be considered as Minors.

Co. Lit. 43.
Dyer, 209.
b.

THE privilege of infancy does not extend to the king; for the political rules of government have thought it necessary, that he who is to govern and manage the whole kingdom, should never be considered as a minor, incapable of governing himself and his own affairs.

Plow. 213.
a. 5 Co. 27.
7 Co. 12.

Therefore if the king within age make any lease or grant, he is bound presently, and cannot avoid them, either during his minority, or when he comes of full age.

Co. Lit. 43.
Roll. Abr.
728.

So, if the king consent to an act of parliament during his minority, yet he cannot after avoid this act; because the king, as king, cannot be a minor; for as a king he is a body politic.

Cro. Car.
557.
5 Co. 27.

Also, the acts of a mayor and commonalty shall not be avoided, by reason of the nonage of the mayor.

4 Co. 115.
Comp. In-
cumb. 22.

Although a duke, earl, or the like, be but a minor, or not above ten years of age, in the custody and in the family of another nobleman, who may and doth retain chaplains, yet he may qualify chaplains to be dispensed withal to hold two benefices with cure, in like sort as if he was of full age.

Roll. Abr.
144.

An infant in gavelkind shall have his age, and all other privileges of the infant at common law; because though he hath the privilege of alienation at fifteen, yet that doth not take from him any privilege he had before at common law.

Co. Lit.
244. b.

A bastard being impleaded shall have his age; for the dilatory plea must be determined before the pleas in chief can come on; so that the plea of infancy will stay the suit, before it can be inquired whether he is or is not a bastard.

(C) How far the Law regards and takes Notice of Infants in *Ventre sa Mere*.

Godolph.
Orph. Leg.
102.
(a) And by
our law a

A Child in *ventre sa mere* may be appointed executor, or may take a legacy: also, if there are two or more at a birth, they shall be joint executors or joint legatees of the thing bequeathed; for the (a) civil law, for the benefit of the infant, repotes a child

child in his mother's womb in the same condition as if he were born. child in *ventre sa mere* may be vouched; is capable of taking; the mother may detain charters on behalf of such child; a bill may be brought on behalf of such child; a court of equity will grant an injunction in his favour to stay waste, 2 Ven. 710. [and the destruction of him is murder. 3 Inst. 50. 1 Vez. 86.]

If there be a *bastard eigne* and *mulier puisne*, and the bastard enter, and die seised, his issue shall inherit the lands, and exclude the *mulier* for ever; but in this case, if the bastard had died leaving issue in *ventre sa mere*, and the *mulier* had entered, and then a son were born, yet cannot he enter upon the *mulier*: And herein our law differs from the civil law; for our law requires an immediate descent, which cannot be before the person is in *esse*; also, by our law, the freehold cannot be in abeyance. Co. Lit. 244.

It appears to have been a matter of much controversy, whether a devise of lands to an infant in *ventre sa mere* be good, because not in being to take at the time of the death of the devisor; for, as some say, by the devise the person is to take immediately after the death of the devisor, and the freehold cannot be put in abeyance by the act of the parties; but others hold, that such devise is good, though the infant be not in *esse* at the death of the devisor, and that the freehold shall not be in abeyance, but shall descend to the heir at law in the mean time. 11 H. 6. 17. Bro. Devnt. 32. M. 177. 637. 2 Bull. 2. Cro. Eliz. 423. 1 Lev. 155. 1 Sid. 183. Raym. 1. 1 Keb. 83. 1 Salk. 23. 2 Mod. 9. 2 Vern. 711. Prec. Chan. 50. Eq. Cas. 173. 2 Stra. 1092. 2 Eq. Abr. 294. pl. 2. Andr. 263. S. C. S. P.

But, however, all the books agree in this, that a devise to an infant when he shall be born, or when God shall give him birth, is good as an executory devise, and that the freehold shall descend to the heir at law in the mean time *. Sid. 153. Lev. 135. Raym. 163. S. C. Snaw and Cutler. * At this

day it is clearly agreed that a devise to an infant in *ventre sa mere* is good, though he be born after the testator's death, and he shall take by way of executory devise. 1 Freem. 244, 293. Vide Fearn's Ed. 3d edition 419, &c.

So it is clear, that if land be devised for life, the remainder to a posthumous child, that this is a good contingent remainder; because there is a person in being to take the particular estate; and if the contingent remainder vests during the continuance of the particular estate, or *eo instanti* that it determines, it is sufficient. Moor, 637. Churchman 1. Wiatt. 3 Lev. 408. 4 Mod. 344. Salk 227. pl. 6. Carth. 300.

Reeve and Long; & vide 10 & 11 W. 3. c. 16. and head of *Remainder* and *Reversion*.

Also, it seems agreed, that a man may surrender copyhold lands immediately to the use of an infant in *ventre sa mere*; for a surrender is a thing executory, and nothing vests before admittance; and therefore, if there be a person to take at the time of the admittance, it is sufficient; and not like a grant at common law, which putting the estate out of the grantor must be void, if there be no body to take. Roll. Re. 109. 133. 2 Bull. 275. Co. Copy. 9. & v. d. Moor, 637.

If an usurpation be had on one in *ventre sa mere*, at the next turn after his birth he shall be relieved on the statute *Westm. 2. cap. 5.* Hob. 210.

[A posthumous child is within a provision in marriage articles for such children of the marriage as should be living at the death of the father or mother; and shall take under the statute of distributions.] Millar v. Turner, 1 Vez. 86. Burnet v. Mann, 1 Vez. 156.

(D) How Infancy is to be tried.

Lev. 142.
Sid. 321.
Keb. 796.
Cro. Jac.
59. 581.

INFANCY is to be tried by inspection of the court, or by jury : And herein it is laid down as a rule in some books, that where-soever it is alleged upon the pleading, that the party was and yet is under age, there it shall be tried by inspection ; but where the infant is of full age at the time of the plea, there it shall be tried *per pais*.

Co. Lit. 380.
Moor, 76.
2 Roll.
Abr. 15.
2 Inst. 483.
2 Bulst. 330.
12 Co. 122.
(a) To prove the nonage of a devilor, an alma-nack, in which the father had written the nativity of his son, was allowed to be strong evidence. Raym 84.

But here we must observe, that as to judicial acts, or acts done by an infant in a court of record, which he is allowed to avoid, the trial thereof must be by inspection ; and therefore if an infant levies a fine, he must reverse it by writ of error ; and this must be brought during his minority, that the court may by inspection determine the age of the infant ; but the judges, as by *adjuncta*, may in such cases inform themselves by witnesses, (a) church-books, &c.

Co. Lit. 380.
Moor, 884.
Keckwick's case.

If an infant brings a writ of error to reverse a fine for his non-age, and, after inspection, and proof of infancy by witnesses, dies before the fine is reversed, his heir may reverse it ; because the court having recorded the nonage of the consor, ought to vacate his contract, when he appeared to be under a manifest disability at the time he entered into it.

Moor, 189.
& vide Cro.
Jac. 230,
231.

An infant acknowledged a fine, and the consuees omitting to have the fine engrossed till he came of age, in order to prevent the infant from bringing a writ of error ; the court upon view of the consueance produced by the infant, and upon his prayer to be inspected, and his age examined, recorded his nonage, to give him the benefit of his writ of error, which he must otherwise lose, his nonage determining before the next term.

(b) That if he suffers a common recovery by

So, if an infant suffer a common recovery by appearing in (b) person, this must be reversed during his minority by inspection of the judges.

guardian, and have a privy seal for that purpose, such recovery cannot be at any time set aside. But for this *vide tit. Fines and Recoveries*, and *infra* letter (I).

Sid. 321.
Lev. 142.

But it is said, that if an infant suffers a recovery, in which he appears by attorney, he may reverse it after his full age, as it may be discovered whether he was within age when the recovery was suffered ; because it may be tried *per pais* whether the warrant of attorney was made by him when he was an infant.

Skin. 10.
pl. 10.

It is said, that in all cases where the party pleads that he was within age at *B.* and alleges a place, that there the trial may be well enough where it is alleged ; where no place is alleged, there in personal actions where the writ is brought ; and in (c) real actions where the right of the lands depends upon infancy, the trial is to be where the land lies ; and if not, where the action is brought.

(c) Cro.
Eliz. 518.
S. P.

An infant entered into a recognizance of 100*l.* as bail to *J. S.* which became forfeited, and he was taken in execution; whereupon he brought an *audita querela*, suggesting his infancy, and the writ being brought into court, he appeared in *propria persona*; and it was moved that he might be inspected, and his witnesses examined; and thereupon his mother peremptorily deposed, that at that very time he was twenty years old, and no more, and a maid servant gave circumstantial evidence to the same purpose; and it was moved that he might be bailed: But *per curiam*, it is a matter of discretion either to admit him to bail, or to refuse it, he being in execution; but if he had brought his *audita querela* before he had been taken in execution, he must have a *superfedeas* of course; and the court would not bail him, though the long vacation was near, but required the evidence to be strengthened by a copy of the register where he was born, which being in *Yorkshire*, he appeared again in *Mich.* term in custody, and a copy of the register was produced, and sworn to be a true copy, and the mother and the maid being again sworn, and all agreeing in the same thing, he was discharged by the court.

Carth. 278.
Trin.
5 W. 3.
Loyd v.
Eagle.

(E) Of what Things an Infant is capable in relation to the Publick, and in which he shall answer for his Neglect.

AN infant seems capable of such offices as do not concern the administration of justice, but only require skill and diligence; and these, it seems, he may either exercise himself, when of the age of discretion, or they may be exercised by deputy; such as the offices of park-keeper, forester, (a) gaoler, &c.

minster, 2. c. 11. extends to an infant gaoler, so as to charge him in an action of debt for an in execution. 2 Inst. 382. 3 Mod. 222. S. P. cited.

Plow. 379.
381. 9 Co.
48. 97.
Vide tit.
Offices.
(a) The statute of *West-*
escape of one

But it is said, that an infant is not capable of the stewardship of a manor, or of the stewardship of the courts of a bishop; because, by intendment of law, he hath not sufficient knowledge, experience, and judgment to use the office, and also because he cannot make a deputy.

Co. Lit.
3. b.
Roll. Abr.
731. 2 Roll.
Abr. 153.
March, 41.
43. Cro. Eliz. 636. Cro. Car. 556.

An infant cannot be an (b) attorney, (c) bailiff, factor, or receiver.

F. N. B.
118. Roll.

Abr. 117. Co. Lit. 172. Cro. Eliz. 637. (b) Cannot be an attorney, because he cannot be sworn. March 92. (c) Because not to be charged in any account. Co. Lit. 172. — Not in an *indebitatus* upon an *insumul computasset*; for in this action no evidence shall be given of the value or necessity of the things, but of the account only, in which the infant may be mistaken. Latch 169. adjudged. Noy 87. S. C. adjudged, between Wood and Witerick, & vide Palm. 528. 2 Roll. Rep. 271. [Trueman v. Hurst, 1 Term Rep. 40. adjudged.] — Nor can an infant be charged as bailiff, &c. in equity farther than in law; and therefore it is said, that if such a one is made factor, his friends should give security for his accounting. Abr. Eq. 6.

If an infant, being master of a ship at *St. Christopher's* beyond sea, by contract with another, undertakes to carry certain goods from *St. Christopher's* to *England*, and there to deliver them; but

Roll. Abr.
530. Furnes
and Smith,
and a prohibi-

does

bition de-
nied to the
court of
Admiralty.

does not afterwards deliver them according to the agreement, but wastes and consumes them, he may be sued for the goods in the court of Admiralty, though he be an infant; for this suit is but in nature of a detinue, or trover and conversion at the common law.

Roll. Abr. 2.
Carth. 161.
cited.

If an infant keeps a common inn, an action on the case upon the custom of inns will not lie against him.

Carth. 160.
Williams v.
Harrison,
adjudged on
demurrer.
[But *quæ* whether an action will not lie on a promissory note given by an infant for necessities? See *Trueman v. Huft*, 1 Term Rep. 45. In this case of *Williams v. Harrison*, the security was given in the course of trade.]

So, if an infant draws a bill of exchange, yet he shall not be liable on the (a) custom of merchants, but he may plead infancy in the same manner that he may to any other contract of his.

(a) Not a trader within the statutes of bankrupts. *Vide tit. Bankrupt.*

Hob. 325.
(b) But may
be a witness,
if he appears
to have dis-
cretion. *Vide*
tit. Evidence.

An infant cannot be a (b) juror; and it is said by *Hobart*, that by the wisdom of the common law a person under forty-two could not be on a trial *de ætate probandâ*, because he then tried a matter which might have happened before he was twenty-one.

2 Inst. 47.
(c) This is
expressly en-
acted by the
7 & 8 W.
& M. c. 25.
§ 8.

An infant, or one under the age of twenty-one years, cannot be elected a member of the house (c) of commons; nor can any lord of parliament sit there until he be of the full age of twenty years.

Vide head of
Executors
and Admini-
strators,
letter (A).

An infant may be appointed executor, but he cannot administer till he is of the age of seventeen; and before that age, administration is to be granted to some friend of his; but an infant cannot be an administrator before the full age of twenty-one years, because before that age he cannot give bond, as required by the statute, to administer faithfully.

(F) Of what Things capable, being for his own Advantage.

Co. Lit.
2. 8.
2 Inst. 203.

AN infant is capable of inheriting, for the law presumes him capable of property: also, an infant may purchase, because it is intended for his benefit, and the freehold is in him till he disagree thereto, because an agreement is presumed, it being for his benefit, and because the freehold cannot be in the grantor contrary to his own act, nor can be in abeyance, for then a stranger would not know against whom to demand his right; and if at his full age the infant agrees to the purchase, he cannot afterwards avoid it; but if he dies during his minority, his heirs may avoid it; for they shall not be bound by the contracts of a person who wanted capacity to contract.

2 Bulf. 69;
(d) That the
court of
Chancery
will decree

If an infant take a lease for years rendering rent, if he enter upon the land he shall be charged with an action of debt during his minority, because the purchase is intended for his (d) benefit; but he may wave the term, and not enter, and if more
rent

rent be reserved upon the lease than the land is worth, he may avoid it. building leases of 60 years of infant's estates, when it appears to be for their good. 2 Vern. 224.

If an infant be lord of a copyhold manor, he may grant copyholds notwithstanding his nonage; for these estates do not take their perfection from the interest or ability of the lord to grant, but from the custom of the manor, by which they have been demised, and are demiseable, time out of mind. 4 Co. 23. b. Co. Copyholder, 79. 107. Noy, 41. 8 Co. 63.

An infant may present to a church; and here it is said, that this must be done by himself, of whatsoever age he be, and (a) cannot be done by his guardian, for the guardian can make no advantage thereof, and consequently has nothing therein whereof he can give an account, and therefore the infant himself shall present. Co. Lit. 17. b. 89. a. 20 E. 3. 5. 3 Inst. 156. [See supra 416.] (a) But it is said, that if the heir be within the age of discretion, the guardian may present in his name. Cro. Jac. 99. *vide* Parson's Law, c. 20. fol. 76. — Also a presentment made by the guardian, in the name of the heir is a good title to the heir in a *quare impedit*. 42 E. 3. 130.

(G) How far the Law takes Care of his Interest, so as not to let him suffer by his Laches; and herein, where he must take Notice and perform Conditions, &c.

THE rights of infants are much favoured in law, and regularly their laches shall not be prejudicial to them, upon a presumption that they understand not their right, and that they are not capable of taking notice of the rules of law, so as to be able to apply them to their advantage. Hence, by the common law, infants were not bound for want of (b) claim and entry within a year and a day, nor are they bound by a fine and five years non-claim, nor by the statutes of limitation, provided they prosecute their right within the time allowed by the statute after the impediment removed. Plow. 358. a. 360. a. 4 Co. 125. a. *vide* tit. Fines and Recoveries, and tit. Limitations. (b) Not bound by a *cessavit per biennium*, because the law intends that they do not know what arrearages to tender. 3 Mod. 223.

If lands are devised to trustees till debts paid, and then to an infant and his heirs, and *J. S.* a stranger enters on the lands, and levies a fine, and five years and non-claim pass, and the infant, when of age, brings an ejectment, but is barred, because the trustees ought to have entered; yet equity will relieve, and not suffer an infant to be barred by the laches of his trustees, nor to be barred of a trust-estate during his infancy; and the infant in this case shall recover the mesne profits. 2 Vern. 386. Allen v. Sayer.

It has been ruled in Chancery, that where one receives the profits of an infant's estate, and six years after his coming of age he brings a bill for an account, that the statute of limitations is a bar to such suit, as it would be to an action of account at common law; for this receipt of the profits of an infant's estate is not such a trust as, being a creature of a court of equity, the statute shall be no bar to, for he might have had his action of account against him at law, and therefore no necessity to come into this court. Preced. Chan. 518. Lockey and Lockey.

(a) If a stranger enters and receives the profits of an infant's estate, he shall, in consideration of equity, be looked upon as a trustee for the infant. 2 Vern. 342. Vern. 295. S. C.—So, if a man, during a person's infancy, receives the profits of an infant's estate, and continues to do so for several years after the infant comes of age before any entry is made on him, yet he shall account for the profit throughout, and not during the infancy only. Abr. Eq. 280. Yallop and Holworthy.

Lit. §402, 403. The entry of an infant is not taken away by a descent cast, by reason of his weakness and incapacity to claim, which is not to be imputed to him.

Co. Lit. 245. b. But if a man seised of lands in fee die, his wife *privement enfeint* with a son, and a stranger abate, and die seised, and after the son is born, he shall be bound by the descent; because at the time of the descent he had no right to enter, not being *in esse*, and, by consequence, had no wrong then done him, and the lord had none but the heir to avow upon at the time of the descent.

Co. Lit. 246. a. *B.* tenant in tail, enfeoffs *A.* in fee, who hath issue within age, and dies, *B.* abates and dies seised, the issue of *A.* being still within age; this descent shall bind the infant, because the issue in tail is remitted to his former and elder right, which is to be preferred before the defeasible title of the discontinuee's heir.

Co. Lit. 244. 3 Co. 101. Sir Richard Pexhall's case, Plow. 372. It is a rule in law, that the possession and dying seised of a *bastard eigne* bars the *mulier*: so, if the *mulier* be an infant during the possession of the *bastard eigne*, yet he is barred by the descent; for though no laches can be imputed to an infant, because, not being of the age of consent, his permission cannot be taken for a consent; yet in such cases, where time is limited by the law for pleas and actions, infants are included, unless specially excepted, for here their permission is taken for a consent; because they are supposed to consent to the established law, to which they are obliged for protection during minority; and the law hath not thought fit in this case, because it might happen to be a publick mischief in a very tender point, for it might be any man's case to suffer by the bastardy of an ancestor; and the law hath given the infants guardians to plead by, but it cannot revive the evidence of legitimation, which so easily perishes with the life of the party.

2 Inst. 303. If an infant be tenant by the curtesy, or lessee for life or years, he shall answer not only for waste committed by himself, but also for permissive waste or wastes committed by a stranger; for the privilege of infancy cannot prevail in a matter that would be a wrong and disherison to him who hath the inheritance; nor is it in the last case any hardship to the infant, because he hath his remedy over against the wrong-doer.

2 Inst. 703. If by tenure or prescription certain lands are obliged to the repair of bridges, highways, &c. and such lands come to an infant either by descent or purchase, he shall be obliged to repair, &c. in the same manner as if he were of full age.

If an infant present not to a church within six months, it shall lapse; if the five years for making a claim after a fine begin in the ancestor's life, he must claim within them; if he does not claim a villain, fled into ancient demesne, within a year and a day, he cannot afterwards claim him; and he shall be barred in an appeal of the death of his ancestor, if he do not bring it within a year and a day: If the king die seised, the infant is driven to his petition; for in these cases the law prefers the good of the church, the publick repose of the realm, liberty, life, and the king's prerogative, before the privilege of infancy.

An infant is bound by (a) all conditions, charges, and penalties, in an original conveyance, whether he comes to the estate by grant or descent.

Rep. 72. Leon. 100. Hard. 11. (a) Bound by conditions annexed to the estate at common law, because *transit cum onere*; and therefore if the infant will have the estate, he must observe the condition upon which it was granted. Carth. 43.

Therefore if a person devise to his grand-daughter, who is not heir at law, lands, upon condition that she marry with the consent of certain trustees, she is obliged to take notice, at her peril, of the condition, and likewise to perform it; but had she been heir at law, she must have had notice given her of the condition, to make the marriage, without consent, a forfeiture.

An infant shall be bound by conditions in fact, and such conditions as he can perform, in equity as well as in law, as was adjudged in the precedent case of *Fry and Porter*.

So, where *A.* gave lottery-tickets amongst her servants, on condition, that if any of them came up a prize of 20*l.* or more, they should give one half to her daughter; and the ticket given the foot-boy, who was an infant, came up 1000*l.* prize; it was holden in Chancery, that the daughter was well entitled to a moiety, for a gift to an infant, on condition, binds him as well as another person.

If an office in a parkship be given or descend to an infant, if the condition in law annexed to such an office (which is skill) be not observed, the office is forfeited.

If a man make a feoffment in fee to another, reserving rent, and if he pay not the rent within a month, that he shall double the rent, and the feoffee die, his heir within age, the infant pay not the rent, he shall not by his laches herein forfeit any thing: but otherwise it is of a feme-covert; and the reason of the diversity is, because the infant is provided for by the (b) statute, *non current usura contra aliquem infra atatem existens*. &c. but that statute doth not extend to a feme-covert, neither doth it extend to a condition of a re-entry, which an infant ought to perform, for the forfeiture thereof cannot be called *usura*.

It has been holden by some (c) opinions, where the custom of a copyhold manor was, that every surrender, which is made *secundum consuetudinem* out of court, should be presented by the homage at the next court to be holden for the said manor; and that upon such a presentment proclamation had been usually made, and so for three courts next following; and if upon the third proclamation

Co. Lit.
246.

2 Inst. 233;
8 Co. 44.
Latch, 199.
2 Roll.

Rep. 72. Leon. 100. Hard. 11.

Vent. 200;
2 Lev. 21.
1 Mod. 86.
300. Fry
and Porter,
adjudged.
[*Supra*
456.]

2 Vern. 343;

2 Vern. 560.
Scott and
Houghton.

3 Mod. 224.

Co. Lit.
246. b.

(b) Statute
of Merton,
c. 5.

(c) By Holt,
C. J. v.
three judges,
in the case
of King and
Dalliston,
Carth. 41.,
&c. Salk.
386. pl. 1.

Comb. 118. proclamation no person came to be admitted, &c. that then the
 3 Mod. 221. lord of the manor should seize the lands as forfeited; that this
 Show. 84. custom bound an infant.
 Lutw. 765.

But this is now settled by the 9 *Geo. 1. cap. 29. § 5.* by which it is enacted, "That no infant, or feme-covert, shall forfeit any copyhold, messuages, &c. for their neglect or refusal to come to any court or courts, to be kept for any manor whereof such messuages, &c. are parcel, and to be admitted thereto; nor for the omission or denial to pay any fine or fines imposed or set upon them, or any of their admittances to any such copyhold, messuages, &c."

2 Salk. 415.
 pl. 2. *per*
 Cowper, Ld.
 Chancellor.

If a legacy be devised generally, and no time ascertained for the payment, and the legatee be an infant, he shall be paid interest from the expiration of the first year after the testator's death; but it seems a year shall be allowed, for so long the statute of distribution allows before the distribution be compellable, and so long the executor shall have, that it may appear whether there be any debts; but if the legatee be of full age, he shall only have interest from the time of his demand after the year; for no time of payment being set, it is not payable but upon demand, and he shall not have interest but from the time of his demand; otherwise it is in the case of an infant, because no laches are imputed to him.

(H) Where punishable for Crimes and Injuries committed by him.

Mal. Hist.
 P. C. 16.
 &c. *supra*,
 letter (A).
 Foist. Cr.
 Law, 70.

IT has been already observed, that one above the age of fourteen, or of years of discretion, may be guilty of a capital offence in the same manner as one of full age; also, that one under these years, if above the age of seven, may, according to the circumstances of the case, as if in murder he hides the body slain by him, makes excuses, or otherwise shews such signs of cunning as demonstrate him capable of discerning between good and evil, be guilty and convicted of a capital offence; but that in these latter cases, the judges may respite judgment, or execution, in order to the obtaining of the king's pardon.

Mal. Hist.
 P. C. 22, 9.

Also, if an infant, under the age of fourteen, be indicted by the grand inquest, and thereupon arraigned, the petit jury may either find him generally not guilty, or they may find the matter specially, that he committed the fact, but that he was under the age of fourteen, *scilicet etatis 13 annorum*, and had not discretion to discern between good and evil, & *non per feloniam*; but if a man be arraigned in such a case upon an indictment of murder, or manslaughter, by the coroner's inquest, there, if the party committed the fact, regularly, the matter ought to be specially found; because if the jury find the party not guilty, they must inquire how he came by his death; but if he be first arraigned, and acquitted upon the indictment, he may plead that acquittal upon
 his

his arraignment upon the coroner's inquest, and that will discharge him; and the *petit jury* shall inquire farther how the party came by his death.

As to misdemeanours and offences that are not capital, in some cases an infant is privileged by his nonage; and herein the privilege is all one, whether he be above the age of fourteen, or under, if he be under one and twenty years, but with these differences:

If an infant under the age of twenty-one years be indicted of any misdemeanour, as a riot or battery, he shall not be privileged barely by reason that he is under twenty-one years; but if he be convicted thereof by due trial, he shall be fined and imprisoned; and the reason is, because upon his trial the court *ex officio* ought to consider and examine the circumstances of the fact, whether he was *doli capax*, and had discretion to do the act wherewith he is charged: and the same law is of a feme-covert: but if the offence charged by the indictment be a mere nonfeasance, (unless it be of such a thing as he is bound to by reason of tenure, or the like, as to repair a bridge, &c.) there, in some cases, he shall be privileged by his nonage, if under twenty-one, though above fourteen years, because laches in such a case shall not be imputed to him.

If an infant in assise vouch a record, and fail at the day, he shall not be imprisoned, nor, it seems, a feme-covert; and yet the statute of *Wejm. 2. cap. 25.* that gives imprisonment in such a case, is general.

If *A.* kills *B.* and *C.* and *D.* are present, and do not attach the offender, they shall be fined or imprisoned; yet if *C.* were within the age of twenty-one years, he shall not be fined or imprisoned.

Where the corporal punishment is but collateral, and not the direct intention of the proceeding against the infant for his misdemeanour, there, in many cases, the infant, under the age of twenty-one, shall be spared, though possibly the punishment be enacted by parliament.

It is said by *Hale*, that if an infant, of the age of eighteen years, be convicted of a disseisin with force, yet he shall not be imprisoned, and yet a feme-covert shall be imprisoned in such case.

But herein the law seems to be, that an infant at the age of eighteen, nay fourteen, or a feme-covert, by their own acts, may be guilty of a forcible entry, and they may be fined for the same; but it seems by the better opinion, that the infant cannot be imprisoned, because his infancy is an excuse by reason of his indiscretion, being not (a) particularly mentioned in the statute against forcible entries, to be committed for such fine.

shall not be subject to corporal punishment by force of the general words of any statute wherein he is not expressly named. 1 Hawk. P. C. c. 64. § 35.

But neither an infant, nor feme-covert, can be guilty of a forcible entry or disseisin, by barely commanding one, or by assenting to

Hal. Hist.
P. C. 20.

Bro. Saver
Default, 50.
Plow. 364. a.
Co. Lit.
246. b.
2 Inst. 703.
Cro. Jac.
465.
Hal. Hist.
P. C. 20.

Hal. Hist.
P. C. 20.

Hal. Hist.
P. C. 21.

Hal. Hist.
P. C. 21.

Hal. Hist.
P. C. 21.

Bridg. 173.
Crompt.
Just. 61.
Dalt. 302.
Co. Lit. 357.
(a) That the
infant ought
not to be
imprisoned,
because he

Crom. 69.
Co. Lit. 357.
Hawk. P. C.
to c. 64. § 35.

to one to their use, because every such command or assent by persons under these incapacities is void; but an actual entry by an infant, into another's freehold, gains the possession, and makes him disseisor as well as it does a feme-covert.

Bro. Discei-
60, 19.

Two infants joint-tenants, one releases to the other, by which the other holds the whole; this seems a disseisin, because the release being in no manner for the advantage of the infant, is utterly void; then the entry of the other being without title is tortious, and a disseisin; but if there had been livery made upon it, though between joint-tenants, this is void; yet it seems no disseisin, for the regard the law has to the solemnity of livery, which shall continue till defeated by act of equal notoriety.

Roll. Abr.
661.

If a man carries an infant into the lands of *J. S.* and there claims the lands to the use of himself and the infant, yet the infant seems no disseisor, because he made no claim of it himself, and then shall not be charged with the tort of another person.

Cro. Jac.
274.

Hal. Hist.
P. C. 21.

* The *capitulation pro fine* taken away, and other provisions in lieu thereof. 5 W. & M. c. 12.

If an infant be convicted in an action of trespass *vi & armis*, the entry must be *nihil de fine, sed pardonatur quia infans*, for if a *capitulation* be entered against him, it is error, for it appears judicially to the court that he was within age when he appears by guardian; the like law is, that he shall not be in *miseriordia pro falso clamore* *.

Plow. 364.
Hal. Hist.
P. C. 21.

General statutes, that give corporal punishment, are not to extend to infants; and therefore, if an infant be convicted in ravishment or ward, he shall not be imprisoned, though the statute of *Merton, cap. 6.* be general in that case; but this must be understood where it is, as before said, a punishment as it were collateral to the offence, as in the cases before-mentioned.

Co. Lit. 247.
Hal. Hist.
P. C. 21, 22.
(a) So, by the statute of 21 H. 8. c. 7., concerning felony by servants that embezzle

But where a fact is made felony or treason, it extends as well to infants, if above fourteen years, as to others; and this appears by several acts of parliament, (a) as by 1 Jac. 1. cap. 11. of felony for marrying two wives, &c. where there is a special exception of marriages within the age of consent, which in females is twelve, in males fourteen years; so that if the marriage were above the age of consent, though within the age of twenty-one years, it is not exempted from the penalty.

their masters goods delivered to them, there is a special proviso, that it shall not extend to servants under the age of eighteen years, who certainly had been within the penalty if above the age of discretion, viz. fourteen years, though under eighteen years, unless a special provision had been to exclude them. Hal. Hist. P. C. 22. — So, by the 12 Ann. c. 7. where apprentices, under the age of fifteen years, who shall rob their masters are excepted out of the act.

1 Sid. 258.

1 Lev. 169.

1 Keb. 905.

913, S. C.

Johnson

and Pie.

(b) That an

action for

words lies

against an

infant of

the age of

seventeen, for *malitia supplet etatem*.

Infants are liable for torts and injuries of a private nature; but if an infant, affirming himself to be of age, borrows 100*l.* and gives his bond for it, and being sued upon the bond, avoids it by reason of his nonage, yet no action lies against him for the deceit; for though infants shall be bound by actual torts, (b) as trespass, &c. which are *vi & armis*, yet they shall not for those that found in deceit; for if they should, all the infants in *England* might be ruined; adjudged, and judgment arrested after a verdict for the plaintiff in an action upon the case for the deceit.

Noy, 129.

So, where an action of deceit was brought for affirming upon the sale of a horse, that it was the defendant's horse, whereas it was the horse of another man, &c. the defendant pleaded infancy; and on demurrer the court, on the first argument, inclined for the defendant, for this action depends upon the contract; and though the contract (it being an actual delivery) be not void, but voidable, and this action be brought upon the wrong, and not upon the contract, yet here, by this plea, he shews that he elects to avoid the contract, and then this action falls; and afterwards it was adjudged for the defendant; and the court said, that it was like an action brought against an infant for affirming himself to be of full age.

Keb. 778.
Grove and
Nevil.
Sid. 238.
Lev. 169.
S. C. cited.

But if an infant judicially perjure himself in point of age, or otherwise, he shall be punished for the perjury; so he may be indicted for cheating with false dice, &c.

Sid. 258:
per Cur.

(I) Of the Acts of Infants as they are good, void, or voidable: And herein,

1. Of their Contracts for Necessaries.

HERE we must observe, that, strictly speaking, all contracts made by infants are either void or voidable, because the contract is the act of the understanding, which during their state of infancy they are presumed to want; yet civil societies have so far supplied that defect, and taken care of them, as to allow them to contract for their benefit and advantage, with power, in most cases, to recede from and vacate it when it may prove prejudicial to them: and where they contract for necessaries they are absolutely bound; and this likewise is in benignity to infants, for if they were not allowed to bind themselves for necessaries, no person would trust them, in which case they would be in worse circumstances than persons of full age.

10 H. 6. 14.
13 E. 4. 2.
Roll. Abr.
729. * That
the contract
of an infant
is not abso-
lutely void,
but only
voidable, at
his own
election, is
a doctrine
now settled
and esta-
blished.

Burr. 566. 2 Stra. 938. 2 Barnard. K. B. 174.*

Therefore it is clearly agreed by all the books that speak of this matter, that an infant may bind himself to pay for his necessary meat, drink, apparel, physick, and such (a) other necessaries; and likewise for his good teaching and instruction, whereby he may profit himself afterwards.

Co. Lit.
172. a. &c.
(a) If an in-
fant at the
age of fif-
teen mar-
ries, he

may take up provision for his wife and children. Carter, 315. said

But it must appear that the things were actually necessary, and of reasonable prices, and suitable to the infant's (b) degree and estate, which regularly must be left to the jury; but if the jury find that the things were necessaries, and of reasonable price, it shall be presumed they had evidence for what they thus find; and they need not find particularly what the necessaries were, nor of what price each thing was: also, if the plaintiff declares for other things as well as necessaries, or alleges too high a price for those things that are necessary, the jury may consider of those things that

Cro. Jac.
560.
2 Roll.
Rep. 144.
Poph. 151.
Palm. 361.
Goult. 68.
Godb. 219.
Leon. 114.
(b) That the
law dis-
guises be-

tween persons as to necessities; were really necessities, and of their intrinsic value, and proportion their damages accordingly.

as between a nobleman and a gentleman's son; also, in point of time and education, the law distinguishes; as at school, *Oxford*, and inns of court; and that he is not to be looked upon in the same condition when a school boy, as when of riper years. Carter, 215.—Velvet and Sattin suits laced with gold held not necessary. Cro. Eliz. 583.

Roll. Abr.

729.

Palm. 528.

Jon. 182.

S. C. Pick-

erning v.

Gunning,

adjudged on

a motion in

arrest of

judgment.

Carth. 110.

Huggins

and Wise-

man.

If an infant promises another, that if he will find him meat, drink, and washing, and pay for his schooling, he will pay 7*l.* yearly; an action upon the case lies upon this promise; for learning is as necessary as other things; and though it is not mentioned what learning this was, yet it shall be intended what was fit for him, till it be shewn to the contrary on the other part; and though he to whom the promise was made does not instruct him, but pays another for it, the promise of re-payment thereof is good.

Assumpsit for labour and medicines in curing the defendant of a distemper, &c. who pleaded *infra atatem viginti & unius annorum*; the plaintiff replied, it was necessities generally; and upon a demurrer to this replication it was objected, that the plaintiff had not assigned in certain how or in what manner the medicines were necessary; but it was adjudged that the replication in this general form was good.

Roll. Abr.

729. Cro.

Jac. 494.

2 Roll.

Rep. 45.

S. C. ad-

judged be-

tween Hill

and Whittingham,

If an infant be a mercer, and have a shop in a town, and there buy and sell, and contract to pay a certain sum to *J. S.* for certain wares sold to him by *J. S.* to re-sell, yet he is not chargeable upon this contract, for this trading is not immediately necessary *ad vitium & vestitum*; and if this were allowed, infants might be infinitely prejudiced, and buy and sell and live by the loss.

[2 Str. 1083. Whywall v. Champion, S. P.]

5 Mod. 368.

Salk. pl. 2.

386, 387.

Ld. Raym.

344.

And as the contract of an infant for wares, for the necessary carrying on his trade, whereby he subsists, shall not bind him; so neither shall he be liable for money which he borrows to lay out for necessities; and therefore the lender must, at his peril, lay it out for him, or see that it is laid out in necessities.

Salk. 586.

pl. 2. Earle

v. Peale.

As in debt upon a single bill, the defendant pleaded that he was within age; the plaintiff replied, that it was for necessities, *viz.* 10*l.* for clothes, and 15*l.* money lent *pro & erga* his necessary support at the university; the defendant rejoined, that the money was lent him to spend at pleasure; *absque hoc*, that it was lent him for necessities; and issue hereupon was found for the plaintiff, who had judgment in *C. B.* but was reversed in *B. R.* on a writ of error; for the issue only being, whether this money was lent the infant for necessities, not whether it was laid out in necessities, it cannot bind the infant which ever way it is found; for it might have been borrowed for necessities, and laid out in a tavern; and the law will not intrust the infant with the application and laying of it out.

Salk. 279.

pl. 4.

So, if one lends money to an infant, who actually lays it out in necessities, yet this shall not bind the infant, nor subject him to an action; for it is upon the lending that the contract must arise, and after that time there could be no contract raised to bind the

the infant, because after that he might waste the money, and the infant's applying it afterwards for necessaries will not by matter *ex post facto* entitle the plaintiff to an action (a).

[(a) Butin Marlow v. Pitfield, 1 P. Wms.

559., the Master of the Rolls held, that if one lends money to an infant to pay a debt for necessaries, and in consequence thereof he does pay the debt, the infant shall be liable in equity; for the lender of the money stands in the place of the person paid, viz. the creditor for necessaries, and shall recover in equity, as the other should have done at law.]

Also, although an infant shall be liable for his necessaries, yet if he enters into an obligation with a penalty for payment thereof, this shall not bind him; for the entering into a penalty can be of no advantage to the infant.

Cro. Eliz. 920. Moor, 679. pl. 929. Co. Lit. 172. Roll. Abr. 729.

It is also said, that an infant cannot either by a parol contract or a deed bind himself, even for necessaries, in a sum certain; and that should an infant promise to give an unreasonable price for necessaries, that would not bind him; and that therefore it may be said, that the contract of an infant for necessaries, *quatenus* a contract, does not bind him any more than his bond would; but only since an infant must live as well as a man, the law gives a reasonable price to those who furnish him with necessaries.

Cases in Law and Eq. 185.

Yet it hath been (b) adjudged, and is admitted in several (c) other books that if an infant contracts for necessaries, and enters into a single bill for payment, that this shall bind him, and that an action of debt will lie on such obligation.

(b) Lev. 86. Russel and Lee, adjudged, Keb. 382. 416. 423. S. C.

(c) Co. Lit. 172. S. P., and diversity taken between a single obligation and an obligation with penalty. Cro. Eliz. 910. S. P., and same diversity *per Curiam*. Roll. Abr. 729. S. P., though thereby the defendant is ousted of his wager of law.

So, an infant may bind himself in an *assumpsit* for payment of necessaries, and an action upon the case lies against him upon the promise for this, but in nature of an action of debt; and therefore where debt lies, an action on the case lies against him.

Roll. Abr. 729. Noy, 85. Latch. 157. & vide

3 Bulf. 188. Roll. Rep. 328.

Also, it seems clear, that if an infant becomes indebted for necessaries, and the party takes a bond from the infant, that this shall not drown the simple contract, because the bond has no force.

Cro. Eliz. 920.

But it is agreed, that an *infirmul computasset* will not lie against an infant, though it be for necessaries; for he, not having discretion, is not to be liable to false accounts.

Co. Lit. 172. Latch. 169. Noy, 87. [Trueman v. Hurst, 1 Term Rep. 40.]

If an infant comes to a stranger, who instructs him in learning, and boards him, there is an implied contract in law, that the party should be paid as much as his board and schooling are worth; but if the infant at the time of his going thither was under the age of discretion, or if he were placed there upon a special agreement with some of the child's friends, the party that boards him has no remedy against the infant, but must resort to them with whom he agreed for the infant's board, &c.*

Allen, 94. Duncomb and Tickridge.

* It hath of late years been several times determined, that where a parent or

relation, &c. places an infant at a boarding-school, the credit being given to such parent, relation, &c., the master cannot have any remedy against the infant.—[And an infant who lives with, and is properly maintained by his parents, cannot bind himself to a stranger for what might otherwise be allowed as necessaries. Bainbridge v. Pickering, 2 Bl. Rep. 1325.]

Turner v.
Trisby,
1 Str. 168.

Lord Bacon's Max.
Reg. 18.

[As necessaries for an infant's wife are necessaries for him, he is chargeable for them, unless provided before the marriage, in which case he is not chargeable, though she uses them afterwards.

An infant is also liable to an action for the nursing of his lawful child; *nam persona conjuncta equiparatur interesse proprio.*]

2. Of judicial Acts, or Acts done by him in a Court of Record.

Co. Lit. 3^o.
Moor, 76.
2 Roll.
Abr. 15.
2 Inst. 483.
2 Bull. 320.
12 Co. 122.
Yelv. 155.
3 Mod. 229.

As to judicial acts, and acts done by an infant in a court of record, they regularly bind the infant and his representatives, with the following savings and exceptions; as if an infant levies a fine, though the judges ought not to admit the acknowledgment of one under that disability, yet having once recorded his agreement as the judgment of the court, it shall for ever bind him and his representatives, unless he reverses it by writ of error, which must be brought by him during his minority, that the court by inspection may determine his age.

2 Co. 58. a.
10 Co. 42.
Moor, 22.
Dalf. 47.
2 Leon. 159.
Goult. 13.
Jones, 390.
Winch. 103,
104.

So, if an infant levies a fine, he is enabled by law to declare the uses thereof, and if he reverseth not the fine during his nonage, the declaration of uses will stand good for ever; for though that be a matter in *pais*, and all such acts an infant may avoid at any time after his full age, if he do not consent; yet being made in pursuance of the fine levied, which fine must stand good for ever, (unless reversed in the manner which has been mentioned,) so will the declaration of uses too.

Leon. 115.
317.
2 Sid. 55.
2 Jones, 182.
3 Burr.
1802.

If there be tenant for life, the remainder to an infant in fee, and they two join in a fine, the infant may bring a writ of error, and reverse the fine as to himself, but it shall stand good as to the tenant for life, for the disability of the infant shall not render the contract of the tenant for life, who was of full age, ineffectual.

Roll. Abr.
788.

If an infant brings a writ of error to reverse a fine for his nonage, and his nonage, after inspection, is recorded by the court, but before the fine reversed he levies another fine to another, this second fine shall hinder him from reversing the first; because the second having entirely barred him of any right to the land, must also deprive him of all remedies which would restore him to the land.

Moor, 74.
but *quare*.

If an infant levies a fine, and the conuzee renders to him either for life or in tail, it is said that he shall have no writ of error to avoid this fine; because the reversal of the fine being only to restore him to the land he parted with by the fine, it would be fruitless to give him a writ of error, since he could not thereby be restored to the land, which the very fine he would endeavour to reverse, had before given him.

Roll. Abr.
731. 742.
Co. Lit.
381. b.
2 Roll.
Abr. 395.
10 Co. 43. a.
Cro. Eliz.
471. Hob.
126, 197.

As to recoveries suffered by infants, when these were improved into a common way of conveyance, it was thought reasonable, that those whom the law had judged incapable to act for their own interest, should not be bound by the judgment given in recoveries, though it was the solemn act of the court; for where the defendant gives way to the judgment, it is as much his voluntary act and conveyance, as if he had transferred the land by livery, or any other act in *pais*; and therefore, if an infant suffers a recovery, he

may reverse it as he may a fine, by writ of error, during his minority: and this was formerly taken to be law, as well where the infant appeared by guardian, as by his attorney, or in person: but now the distinction turns upon this point, that if an infant suffers a recovery in person, it is erroneous, and he may reverse it by writ of error; but even in this case, the writ of error must be brought during his minority, that his infancy may be tried by the inspection of the court; for at his full age it becomes obligatory and unavoidable; but in cases of necessity the court has admitted the infant to appear by guardian, and to suffer a recovery, or come in as vouchee; but this too is seldom allowed by the court, unless it be upon emergencies, when it tends to the improvement of the infant's affairs, or when lands of equal value have been settled on him, and when he has had the king's privy seal for that purpose; and these recoveries have been allowed and supported by the judges, and the infant could not set them aside or shake them; besides, if such recoveries be to the prejudice of the infant, he has his remedy for it against his guardian, and may reimburse himself out of his pocket, to whom the law had committed the care of him.

Partition by writ *de partitione faciendâ* binds infants, because by judgment in a court of justice, to which no partiality can be imputed.

the benefit of an infant, will bind him: nor shall his executor dispute such decree, though it may be for his advantage to do so. 1 Atk. 631.]

If an infant acknowledge a recognizance or statute, it is only voidable; and the infant, at his peril, must avoid them by *audita querela*, as he must a fine or recovery by writ of error, during his minority; for such conveyances, or other acts of record, become obligatory and unavoidable, if they be not set aside before the infant comes of age; the reason is, because these contracts being entered into under the inspection of the judge, who is supposed to do right, the infant cannot against them aver his disability, but must reverse them by a judgment of a superior court, which by inspection hath the same means to determine whether the inferior jurisdiction has done right, that first received the contract.

If an infant bargain and sell his lands by deed indented and enrolled, yet he may plead nonage; for notwithstanding the statute 27 H. 8. cap. 16. makes the enrollment in a court of record necessary to complete the conveyance, yet the bargainee claims by the deed as at common law, which was, and therefore still is defensible by nonage.

3. Of his Act in *Pais*, where void or only voidable.

Infants are regularly allowed to rescind and break through all contracts in *pais* made during minority, except only for schooling and necessities, be they never so much to their advantage; and the reason hereof is, the indulgence the law has thought fit to give infants, who are supposed to want judgment and discretion in their contracts and transactions with others, and the care it takes of them in preventing them from being imposed upon or over-reached by persons of more years and experience.

Cro. Car.
307.
2 Bullst. 235.
Sid. 321,
322.
Lev. 142.
2 Sand. 94.
Vern. 461.
2 Salk. 567.
pl. 1.

Co. Lit.
171. b.
[A decree
in equity for

Moor, pl.
206. 2 Inst.
483. 673.
Co. Lit. 380.
Keilw. 10.
Reg. 149.
10 Co. 43. a.

2 Inst. 673.

29 E. 3. 20.
b. Roll.
Abr. 729.
Co. Lit.
172. 381.

Cro. Car. 502. And for the better security and protection of infants herein, the law has made some of their contracts absolutely void, *i. e.* all such, in which there is no apparent benefit, or semblance of benefit to the infant; but as to those from which the infant may receive benefit, and which were entered into with more solemnity, they are only voidable; that is, the law allows them when they come of age, and are capable of considering over again what they have done, either to ratify and affirm such contracts, or to break through and avoid them.

Jones, 405. 3 Mod. 310. [It was laid down by Ld. Mansfield as a general principle, in *Drury v. Drury*, 5 Br. P. C. 570., that if an agreement be for the benefit of an infant at the time, it shall bind him. And this rule hath been adopted in subsequent cases. 2 Term Rep. 159.]

Co. Lit. 2. 8. Hence it hath been agreed, that an infant may purchase, because it is intended for his benefit, and that at his full age he may either agree or disagree to the same.

2 Vent. 203.

Co. Lit. 380. Also, the feoffment of an infant is not void, but only voidable, not only because he is allowed to contract for his benefit, but because that there ought to be some act of notoriety to restore the possession to him, equal to that which transferred it from him.

Dyer, 104. 2 Roll. Abr. 572. 4 Co. 125. a. 8 Co. 42.

Bro. tit. *Diffinit.* 63. Therefore, if an infant make a feoffment and livery in person, he shall have no assise, &c. but must avoid it by (a) entry; for it is to be presumed in favour of such solemnity, that the assembly of the *pais* then present would have prevented it, if they had perceived his nonage, and therefore the feoffment shall continue till defeated (b) by entry, which is an act of equal notoriety*.

(a) May avoid his feoffment by entry during his minority, but must not have the writ *dum fuit infra ætatem* till his full age, F. N. B. 192. Co. Lit. 380. Show. Parl. Cases, 153. Co. Lit. 247. a. [for the judgment would bind his election. 3 Burr. 1808.] (b) But if an infant exchanges with another, if the other enters, the infant may have an assise. 18 E. 4. 2. Roll. Abr. 730. —* If an infant makes a feoffment, or conveys, by lease and release, and re-enters within age, still the feoffment or conveyance is only voidable, and he may elect to confirm it, when of full age; therefore a stranger cannot avail himself of the infant's entry, for he cannot elect for him. 3 Burr. 1794.

2 Roll. Abr. 2. But if the infant had made a letter of attorney to deliver seisin, he might have an assise, &c. because the letter of attorney, like all other acts of agreements made by an infant to his (c) prejudice, must be void; and therefore whoever claims under it, or by virtue of its authority, must be (d) a wrong-doer.

Noy, 130. Palm. 257. (c) But a feoffment to an infant, with a letter of attorney by him to accept livery, is said to be only voidable, because for the infant's benefit. Roll. Abr. 730. (d) That the attorney who executes it is a disseisor. Roll. Rep. 242.

35 Aff. 8. So if an infant enfeoffs his guardian, this is void, for the apparent prejudice it must be to the infant.

Roll. Abr. 728.

Vide head of *Leases and Terms for Years.* If an infant make a lease for years, reserving rent, it seems agreed, that such a lease is only voidable by the infant.

Moor, 105. But if he make a lease for years, without reservation of any rent †, it seems by the opinion of the greater number of the books, that from the apparent prejudice and hurt it must be to the infant, such lease is absolutely void: But this point does not appear to have been ever judicially determined; and indeed the reasons against it seem very cogent, and that it would be a greater indulgence

Fl. 241. 2 Leon. 216. Nov. 130. Co. Lit. 45. 308. a. Jones, 157. 4 Leon. 4.

indulgence to the infant, and more for his service, to allow him when he comes of age, and is capable of considering over again what he has done, either to ratify and affirm all his contracts, or to break through and avoid them; and that this power should be extended to all leases and contracts made by infants during their minority, as well to those which are for their benefit and advantage, as to those which apparently tend to their hurt and prejudice; for if it were to be confined only to the last, it would exclude them from being judges of either, since no man can be supposed to know what is to his disadvantage, but as he is allowed to compare it with such things as are for his advantage and good; and therefore the power of judging in general must be left to him; and, as a consequence thereof, it should seem that he may, when he comes of age, either affirm or avoid all leases or contracts made by him during his minority, according as he judges them to be beneficial or hurtful to him, without any intervening judgment of law to condemn some only, and leave others to the infant's discretion, when he comes of age. And the giving of infants such power in general over all their contracts, will sufficiently secure them against the danger of being imposed on, or over-reached by others; for when the power is general, and all persons who deal with infants know they are to be at their mercy, when they come of age, whether they will think fit to stand to their bargain, or not, this will take off from the temptation of imposing upon them; or if any should be so hardy as to do it, yet since the infant is at liberty, when he comes of age, to rescue himself by avoiding such injurious contract, there seems no possible mischief in the mean time to suffer such contract to hang *in equilibrio*, and defer pronouncing any sentence upon it, since that, as hath been said, would curtail the infant's power, and take off from his freedom of judging at all; besides that, the very reason of giving to infants such power, was to secure them against the imposition of others, which a lease for years, reserving the full rent, cannot be supposed to be; and therefore, if they were only to use it in such cases, it would be useless; and if they were denied it in the other, where no rent at all is reserved, (as they must be, if the law prejudices for them,) it would be no power at all in them, or at most but an empty and idle one; therefore, it seems by the stronger reasons, if an infant make a lease for years, without reservation of any rent, though this is apparently to his hurt and prejudice whilst he continues a minor, yet since when he comes of age he may either by assise or trespass recover the possession and mesne profits, and so make it whole *ab initio*, the lease is good in the mean time; and the rather, because most of the books agree, that if a rent were reserved on such lease, it would then be only voidable; whereas such rent may be so small in proportion to the value of the land, that there may be more reason to adjudge it absolutely void, than if none at all were reserved; because in the one case the imposition is apparent, but in the other it may be so misrepresented and coloured over as to deceive the infant, even when he comes of age, into some unwary act of ratification

Brownl 120.
Hutton,
102.
Roll. Rep.
441. Lev. 6.
Mod. 263.
3 Mod. 310.
† A lease on
which no
rent is re-
served is not
absolutely
void. An
infant may
make a lease,
without:
rent, to try
his title.
3 Burr.
1806.—
The lessee
cannot, in
any instance,
avoid the
lease on ac-
count of the
lessor's in-
stance, there-
fore it is not
void. *Ibid.*
[Clayton v.
Ashdown,
Vin. Abr.
tit. *Exfuntis*,
G. 4. pl. 1.]

tification of it; besides that, the infant when he comes of age may, if he think fit, make such lease for years without reserving any rent: And why then may he not consent to, and ratify such lease, though made before, which (if the law permitted him) he might do by accepting fealty, which is incident to every such lease.

Moor, 105.
2 Leon. 216.
218.

As to the books before cited, that a lease for years by an infant without any reservation of rent should be absolutely void, they are only *obiter* opinions; and there is but one case where it is expressly so holden, and there, only by two judges; for *Gaudy* was of another opinion, and the judgment there given was upon the right and merits of the case, not upon the point of the lease; though the two judges, to enforce the judgment for the defendant, would have the infant's lease to the plaintiff, upon which the ejectment was brought, to be absolutely void, and so no title at all against the defendant, who was in possession; besides the lease, there, was by parol, not by deed, which may make a considerable difference.

Cro. Car.
502.
Jones, 405.
Roll. Abr.
728. Lloyd
and Gregory.
An infant may
surrender
leases in a
court of
equity in
order to re-
new the
same by stat.
29 Geo. 2.
c. 31.

Another case, produced to enforce the reason of such leases being absolutely void, is, that a surrender by an infant to him in reversion hath been adjudged to be absolutely void, whether it were a surrender in law by taking a new lease, or an express surrender, and that no agreement by him at full age should make it good, so as to establish the second lease; and the reason there given was, because there being no increase of his term, or decrease of the rent, the surrender was absolutely void at first: but there seems a much better reason for the judgment given in that case; for the first lease was made 1 E. 6. by a dean and chapter for fifty years, and this lease being afterwards assigned to infants, they, 29 Eliz. took a new lease of the same lands from the then dean and chapter for the same term, and under the same rent and covenants as were in the first; but this second lease not being warranted by 13 Eliz. cap. 10. the succeeding dean and chapter would have avoided it, and so stripped the infants of any interest at all in the lands; to prevent which mischief, and help the infants, the court gave judgment against the surrender, that it was absolutely void *ab initio*, and so the second lease never good; and this was but a just construction as this case was; for if the court had adjudged the surrender to have been only voidable, then the infant's agreement to the second lease when they came of age, would have made the surrender of the first absolute, and then their title standing only upon the second lease, and that not warranted by 13 Eliz. cap. 10. they would have been defeated of both, which would have been a very severe construction in a case of this nature, where the operation of the law in working the surrender of the first lease might be easily supposed not to be thought of or understood by them.

Show. Parl.
Cases, 153.
3 Mod. 310.
2 Sak. 427.
pl. 2. Ld.
Raym. 313.

Another case produced is of a surrender by a person *non compos*, &c. who being tenant for life, with remainder to his first and other sons, did before the birth of any son surrender to him in the remainder, with intent to destroy the contingent remainders to his

his sons; but it was adjudged, that the surrender was absolutely void *ab initio*, and by consequence, the contingent remainders not hurt thereby; and there, it was said, that the grants of infants and of persons *non compos* were parallel both in law and reason; and the preceding case was cited as an authority in point, that a surrender by an infant was *ipso facto* void, and so of a person *non compos*, &c. but the case of an infant has already received an answer; and this of the *non compos* may be easily answered too; for if the surrender should have been allowed, it would have been not only prejudicial to himself, but likewise to all his sons after born, who were strangers or third persons; and there could be no use made of the surrender but to do them mischief, which the acts of a madman ought not to be allowed to do, when by a reasonable construction it is in the power of the court to help them, as in that case they did, by adjudging the surrender to be absolutely void, rather than voidable: So that notwithstanding the cases above cited, it does not seem clear that the lease of an infant, without reservation of any rent, is absolutely void, but rather voidable, since their power of avoiding it when they come of age, sufficiently guards them against the unreasonableness or practice of others, the only mischief, which the introducing this law in favour of infants designed at first to obviate and prevent.

Also, it hath been holden, that if an infant grant a rent-charge out of his land, this is not absolutely void, but only voidable by him when he comes of age; for if the grantee should then distrain for the rent, though the other may bring an action of trespass, yet he cannot plead *non concessit*; for the deed is only voidable (a) by shewing his infancy, and not void, because it was delivered with his own hands.

grants a rent-charge out of his lands, it is not voidable, but *ipso facto* void; and that if the grantee distrain for the rent, the infant may have an action of trespass against him. (a) That to a lease for years made by an infant, he can in no case plead *non est factum*, but must avoid it by pleading the special matter of his infancy. 5 Co. 115. 2 Inst. 483. Cro. Eliz. 127. Moor, pl. 132. Poph. 178.

Copyhold was granted to one for life, remainder to an infant in fee; they both join in a surrender to one, who was admitted; then the tenant for life dies, and after the infant dies, and his heir enters; and it was adjudged that he might well enter, without being put to the writ of *dum fuit infra aetatem*; for such surrender was but a conveyance by matter *in pais*, which cannot bind an infant, but that he or his heirs may enter, or bring trespass before admittance.

If there be two coparceners, and one of them an infant, and they make an unequal partition, this shall not bind the minor; for though partition, if equal, will bind an infant, because compellable to make partition; and whatever one is compellable to do, may be done by the same person voluntarily (b); yet when the partition is unequal, and the less part allotted to the minor, this shall not bind her; for then the security the law has provided for infants, to prevent them from being over-reached, would be useless.

Show. 296.
Comyn, 45.
pl. 30.
12 Mod.
174.
3 Salk. 300.
pl. 10. 576.
pl. 2.
Carth. 211.
435. Comb.
439. S. C.
Thomson v.
Leach,
3 Burr.
1807.

Trin.
6 Annz,
in B. R.
Hudson v.
Jones. But
in 3 Mod.
310., it is
said per
Cur. that if
an infant

Cro. Eliz.
90. Knight
v. Fortipan;
& vide Cro.
Car. 103.

Lit. § 258.
Co. Lit. 171.

(b) 3 Burr.
1804.

Co. Lit. 171. But yet such unequal partition is not absolutely void, but the infant has election either to affirm it at full age, by taking the profits of the unequal part allotted to her, or to avoid it, either during her minority, or at full age, by entry into the other part with her sister.

May v.
Hook, in
Canc. 1773.
Co. Lit.
13th edit.
246. note 1.

[*Anne May*, and her two sisters were, under their father's will, seised of a considerable freehold estate, and possessed of a considerable leasehold estate, as joint-tenants. Previous to the marriage of *Anne May* with the defendant *John Hook*, she being then an infant, by articles of agreement dated 28th Oct. 1761, and made between her of the first part, *John Hook* of second part, and trustees of the third part, it was covenanted and agreed, that the leasehold estates should be assigned to *John Hook* for his own use and benefit, and that the freehold estates should be settled on him for life; and then on her for life; remainder to their first and other sons successively in tail-male; remainder to their daughters as tenants in common in tail; remainder to *John Hook* in fee. And *John Hook* covenanted to pay 100*l.* to the trustees, upon trust, to pay *Anne May* if she survived him, the interest of it for her life, and after her death to divide it among the children.—*Anne May* died under age. The question was, whether these articles were in equity a severance of the joint-tenancy? Lord Chancellor *Bathurst*, when he made his decree in this cause, observed, that the first point attempted to be established by the counsel was, that had *Anne May* been of full age, when she entered into the articles, they would have amounted to a severance; but that no determination to that effect had ever been made: that the co-joint-tenants were not, in this case, to be considered as volunteers, as they claimed by title paramount; and that their situation approached nearer to that of issue in tail, who claimed *per formam doni*, than to that of an heir at law, who claims only under his ancestor: that the utmost which an infant could do, would be an avoidable act; and that, of course, it would be in the discretion of the court either to give or refuse their assistance to it, and, by a parity of reason, it must be in their power to model his contracts at their pleasure: that the contract in the present case was not such as the court would uphold. Had the infant lived to come of age, and a bill been filed against her for performance of the articles, the court would have set them aside, and referred it to the master to draw new proposals for a proper settlement: that as the contract was not such as would have bound the infant, *a fortiori* it should not bind the co-joint-tenants: that it would be a strange doctrine that any act of an infant, which by its nature is voidable, should sever the joint-tenancy, as, if that were allowed, it would always be in the power of the infant to say, whether the joint-tenancy should be severed or not; then, if any of the co-joint-tenants should die under age, the infant might avoid his own act by pleading *infra etatem*, and resort to his title of survivorship, which would be a great injustice and hardship on the survivor.—On these grounds his lordship was of opinion, that

the articles did not in equity amount to a severance of the joint-tenancy.

It is now settled that a *female* infant may bar her dower by consenting to a jointure in lieu thereof, agreeably to the 27 H. 8. cap. 10.

Earl of
Buckinghamshire
v. Drury,

5 Br. P. C. 570. But how far the competency of the settlement, or the leaving of issue are material to bind the rights of the female infant to a real estate, see *Cannel v. Buckle*, 2 P. Wms. 245. *Harvey v. Ashley*, 3 Atk. 612. *Durnford v. Lane*, 1 Br. Ch. Rep. 106. *Williams v. Williams*, *id.* 152. It seems to be absolutely necessary, in order to support such a settlement, that it be made before marriage. *Lucy v. Moore*, 3 Br. P. C. 514. *Scamer v. Bingham*, 3 Atk. 56.

It also seems, that the interest of a female infant in a money portion, may be bound by an agreement before marriage; for if a parent or guardian cannot contract for the infant so as to bind this property, the husband, as it is a personal thing, would be entitled to it absolutely on the marriage.

Harvey v. Ashley,
3 Atk. 613.

Whether a male infant may make a settlement of his real estate, is a point which doth not yet seem to have been determined. It hath indeed been holden, that an infant tenant in tail, with a power to settle land by way of jointure to a given amount, was bound by a covenant to make a settlement within the limits of the power.

Holinghead v. Holinghead, Gilb. Eq. Rep. 137., cited in 2 P. Wms. 229., and 1 Str. 604.

But in a later case Lord *Hardwicke* declared in broad terms, that a power coupled with an interest over real estate, could not be exercised by an infant. The above decision evidently escaped his lordship's recollection, for he is made to say, that "there is no precedent either in a court of law or of equity, where it has been holden a power over real estate, executed by an infant, is good."

Hearle v. Greenbank,
3 Atk. 696.
1 Vez. 293.
See 1 Fonbl. Eq. Tr. 78.

It hath been determined, that where a male infant married an adult, who by settlement on the marriage covenanted that her estate should be settled to certain uses, he was bound by her covenant.]

Slocombe v. Glubb,
2 Br. Ch. Rep. 545.

If an infant submit to arbitration, he may execute or avoid it at his election, as he may all other his contracts.

13 H. 4. 12.
10 H. 6. 14.
March, 111.

141. Roll. Abr. 730. *Jones*, 164. Lev. 17. [But an infant was holden bound by an award made upon a reference with the consent of his guardian. *Bishop of Bath and Wells v. Hippeley*, cited by Lord *Hardwicke*, 3 Atk. 614.—Indeed, wherever an infant, with the advice of his friends, enters into a contract, which appears to be beneficial to his interests, equity will support it. Therefore, where *J. S.* mortgaged his estate to the plaintiff, and died, leaving the defendant his daughter and heir, who was an infant, and had nothing to subsist upon but the rents of the mortgaged estate, and the interest being suffered to run in arrear three years and a half, the plaintiff grew uneasy at it, and threatened to enter on the estate, unless his interest was made principal; upon which, the defendant's mother, with the privity of her nearest relations, stated the account, and the defendant, who was then near of age, signed it; and the account was admitted to be fair; the Lord Chancellor held, that though, regularly, interest shall not carry interest, yet, that in some cases, in some circumstances, it would be injustice, if interest were not made principal; and the rather, in this case, because it was for the infant's benefit, who, without this agreement, would have been destitute of subsistence. *Earl of Chesterfield v. Lady Cromwell*, 1 Eq. Ca. Abr. 287.]

Also, as to the acts of infants being void or voidable, there is a diversity between an actual delivery of the thing contracted for, and a bare agreement to deliver it only, that the first is voidable, but the last absolutely void; as if an infant deliver a horse or a sum of money with his own hands, this is only voidable, and to be recovered back in an action of account.

Perk. § 12.
19. Roll. Abr. 730.
2 Roll. Rep. 408.
Latch, 10.

But

Peik. § 12. But if an infant agrees to give a horse, and does not deliver
 19. Mod. the horse with his hand, and the donee takes the horse by force of
 137. [The the gift, the infant shall have an action of trespass, for the grant
 words of was merely void.
 Perkins in

the passage referred to are, that "that all such gifts, grants, or deeds made by infants, as do not take effect by delivery of his hand, are void : but all gifts, grants, or deeds made by infants, by matter in deed or writing, as do take effect by delivery of his hand, are voidable by himself, by his heirs, and by those who have his estate." Upon which Lord Mansfield observes, in 3 Burr. 1804., that the words "which do take effect," are an essential part of the definition, and exclude letters of attorney or deeds which delegate a mere power, and convey no interest ; a power to receive seisin is indeed an exception to this rule.]

Mich. In trespass *quare vi & armis insultum fecit, & totum crinem capitis*
 26 Car. 2. *ipsius Anna abscidit*, the defendant as to all the trespass *præter ton-*
suram crinis pleads not guilty, and as to that, pleads that the plain-
 Anna Se- tiff was of the age of sixteen years, and for a certain sum of
 erogham per money *licentiavit* the defendant *duas uncias crinis diæ Annæ deton-*
 Guardianum *dere & abscindere* ; and upon the demurrer to this plea the court
 v. Suarti- held, that the contract was absolutely void, and consequently
 fen. the tonture unlawful, and gave judgment accordingly for the
 3 Keb. 369. plaintiff.
 S. C.

Sid. 129. And as an infant is not bound by his contract to deliver a thing ;
 Lev. 169. so if one deliver goods to an infant upon a contract, &c., knowing
 Keb. 905. him to be an infant, he shall not be chargeable in trover and con-
 913. version, or any other action for them ; for the infant is not capa-
 ble of any contract, but for necessities ; therefore, such delivery is
 a gift to the infant : but if an infant without any contract wilfully
 takes away the goods of another, trover lies against him ; also it is
 said, that if he take the goods under pretence that he is of full age,
 trover lies, because it is a wilful and fraudulent trespass.

Vide Vern. Also, it seems, that if an infant, being above the age of discre-
 132. tion, be guilty of any fraud in affirming himself to be of full age,
 2 Vern. 224. or if by combination with his guardian, &c. he make any contract
 2 Vez. 212. or agreement with an intent afterwards to elude it, by reason of
 3 Burr. his privilege of infancy, that a court of equity will decree it good
 1802. against him according to the circumstances of the fraud : but in
 [(a) It can what cases in particular a court of equity will thus exert itself, it is
 thus exert not easy to determine (a).
 itself only where the
 act done by the infant is voidable : if it be absolutely void, as, in the case of a warrant of attorney given by an infant, it cannot make it good, though there appear circumstances of fraud on the part of the infant.
 Saunderson v. Marr, 1 H. Bl. 75.]

For the Also, notwithstanding the disability of an infant to contract, by
 manner in the 7 Ann. cap. 19. it is enacted, "That it shall and may be law-
 which in- ful for any person under the age of twenty-one years by the di-
 fant trustees rection of the high court of Chancery, or the court of Exche-
 are to con- quer, signified by an order made upon hearing all parties con-
 vey the es- cerned, on the petition of the person or persons for whom such
 tates devolv- infant or infants shall be seised or possessed in trust, or of the
 ed on them mortgagor or mortgagors, or guardian or guardians of such in-
 pursuant to fant or infants, or person or persons entitled to the monies
 this act, secured by or upon any lands, tenements or hereditaments,
 vide Preced. whereof any infant or infants are or shall be seised or possessed
 Chan. 284. by
 [The infant may be directed to

“ by way of mortgage, or of the person or persons entitled to the convey, though the
 “ redemption thereof, to convey and assure any such lands, tene- estate be in
 “ ments, or hereditaments, in such manner as the said court of the planta-
 “ Chancery, or the court of Exchequer, shall by such order so to be tions.
 “ obtained direct, to any other person or persons; and such con- *Ex parte*
 “ veyance, or assurance, so to be had and made as aforesaid, shall Proffer,
 “ be as good and effectual in law to all intents and purposes what- 2 Br. Ch.
 “ soever, as if the said infants or infant were, at the time of mak- Rep. 325.
 “ ing such conveyance or assurance, of the full age of twenty-one He may
 “ years; any law,” &c. convey by
 recovery,
ex parte,
 Johnson,

3 Atk. 559. *Ex parte* Smith, Amb. 624., or if the infant be a feme covert, she may be directed by the court to convey by fine. *Ex parte* Maire, 3 Atk. 479. Com. Rep. 615. But the infant must be a clear, undoubted, express trustee, and the trust must be in writing, not by construction of equity. *Ex parte* Vernon, 2 P. Wms. 549. Godwyn v. Lister, 3 P. Wms. 387. Hawkins v. Obeen, 2 Vez. 559.] How to bind themselves by a contract to serve in the plantations, see 4 Geo. 1. c. 5. § 1. How to be admitted to a copyhold, and how compellable to pay their fines, see 9 Geo. 1. c. 29.

And it is further enacted by the said statute, “ That all and
 “ every such infant and infants, being only trustee or trustees,
 “ mortgagee or mortgagees as aforesaid, shall and may be compel-
 “ lable, by such order so as aforesaid to be obtained, to make such
 “ conveyance or conveyances, assurance or assurances as aforesaid,
 “ in like manner as trustees or mortgagees of full age are compel-
 “ lable to convey or assign their trust-estates or mortgages.”

4. Where voidable, as to the Infant, shall yet bind others.

It is laid down as a general rule, that infancy is a personal pri- 1 Show. 171.
 vilege, of which no one can take advantage but the infant himself, 3 Mod. 248.
 and that therefore, though the contract of the infant be voidable,
 that yet it shall bind the person of full age; for being an indul-
 gence which the law allows infants, to protect and secure them
 from the fraud and imposition of others, it can only be intended
 for their benefit, and is not to be extended to persons of the years
 of discretion, who are presumed to act with sufficient caution and
 security; and were it otherwise, this privilege, instead of being
 an advantage to the infant, might in many cases turn greatly to his
 detriment.

Therefore it hath been adjudged, that if an infant let a house to 1 Sid. 446.
 J. S., reserving rent, and the rent be in arrear, the infant may 1 Mod. 25.
 distrain for the rent, or bring an action of debt; though it was
 objected, that, in the institution, the contract was not reciprocal.

Again, an infant brought an action on the case by her guardian, 1 Sid. 446.
 and set forth, that she gave the defendant 10*l.* and put herself to 2 Keb. 623.
 be her servant for seven years, and that, in consideration thereof, S. C.
 the defendant promised to find her with all necessaries, save only Farmha v.
 apparel, and likewise promised to teach her to sing and to dance; Watkins.
 and that the defendant within the time turned her out of the house,
 and did not teach her to sing and dance; whereupon there was
 judgment by default, and a writ of inquiry, of damages: it was
 moved to stay the filing of the writ of inquiry because here was no
 consideration, the agreement not being reciprocal: but the court
 held, that, though the contract might be void as to the infant, yet
 it

it bound her mistress, who was of full age; and therefore ordered the writ of inquiry to be filed.

1 Vent. 51.
1 Mod. 25.
3 Keb. 581.
S. C. Smith
v. Bowen,
See the au-
thorities
above.

Again, an infant brought an *assumpsit* by his guardian, and declared, that whereas the defendant entered into his close, and cut his grass, that in consideration he would permit him to make it hay, and carry it away, he promised to give him six pounds for it: upon this declaration the defendant demurred, supposing it to be no consideration; for the infant was not bound by his permission, but might sue him notwithstanding; but the court gave judgment for the plaintiff.

2 Sid. 109.
Davis and
Manning-
ton.

So, on a promise to pay the plaintiff, an infant, the value of such land, in consideration the plaintiff would suffer the defendant to enjoy the said land after the death of A., to the time of his full age, the plaintiff had judgment, though he was not bound by the contract.

Sid. 41.
Keb. 1.
S. C. For-
rester's
case.

So, on a promise to an infant to do such an act, in consideration that the infant promised to pay such a sum, in *assumpsit* by the infant, he had judgment, though the money was not paid; for the court held, that the infant's promise was only voidable at his own election, and not at the election of him to whom it was made.

Trin.
5 Geo. 2.
Holt and
Ward, ad-
judged,
2 Stra. 937.
1 Barnard.
K. B. 290.
Fitzgib. 175.
275. 3 Atk. 306.

So, if a man of full age and a female of fifteen promise to intermarry, and after request by her, he marries another woman, an action on the case lies against him for the violation of the contract; for though objected that this was *nudum pactum*, and not reciprocal, as the man could not compel her, being an infant, to perform her promise, yet being voidable as to herself only, as she finds it for her benefit, it shall bind him, being of full age.

Cited in the
case of Holt
and Ward,
to have been
so held by
Holt, C. J.
Hil. 3 Annæ,

If an infant lose money at play, which the winner takes, such taking is a conversion, and trover and conversion lies for the infant for the sum so received; but if the infant had won, he might have retained the money, and no action would have laid against him for it.

in B. R. in the case of Barker and Medlicot; but the action there brought was an *indebitatus assumpsit*, and for that cause the plaintiff was nonsuited, because the foundation of the action was a tort, and the action brought founded in contract. Fitzg. 279.

Lord Brooke
v. Lord and
Lady Hert-
ford, 2 P.
Wms. 518.
Tuckfield v. Buller, Ambl. 197.

[Upon a bill for a partition between an adult and an infant, as the latter cannot convey till he comes of age, the court will therefore respite the conveyances on the part of the adult; and this, it seems, whether the infant be plaintiff or defendant.]

5. At what Time voidable Acts are to be avoided.

Co. Lit. 380.
2 Inst. 483.
Godb. 149.
Winch. 114.
Yelv. 155.
12 Co. 121.
3 Mod. 229.

Here we must observe a diversity between matters of record done or suffered by an infant, and matters in *fact*; that he may avoid matters in *fact*, either within age, or at full age; but matters of record, as statutes merchant and of the staple, recognizances acknowledged by him, or a fine levied by him, recovery against him by default in a real action, (saving in dower,) must be avoided,

viz. the statute, &c., by *audita querela*, and the fine and recovery during his minority; for being judicial acts, taken by a court or judge, the nonage of the party to avoid the same shall be tried by inspection, and not by the country.

And as an infant cannot avoid a recognizance, &c. but during his minority, so if an infant enters into a recognizance, &c. and brings an *audita querela* to reverse it, and the judges, upon inspection, find him within age, and therefore adjudge the recognizance void, and discharge the infant; but the conusee after reverses the judgment in the *audita querela* for error, the infant, after his full age, shall have no new *audita querela* to vacate the recognizance, though it once appeared to the judges that he was within age when he entered into the contract; and the reason hereof is, because the infant in no case after his full age can set aside the recognizance or statute: for, 1st, the writ in the register runs *quod conuser adtunc &c. adhuc infra etatem existit*, and therefore cannot have it at full age without altering the form of the writ. 2^{dly}, When the judgment of the *audita querela* is reversed by a writ of error, it is entirely set aside, and in all respects useless as if it had never been given, and consequently can obtain no credit, should the conuser produce the record. 3^{dly}, When the conuser is of full age, there will be no averment admitted against the recognizance, &c. which is an act of record; and it is presumed by the record that the conuser was of full age, since the judge, or other officer that took the recognizance, &c., suffered him to enter into them.

But if an infant bargain and sell lands by deed indented and enrolled, he may avoid it at any time.

Also, it is said, that if an infant appear by attorney, and suffer a recovery, it may for this error be reversed after the infant comes of age, because it shall be tried by the country whether the warrant of attorney was made when under age or not.

6. By whom to be avoided.

It seems agreed as a general rule, that none but the infant himself, or his representatives privies in blood, can avoid (a) a conveyance made by the infant during his nonage.

(a) This must be understood such a conveyance as is, in its own nature, voidable by the infant, &c. such as a feoffment, &c. and not absolutely void, as a surrender, grant, release, which being void *ab initio*, are so to all men, and of which all persons may take advantage. Carth. 436. 3 Mod. 301., &c.

As, if an infant seised in fee make a feoffment, and die, his heir shall enter.

So, if seised in tail-male, he make a feoffment, and (b) die, his son being heir general and special may enter.

felony. 8 Co. 43. a. — But by Co. Lit. 337. a. it is otherwise in such case, because his entry is not lawful in respect of his estate only, but of his blood also, which is corrupted.

And if he have no sons, but only daughters, his brother, being his special heir *per formam doni* made to his father, may avoid the feoffment, because he is privy in blood, and has the land only by descent.

But

And. 25.
228.
N. Bendl.
80. pl. 123.
Dyer, 232.
pl. 9.
Moor, 75.
460.
2 And. 158.
10 Co. 43.
a. Noy, 16.
Yelv. 88.
Reg. 149.
150.
2 Bull. 320.
F. N. B.
105.

2 Inst. 673;

1 Sid. 321.
1 Lev. 142.
5 Mod. 209.

8 Co. 42. b.
2 Inst. 483.
Roll. Rep.
401.

8 Co. 42. b.

8 Co. 43. a.
(b) So, tho'
attainted of

8 Co. 43.

§ Co. 43. a. But privies in estate cannot avoid (a) a conveyance made by an infant.
 (a) But if tenant in tail within age come in as a vouchee by attorney in a common recovery, he in remainder may assign this for error; for he is party in interest to the recovery; and where a man's interest is bound by another's act, it is but reasonable he should be allowed to free himself from the mischief of it, by taking advantage of any error in it. But for this *vide* Roll. Abr. 755. Bridg. 75. Roll. Rep. 301. Cro. Eliz. 737. Palm. 123. Allen, 75.

§ Co. 43. As if tenant in tail, being within age, make a feoffment, and die without issue, the donor shall not enter, because he was privy only in estate, and no right accrued to him by the death of the donee.
 But in Palm. 254, this case is cited, and denied by Houghton, justice, to be law, who said, the feoffment by an infant could not put him to his *formedon* by a discontinuance, and then if he could not enter, he would be without remedy.

§ Co. 43. a. So, if there be two joint-tenants within age, and one of them make a feoffment in fee of his moiety, and die, the survivor cannot enter; for by the feoffment the jointure was severed, so long as the feoffment continued in force, and therefore the heir of the feoffor may have a *dum fuit infra etatem*, or enter into the moiety.
 337. S. P.

§ Co. 43. a. But if both had joined in the feoffment, and one had died, the right had survived to the other, and he should have had the land from the first feoffor.

Co. 43. b. If a man within age, seised in right of his wife, make a feoffment, and die, his heir cannot enter, because no right descends to him; but inasmuch as the baron, if he had lived, might have entered in the right of his wife only, and not in respect of any right which he himself had, the wife (even before the 32 H. 8. cap. 28.) might in such case have entered in her own right.
 Lit. § 633.

§ Co. 43. b. But if the feme, being only tenant in tail, and the baron within age, had made a gift in tail to another, by which the baron gained a new reversion in fee, and died, the wife might enter, or the heir of the baron who had a new reversion descended to him; but if the heir had entered, and defeated the tail given by the infant, his estate vanished, and by operation of law, the feme was immediately seised of her old estate.
 Co. Lit. 337. a.

§ Co. 44. a. Privies in law, as the lord by escheat, shall not avoid a conveyance made by an infant.

§ Co. 42. As if an infant make a feoffment, and die without heir, the lord shall not avoid it; but because that in this case it appeared the feoffment was executed by letter of attorney made by the infant, it was resolved to be void, and that the land should escheat to the queen.
 45. Whittingham's case, Dyer, 10. b.
 2 Roll. Abr. 2.
 3 Mod. 306.

7. In what Manner they are to be avoided.

Co. Lit. 380. As to fines and recoveries, they being, as hath been already observed, matters of record, are regularly to be avoided by writ of error, which must be brought during the infant's minority, that the court may inspect the infant, and so vacate the contract with the same solemnity that it was entered into.
 2 Inst. 483.

Therefore,

Therefore, if an infant suffer a common recovery, in which he comes in as vouchee in his proper person, and not by guardian, though this shall not bind him, but that he may in a writ of error avoid it, because it is error in law; yet at his full age he cannot enter into the land, and avoid it by his entry, before he has reversed it by a writ of error; for judgments are not to be subverted by matter in *pais* without matter of record.

If a feme covert, being under age, levies a fine, which she is afterwards willing to reverse, she may be brought into court by *habeas corpus*, that she may be inspected: and, it seems, the fine may be set aside on motion: for the husband may not be willing, nor permit her to bring or proceed in a writ of error.

Also it hath been holden, that if a feme covert, being an infant, is about to levy a fine, her relations may enter a *caveat*, and that then the court will set aside all proceedings after such entry, but that if they suffer the fine to pass, they cannot by any means reverse it after the infant's death; but it seems that the fine being taken by virtue of a *dedimus potestatem*, and the commissioners knowing the party to be an infant, may be (a) fined at the discretion of the court, as they were in this case, the one 300*l.* and the other 200*l.*

fine from an infant. 3 Lev. 36. But for this *vide* 12 Co. 124. 2 Roll. Rep. 113. Cro. Eliz. 531.

As infants, at their peril, are obliged to avoid fines and recoveries by writ of error, during their minority, so must they avoid recognizances and statutes entered into by them, and this by (b) *audita querela* during their minority likewise, that the courts may have the like opportunity of determining by inspection as to their nonage; for being matters of record, they must, according to the rule, be dissolved *eo ligamine quo ligantur*.

Abr. 57. 2 Bull. 320. 3 Mod. 229. (b) That an infant may bring an *audita querela* to avoid a statute for his nonage, although it be not certified or returned in any court. And. 228.—And there said, that the common practice was so, else the conusor might be of age before the conusee would procure it to be certified; & *vide* 3 Bull. 307.

If *A.*, being within age, becomes bail for *B.*, and after two *sci. fa.* and *nihil* returned, judgment is given against *A.*, &c., he may have an *audita querela* and avoid the recognizance, and so the judgment thereupon of consequence shall be avoided.

Where an infant was bail, and taken in execution, and he brought an *audita querela*, and moved to be inspected; the court, as a matter discretionary, refused to admit him to bail till he corroborated his allegation by the oaths of witnesses; which he having done, and the copy of the register where he was born being produced, he was discharged; but if he had brought his *audita querela* before he was taken in execution, he must have had a *superjedeas* of course. Carth. 278. & *vide supra*, letter (D).

But if *A.*, being within age, enters into bond to *B.*, who procures *C.*, without any warrant to appear for *A.*, and confesses a judgment thereupon, yet *A.* shall not have an *audita querela*, but he must take his remedy by action of deceit against the attorney.

If an infant makes a feoffment, he may enter, (c) either within age, or at full age; and if he dies, his heir may enter, or have a *dum fuit infra etatem*.

infant may avoid his feoffment by entry during his nonage, yet he cannot have a *dum fuit infra etatem*,
Vol. III. R 1 till

Roll. Abr.
742.
Styl. 246.

2 Vent. 30.
Mod. 246.
3 Lev. 36.
& *vide tit.*
Fines and
Recoveries.

Fasch.
30 Car. 2.
Rawlinson
v. Owens.
(a) Where
the court
ordered in-
formations
to be filed
against com-
missioners
who took a

Dyer, 232.
Reg. 149.
Moor, 75.
F. N. B.
105.
2 Inst. 673.
10 Co. 43.
Noy, 16.
Cro. Jac. 5.
2 Roll.

Yelv. 155.
Cro. Jac.
646. S. P.
& *vide* Co.
Ent. 87,
88.

Cro. Jac.
694. But
for this *vide*
tit. Attorney.

Co. Lit. 247.
b. 248. a.
(c) But
though the

till he comes to his full age; for he is allowed to enter, that he may save to himself the profits in the mean time; but such entry, being the act of an infant, seems to be as voidable at full age as his feoffment; but if he was to recover in a writ of *dum fuit infra ætatem*, it would for ever bind him, and therefore it can only be brought when he comes of full age. F. N. B. 192. See *ante*.

Co. Lit. 337. If husband and wife are both within age, and they by indenture
a. F. N. B. join in a feoffment, and the husband dies, the wife may enter, or
192. have a *dum fuit infra ætatem*.

Co. Lit. But (a) if she was of full age, she shall not have a *dum fuit infra*
337. a. *ætatem* for the nonage of her husband, though they be but one
(a) *Quære*, person in law.
if she was within age, and the baron of full age. F. N. B. 192.

Co. Lit. 337. If two joint-tenants, being within age, make a feoffment,
a. F. N. B. though they may join in a writ of right, yet they cannot in a *dum*
192. S. P. *fuit infra ætatem*; for the nonage of one, is not the nonage of the other.

Cro. Eliz. If an infant surrenders a copyhold estate, and dies, his heir may
90. Leon. enter without being put to his writ of *dum fuit infra ætatem*; for
95. ad- such surrender was but (b) a conveyance by matter in *pais*, which
judged. cannot bind an infant, but that he or his heirs may enter, or bring
(b) That trespass.
surrenders, grants, re-
leases, &c. which are said to be void *ab initio*, may be avoided by entry, assise, &c. at any time. Cro.
Car. 103. 2 Roll. Abr. 728. Show. P. Cases, 153. Carth. 436.—But a feoffment by an infant
with livery cannot be avoided by assise without entry. Bro. Disceisin, 63.—*Secds*, if the livery was
by letter of attorney. Bro. Disceisin, 63.

Bro. tit. If an infant make a lease for years, though he reserve no rent
Leases, 50. thereon, he cannot plead *non est factum*, but must avoid it by plead-
Cro. Eliz. ing the special matter of his infancy.
357.
10 Co. 43. 5 Co. 119. 2 Inst. 483. Moor, pl. 132. Poph. 178.

Salk. 279. So, if an infant enter into an obligation, which takes effect by
pl. 4. *per* sealing and delivery, and consequently is (c) a deliberate act, he can
Treby, C. J. only avoid it by pleading the special matter of his infancy.
(c) The deeds of infants have the form, though not the operation of deeds; so that *non est factum* cannot be
pleaded thereto, without shewing some special matter to make them of no efficacy. 3 Mod. 310. *per*
Cur. [But the reason that infancy must be pleaded specially to avoid the deed, is, not because it has the
form of a deed, but because it has an operation from the delivery. *Per* Lord Mansfield. 3 Burr. 1805.]

2 Lev. 144. But in *assumpsit* against an infant, he may give infancy in
Salk. 279. evidence, and need not plead it; for the promise of an infant is
pl. 4. absolutely void.

F. N. B. If the heir within age assign to the wife more land in dower than
148. Co. she ought to have, he himself shall have a writ of admeasurement
Lit. 39. a. of dower at (d) full age, by the common law: so, if too much be
2 Inst. 367. assigned in dower by the heir within age, or his guardian in chival-
(c) *Quære*, ry, and the heir die, his heir shall have such writ to rectify the
if not with- assignment: but the heir, in whose time the assignment of too
in age. much was by the guardian, cannot have such writ till his full age,
because till then the interest of the guardian continues, and if any
wrong be done, it is to the guardian himself, and not to the heir.

2 Inst. 367. If the heir within age, before the guardian enters, assigns too
much in dower, the guardian shall have a writ of admeasurement
of

of dower by the statute of *W. 2. cap. 7.* before which statute the guardian had no remedy; because the writ of admeasurement being a real action lay not for the guardian, who had but a chattel: also, by the same statute it is provided, that if the guardian pursue such writ faintly, or by collusion with the wife, the heir at full age shall have a writ of admeasurement, and may allege the faint pleading or collusion generally.

8. Of the Confirmation of voidable Acts.

The privilege the law allows infants being entirely calculated for their benefit, hence at their full age they are allowed to ratify and confirm their contracts, or to rescind and break through them, as it shall seem most for their advantage; and therefore the purchase of an infant is only voidable, and vests the freehold in him till he disagrees thereto; and his continuing in possession after he comes of age is a tacit consent and confirmation thereof, since it is to turn to his advantage.

If an infant takes a lease for years of land, rendering rent, which is in arrear for several years, then the infant comes of age, and still continues the occupation of the land; this makes the lease good and unavoidable, and by consequence, makes him chargeable with all the arrears incurred during his minority; for though at full age he might have departed from his bargain, and thereby have avoided payment of the arrears which the lessor suffered to incur during his minority; yet his continuance in possession after his full age ratifies and affirms the contract *ab initio*, and so gives remedy for the arrears of rent incurred from the time of the contract made.

But it is said, that if an infant possessed of a term for years sells it for money, and after he comes of full age receives part of the money for it, he shall avoid the grant notwithstanding; for the contract being void in the commencement, it cannot be made good by any subsequent act*.

Yet it hath been ruled in Chancery, that if an infant makes an agreement, and receives interest under it after he comes of full age, such agreement shall be decreed against him.

So, if an infant make an exchange of lands, and continues in possession after he comes of age, he shall be bound by it.

Also, where an infant desired the lands subject to a trust for payment of younger children's portions might not be sold, and offered by his answer to settle other lands for raising the portions, it was holden, that he should be bound by the offer made by him in his answer, if the other side were thereby delayed, and if the infant did not immediately after his coming of age apply to the court, in order to retract his offer, and amend his answer.

An infant made a lease for years, and at full age said to the lessee, *God give you joy of it*; this was holden by *Mead* a good affirmation of the lease; for this is a usual compliment to express one's assent and approbation of what is done.

Co. Lit.
3. a.
2 Vent. 203.

Cro. Jac.
320.
Godb. 120.
2 Bulst. 69.
Roll. Abr.
731. S. C.
adjudged
between
Kettley and
Elliot.

Dalf. 64.
per Curiam.
* Sed qu.
if this is not
an affirm-
ance of the
contract? vide *infra*.

Vern. 132.

2 Vern. 225.
per Curiam.

2 Vern. 224.

4 Leon. 4.

Smith v. Low, 1 Atk. 489. In this case Ld. Hardwicke said, that, in a court of equity, a woman is bound by a marriage contract made during her minority, if she accepts pin-money, or a jointure under it, 1 Atk. 470.

Ketley's case, Cro. Ja. 320. 1 Roll. Abr. tit. *Enfants*, (K), S. C. by the name of Kettle v. Eliot.

3 Leon. 164. 4 Leon. 5. Godb. 158. Leon. 114. N. Dyer, 272. Cro. Eliz. 127. But Cro. Eliz. 700. S. P. cont. by Fenner cont. Clinch, and Rol. Abr. 18. S. P. cont. & vide Poph. 173. Latch. 21. Owen, 74. [Vide etiam contr. Capper v. Davenant, Tr. 29 Car. 2. B. R. Bull. Ni. Pr. 153.]

[A mother, as guardian to her children, who were all infants, granted a building lease of a part of their estate for 41 years; her eldest son, who was about 19 years of age, joined with her in making the lease, and covenanted that the lessee should have quiet enjoyment, and that the rest of the children, when of age, should confirm the lease: the children all arrived at age, and accepted the rent under this lease for above ten years after the youngest came of age: after such acceptance they brought their ejectment against the lessee, who thereupon filed his bill in the court of Chancery to have the lease established, which Lord *Hardwicke* decreed, principally upon the ground of the acceptance of the rent for so long a time; and as it was against conscience to bring the ejectment, he ordered that the plaintiff should have costs at law and in equity.]

In debt for rent, the defendant pleaded infancy at the time of the lease made; and, upon demurrer, the court held the lease voidable only at the election of the infant, by waving the land before the rent-day came: but the defendant not having so done, and being of age before the rent-day came, the plaintiff had judgment.]

If an infant enters into an obligation for payment of money, and the obligee when he comes of age threatens to sue him, and the infant being of full age promises, in consideration of forbearance, that he would pay him, this promise is good, and shall bind him, though he might have avoided the obligation by plea.

Comb. 387. *per Holt*, at the Sittings in *Guildhall*. [1] So, if goods, not

necessary, be delivered to an infant, and after he comes of age he ratify the contract by a promise to pay, he is bound. *Southerton v. Willock*, 2 Str. 690. *per Holt*, C. J. in *Hylling v. Hastings*, 1 Ld. Raym. 289. S. P. *per Ashurst*, J. in *Cockshott v. Bennet*, 2 Term Rep. 648. and if in an action in such case the defendant deny the ratification of the contract after his age of majority, the proof of infancy lies upon him. *Borthwick v. Carruthers*, 1 Term Rep. 648. However, if the original transaction be not perfectly fair, and the infant be entrapped into a ratification of it immediately upon his coming of age, equity will give relief. *Brooke v. Gally*, 2 Atk. 34.]

Abr. Eq. 282.

Also, it is said to have been decreed in Chancery, that if an infant borrows a sum of money, for which he gives a bond, and devises his personal estate (being of sufficient capacity) for the payment of his debts, particularly those he had set his hand to, this bond-debt shall be paid.

(K) Of the Privileges of Infants in Suits and Actions by and against them: And herein,

1. How far the Courts take care of the Interest of Infants.

INFANTS have divers judicial privileges, which persons of full age have not; as if judgment be given against an infant by (a) default, after the default he shall have a writ of error, and reverse the judgment for his nonage; but if an infant after appearance make default, judgment shall be given against him.

which *vide*, and Hob. 266. 2 Rol. Rep. 14. 22. S. C. (a) That this must be understood of an hereditary right, in which the infant shall not lose by default; but there is a difference betwixt those things which concern the hereditary right, for which the parol shall demur, and those actions which are brought and grounded *de son tort demesne*, as in waste, disseisin, or the like; for in these the infant shall not be privileged, *quia malitia supplet etatem*. Cro. Jac. 467. *per* Croke, justice.

In an assise against two, of which one is an infant, if they make default by which the assise is awarded, and after the assise remains for default of jurors, yet the infant shall be received to plead afterwards.

In an assise by an infant, if the tenant pleads an ill bar, and the infant replies, by which he makes the bar good, if the plaintiff had been of full age, yet this shall not make the bar good against the infant; but if the judgment be for the tenant thereupon, this is error; for the court ought to (b) plead for the infant, for the tenderness of his age.

In debt against an infant for rent arrear, the defendant demurred to the declaration, and afterwards pleaded to issue, and the court held that the infant may waive his demurrer in the same term, but not in a subsequent one *.

give leave, in the second term, to waive the demurrer?

If in a *formedon* in remainder the tenant pleads infancy, and that the remainder descended to him, and prays his age, and the demandant pleads that the remainder did not descend to him, and thereupon issue is joined, and found for the demandant, a final judgment shall be given, notwithstanding the infancy of the tenant; for in all cases where the issue is upon a dilatory plea, and tried *per pais*, the judgment is peremptory.

An infant shall be privileged from fine and imprisonment in those cases in which persons of full age shall be thus punished; as, if an infant in an assise vouch a record, and fail at the day, he shall not be imprisoned, although the statute of *Westm. 2. cap. 25.* that gives imprisonment in such a case, is general: also, if guilty of a forcible entry, though he may be fined for the same, yet he cannot be imprisoned: so, if an infant be convicted in an action of trespass *vi & armis*, the entry must be *nihil de fine, sed pardonatur quia infans* †.

An infant being plaintiff or demandant shall not be amerced; and this is the reason (c) he shall not find pledges.

Palm. 518. Rol. Abr. 214. 238. (c) That he shall not find pledges, Cro. Car. 161. adjudged.

Cro. Jac. 464. *per* Houghton, Justice, in the case of Holtford and Platt,

29 Aff. 36. Roll. Abr. 731. S. C.

37 Aff. 5. Roll. Abr. 731. S. C. (b) That in case of an infant, the judges ought to be his counsellors. Cro. Jac. 466.

2 Bulf. 69. * *Sed qu.* if the court would not on motion

Lev. 163. Sid. 118. 252. Amcot and Amcot, adjudged.

Hal. Hist. P. C. 20. 22. Co. Lit. 357. Bridg. 173. Cro. Jac. 274. † The *captiatur pro fine* is taken away by 5 W & M. c. 12.

Co. Lit. 127. 8 Co. 61. 3 Bulf. 276.

Roll. Abr. But an infant defendant shall be amerced if he pleads with the
 214. Cro. demandant, and the matter is found against him; (a) but he shall
 Car. 2. O. be pardoned of course.
 (a) And the entry in such case is *ides in misericordia, sed pardonatur quia infans*. 8 Co. 61. Palm. 518. *Nihil in misericordia quia infans*. Cro. Car. 410. See the note *supra*.

Dyer, 338. But if an infant brings an action by his *prochein amy*, and pend-
 pl. 41. ing the action comes of full age, and makes an attorney, and after
 is nonsuit, he shall be amerced.

Roll. Abr. If an infant brings an action of trespass by guardian against
 214. Meth- two, and the defendants plead not guilty, and at the *nisi prius* the
 wold and plaintiff appears in person, and a verdict is found for the plaintiff
 Angwin, for part, and not guilty for the rest, and one of the defendants
 adjudged. is found not guilty, and judgment is given for the plaintiff, for
 that for which the verdict is given for him, *Et quod nil capiat per
 billiam* for the rest, *sed nihil de misericordia pro falso clamore, &c.*
quia querens tempore transgressionis predict. facti. intra etatem existi-
ebat, yet this is good, and no error.

5 Co. 49. If a *precipe* be brought against an infant, and pending the plea
 Moor, 394. he comes of full age, he shall be amerced for the delay after he
 Roll. Rep. comes of full age.
 294.

3 Bulf. 151. If an infant by his guardian or *prochein amy* brings an eject-
 Vide tit. ment which is found against him, and the guardian, &c. becomes
 Ejectment. insolvent, the infant himself must answer the costs; because the
 rule was entered into for the infant's benefit; and infants must
 not disturb the possession of others by unlawful entries, without
 being punished with costs.

2 Vern. 342. The interest of infants is so far regarded and taken care of in
 per Holt, the court of (b) Chancery, that no decree shall be made against an
 C. J., in his infant without giving him a day to shew cause against it, when
 argument of he comes of age. An infant may by his *prochein amy* call his
 the case of guardian to an account, even during his minority. If a stranger
 Lord Falk- enters, and receives the profits of an infant's estate, he shall, in
 land and consideration of this court, be looked upon as a trustee for the
 Bertie. [But infant.
 he is not
 bound to
 wait til he

comes of age before he seeks redress against the decree, but may apply for that purpose as soon as he thinks
 fit; and may do this, it is said, by bill of review, rehearing, or by original bill, alleging specially the errors
 in the former decree. *Richmond v. Tayleur*, 1 P. Wms. 736.] (b) That this court will decree build-
 ing leases for sixty years of infants estates, when it appears to be for their advantage. 2 Vern. 224.
 That it will not suffer an infant to be prejudiced by the laches of his trustees. 2 Vern. 368. Nor of
 his guardian. *Preced. Chan.* 151.—That a court of equity may, by the approbation of an infant's rela-
 tions, allot the infant maintenance out of a trust estate, though there be no provision in the trust for
 that purpose; and this is founded on natural justice. 2 Vern. 236. [It may make an order of
 maintenance for an infant, though no cause be depending. *Ex parte Whitfield*, 3 Atk. 315. *Ex parte*
Kent, 3 Br. Ch. Rep. 88. It may change too the nature of the infant's estate; *Lord Winchelsea v.*
Noel, 1 Vern. 435. *Inwood v. Twyne*, Amb. 417. and so, it seems, may guardians and trustees,
 where it is manifestly for the benefit of the infant. See the last case. The question, as to the power of
 a trustee to charge the infant's estate, arising in *Vernon v. Vernon*, Ch. November 1789, Lord Thurlow
 stated it to be a general rule, that a trustee should not *ad libitum* change the nature of an infant's
 estate; but held, that the trustees having, in that case, applied the personal estate of the infant in perform-
 ance or satisfaction of a condition, upon which the infant was entitled to a real estate, that was not a
 ground for raising a trust against the heir, in favour of the personal representative of the infant. 1 Fonbl.
 Eq. Tr. 82. note (f).]

Vern. 25. If there are several parties to a suit in Chancery, and it appears
 2 Vent. 391. that any one of the defendants is an infant, and any thing is
 2 Vern. 232. prayed

prayed against him, by the decree, he must have a day given him to shew cause; the words of which decree are thus; viz. *And this decree is to be binding to the said J. S. the infant, unless he shall within six months after he shall attain his age of twenty-one years, (being served with (a) process for that purpose,) shew unto this court good cause to the contrary.* (a) This process is by way of subpoena, to be served on the defendant at his coming of age, and it is a judicial writ, and must be returned in term-time.

If he shews no cause, the decree is made absolutely upon him; but when he comes of age, and shews cause within the six months, he may put in a new answer, and make a new defence; for it would be highly unreasonable to conclude him by what his guardian had done, who perhaps made an improper defence, or mistook the nature of his case; and if the infant notwithstanding were to be bound thereby, it would be to no purpose to give him a day to shew cause. Abr. Eq. 280, 1.

Therefore if a guardian put in an answer to a bill in Chancery for an infant on oath, such answer shall not conclude the infant, nor be (b) read in evidence against him; for the effect of an infant's answer to a bill in Chancery is to no other purpose than to make proper parties, so as to have an opportunity to take depositions, and to examine witnesses, to prove the matter in question. Eccleston v. Petty, Carth. 79. 3 Mod. 259. Show. 89. S.C. [Fountain v. Cain, 1 P. Wms. 504. Napier v. Lady Effingham, 2 P. Wms. 401. Wrottesley v. Bendish, 3 P. Wms. 237. Bennett v. Lee, 2 Atk. 531. And exceptions cannot be taken to an infant's answer. Strudwick v. Pargiter, Bunb. 338. Copeland v. Wheeler, 4 Br. P. C. 256. And in a suit against an infant, the service of subpoena to hear judgment must be on the guardian, not on the infant. Taylor v. Atwood, 2 P. Wms. 643.] (b) If an infant puts in an answer by guardian, and there is a decree against him without any day given him to shew cause, such answer shall not be read or admitted as evidence against him when he comes of age; but if a superannuated defendant puts in an answer by his guardian, it shall be read against him at any time after, for he is supposed to grow worse, and is not to have a day to shew cause. Abr. Eq. 281. Levin and Caverly. Pr. Ch. 229. S. C.

But it seems that if lands are devised to be sold for payment of debts, the lands may be decreed to be sold without giving the heir who is an infant a day to shew cause when he comes of age; for nothing descends to him; but if he is decreed to join in the sale, he must have a day after he comes of age. 2 Vern. 429. Cooke and Parsons, decreed. Preced. Chan. 185. S. C. and S. P.

[It is said by the court in Whitechurch v. Whitechurch, 9 Mod. 128. that "in cases of trusts, infants are always bound by decrees of this court; and so they are, where the will of the ancestor is contested, and it is either set aside or confirmed in equity after trial on an issue *deviseavit vel non*, or where it is otherwise set aside without a trial at law; and there is scarcely any case where an infant hath time to shew cause against a decree, but where it is necessary for him to join in a conveyance to complete the estate, and where such conveyance is of the inheritance, as in decrees of foreclosure or mortgages, &c." And even in the case of foreclosure, it is not permitted to him to ravel into the accounts, nor is he entitled to redeem; he is merely entitled to shew error in the decree. Mahack v. Ganton, 3 P. Wms. 352. Lyne v. Willis, Rolls, 13th May, 1730. *ibid.*—An infant may file a bill of review to reverse a decree, notwithstanding it hath been enrolled upwards of twenty years. Lytton v. Lytton, 4 Br. Ch. Rep. 441.]

[It hath been holden, that an infant, when plaintiff, is as much bound, and as little privileged, as one of full age; unless gross laches, or fraud and collusion appear in the *prochein amy*; in which case the infant may open the decree by a new bill. Lord Brooke v. Lord and Lady Hertford, 2 P. Wms. 518. Gregory v. Napier, 3 Br. P. C. 301. where the House of Lords gave Sir John Napier leave to shew cause when he came of age, against his own decree. And an infant's neglect to put in a replication shall not be taken as an admission of the truth

truth of the answer, for an infant can admit nothing. *Legard v. Sheffield*, 2 Atk. 377. *Vide contra* *Thurston v. Nutton*, Tr. 1733. 3 P. Wms. 237.—If the court detect an incautious submission in the bill of an infant to any thing that will be prejudicial to his interests, they will direct an amendment. *Serle v. St. Eloy*, 2 P. Wms. 387.

Da Costa v. Da Costa, 3 P. Wms. 142. If it be represented to the court, that a suit instituted on the behalf of an infant is not for his benefit, an inquiry into the fact will be directed to be made by one of the masters, and if he reports that the suit is not for the benefit of the infant, the court will stay the proceedings. So, if two suits for the same purpose, are instituted in the name of an infant, by different persons acting as his next friends, the court will direct an inquiry to be made in the same manner, which suit is most for his benefit, and when that point is ascertained, will stay proceedings in the other suit.]

2. How they are to appear when they sue or are sued.

Palm. 225. 250. Roll. Abr. 287-8 Regularly, an infant plaintiff must appear by *prochein amy* or guardian, but must defend by guardian: but in neither case can he appear by attorney, for an attorney's appearing for him is without warrant, for an infant cannot give him authority *ad perrendend. & lucrand.*, as the warrant of attorney purports; and therefore he is to appear by guardian assigned either by the court, or by writ out of Chancery, and such guardian hath his warrant from the court, not from the infant, and ought to be one of an estate; for if he misbehaves himself, an action of deceit lies against him.

Co. Ent. 289. Cro. Jac. 25. If a judgment be against an infant, and the infant bring a writ of error to reverse the judgment, he ought to assign the error by guardian, and not by attorney.

Moor, 665. Palm. 229. In replevin the defendant being an infant appeared for two terms by attorney, and the third term by guardian, and for this cause the judgment was reversed: But an infant may appear by guardian, and when he comes of full age he may make an attorney in the same suit, and this shall not be error.

Cro. Jac. 580. Stone and March, Bulf. 24. S. C. and S. P., seems to be admitted; but adjudged *per totam curiam*, that it could not be assigned for error, and therefore the first judgment was affirmed. — And now by the 21 Jac. 1. c. 13. it is enacted, that after verdict given in any court of record, judgment shall not be stayed or reversed by reason the plaintiff in ejectment, or other personal action, being under age, did appear by attorney, and the verdict pass by him.—[In Chancery the course seems to be, to proceed in such case without any change. *Pr. Reg. 195.*]

Cro. Jac. 640. Palm. 295. Roll. Rep. 257. Simpson and In an ejectment against an infant the defendant cannot appear by *prochein amy*; for a guardian and *prochein amy* are distinct, and the suit by *prochein amy* was not before the statute of *Westm. 1. cap. 47.* and *Westm. 2. cap. 15.* and is given in case of necessity,

(a) where

(a) where an infant is to sue his guardian, or is esloigned, or that the guardian will not sue for him; adjudged by three judges against one, upon a writ of error upon a judgment given in *Durham*, and the first judgment reversed accordingly.

Jackson, S. C. adjudged, Hutton, 92. S. C. cited. F. N. B. 27.

S. P. Styl. 369. S. P. (a) But for the profits received after fourteen, the infant was admitted by guardian to sue an account against his guardian in focage; for he must charge him as bailiff. Cro. Jac. 219.

But in all cases where an infant is plaintiff, unless in these special cases, the suit shall be by guardian, and not by *prochein amy*.

Palm. 296. per Dod.—But 2 Inst. 390., it is

said, whether the infant be esloigned or no, he may sue by *prochein amy*; but perhaps in all cases where he is plaintiff, except these, he may sue by guardian or *prochein amy*; and for this *vide* F. N. B. 27. 2 Inst. 261, 390. Co Lit. 135. b. Cro. Car. 86. Hutt. 92. Jones 177. Heil. 52. Lit. Rep. 60. Cro. Jac. 161. 641. Bridg. 74.

The respective courts in which the suit is commenced must (b) assign a proper guardian to the infant; and therefore if an infant be sued, the plaintiff must move to have a proper guardian assigned him (c).

Styl. 369. Bridg. 74. Roll. Rep. 303. (b) That the course hath

been to allow some of the officers of the court, who, by reason of their skill, make the best guardians, and *prochein amys*, for the advantage of the infants. 2 Inst. 261.—That the court of Chancery may assign one of the six clerks to be guardian to an infant. 2 Chan. Ca. 163.—But if there be a guardian appointed by the father, or *ex provisione legis*, as guardian in focage, who acts accordingly, he only shall be admitted to sue for the infant, unless he hath misdeemeaned himself. Sid. 424.—[But it is said by Lord King C. that no one can have a testamentary guardian for this purpose. 2 Str. 709.]—That the court may discharge one guardian, and appoint another. Styl. 456.—Where in the Common Pleas a record of admittance is made, but in the King's Bench it is only recited in the count, J. S. per A. B. *guardianum suum ad hoc per cur. specialiter admissum queritur, &c.* 3 Co. 53. b. and *vide* 1 Sid. 173. 342. Cro. Eliz. 158. 2 Inst. 261. 3 Mod. 236. 1 Lev. 224.—The appearance must be entered in the name of the infant, *scilicet, prædicti. Catherina per J. S., guardian. venit, & dicit, quod ipsa, &c. not ipse, &c.* 3 Mod. 236. and the above authorities. If the guardian for the defendant is admitted *ad prosequend.*, this is erroneous. Cro. Jac. 641. Palm. 296.—But an admission *quod sequatur* is good in a common recovery. Sid. 446. Mod. 48. 2 Sand. 95.—The infant cannot revoke the authority of the guardian. Palm. 252. & *vide* Salk. 176. Holt 153. pl. 1. 12 Mod. 372. Ld. Raym. 555. A guardian ordered to acknowledge satisfaction for so much as he received upon a judgment. Moor 852.—[The admission of the *prochein amy* or guardian may be either *special*, to prosecute or defend a particular action; or *general*, to prosecute or defend all actions whatsoever; Archer v. Frowde, 1 Str. 304. though it is said, that by the practice of the court of King's Bench, a special admission of a guardian, to appear in one cause, will serve for others. Id. 305. For the manner in which a guardian or *prochein amy* is appointed in B. R. See Tidd's Pr. 117. (c) For if an infant defendant appear by attorney, it is error: 3 Co. 58. b. 9 Co. 30. b. but if an attorney undertake to appear for the infant, the court will oblige him to do it properly. Straton v. Burgis, 1 Str. 114.—The order for the admission of a *prochein amy* should be obtained before declaration, and a copy thereof annexed to it; else the defendant is not compellable to plead: Sty. Pr. Reg. 264. and the plaintiff's attorney, if required, must give notice to the defendant's attorney, of the place of abode of the *prochein amy*. Tomlin v. Brookes, 1 Wils. 246. So, the rule or order for the admission of a guardian should be obtained before plea, and a copy of it annexed thereto; for if an infant defendant appear by attorney, though it be in consequence of common process, with a notice requiring him to appear in that manner, the plaintiff may obtain an order for striking out the appearance, and that the defendant may appear by guardian within a certain time, usually four or six days: or in default thereof, that the plaintiff may be allowed to name a guardian, to appear and defend for him. Kerry v. Cade, Barnes 413. Gladman v. Bateman, Id. 418. And a similar order may be obtained, where the defendant neglects to appear at all. Stone v. Atwoll, 2 Str. 1076. Shipman v. Stephens, 2 Wils. 50. Tidd's Pr. 117, 118.]

An appeal of death by an infant must be prosecuted by guardian; yet if the infant comes into court, and says that he will relinquish it, and yet the guardian will prosecute it, the court may in discretion discharge such guardian, and assign another; for it is not reasonable that an infant be bound to continue a suit against his will, which demands nothing but revenge, and will be chargeable to him.

Roll. Abr. 288. 1 Ld. Raym. 555.

26 Aff. 40. Roll. Abr. 288. S. C. Roll. Abr. 288. Palm. 224. 244. 250. &c. Cro. Eliz. 379. S. C. Holland and Lee.

In an action against baron and feme, the feme being within age, the feme ought to appear by guardian.

If a common recovery be suffered, and the baron and feme, in right of the feme, (the feme being within age,) be vouched, and they appear by attorney, and vouch over, and so a common recovery be had, this is error; for though the baron is of full age, yet the feme being within age, she ought to have appeared by (a) guardian; for the husband cannot make an attorney for his wife in a matter that concerns her inheritance, for then he might defeat her of her inheritance, especially in a common recovery, which is now but a common assurance, and their coming in as vouchees makes it the stronger; for the vouchee loses all the right to the land, and gives recompence to the tenant.

(a) That the husband cannot disavow a guardian made by the court for his wife. Vent. 185.

Vent. 185. Freeman and Bodington, adjudged. 2 Lev. 38. S. C. 2 Keb. 878. S. C. because the appearance was *per attornatum* of the husband only, and there said, though in a real action, the wife must appear by guardian; yet perhaps it may be otherwise in a personal action, for the damages will survive. (b) But if they bring an action, they may sue by attorney, and the baron shall name an attorney for both. 2 Sand. 213. *per Curiam arguendo*.

If in an *assumpsit* (b) against baron and feme, the feme, being within age appears by attorney, and thereupon judgment is given against them, this is error.

Roll. Abr. 287-8. Poph. 130. Cro. Jac. 420. Roll. Rep. 380. S. C. (c) That an action in such case lies against a guardian. Palm. 229. 2 Leon. 59. Cro. Jac. 641.

If an action of debt be brought against an infant executor, he cannot appear by attorney, but ought to appear by guardian, else it is error, because otherwise he might be at great prejudice; for assets may be found in his hands, and so judgment shall be given to recover the debt, damages, and costs against him *de bonis testatoris, si, &c. si non*, the damages and costs *de bonis propriis*, (as it was done in this case,) and perhaps the infant had a release or acquittance to plead, and so he shall be charged *de bonis propriis* by his ill pleading, without any remedy against the attorney: but if a guardian mispleads, and loses thereby, an (c) action lies against him, and therefore his being executor cannot make him as a man of full age.

Mod 49. — But no action lies against a *prochein amy*; for if he loses in such action, he is not concluded thereby, but may resort to his action of a higher nature. Palm. 296. *per Dod*.

Poph. 130. Cro. Jac. 441. S. C. and there

But if an infant (d) executor brings an action as executor by attorney, and hath judgment to recover, this is not erroneous, because for his benefit.

said, there is a difference where an infant executor is plaintiff, and where defendant, and being plaintiff, where he recovers or not; for if judgment is given against him where he is plaintiff, it seems all one as if he were defendant. (d) That if an infant administrator appears by attorney, it is error, though judgment be given for him. 3 Bull. 180. but Rol. Abr. 288. *cont.* & *vide* Vent. 103. Cro. Eliz. 541. 2 Sand. 213. Mod. 47. 298.

Roll. Abr. 288. Counts of Rutland's case adjudged, in which

If an infant and man of full age are made executors, they may (e) bring an action as executors, and the infant may sue by attorney without making any *prochein amy*, (f) because he sues in the right of the testator, and not in his own right.

the executors recovered in the action. Cro. Eliz. 278. S. C. 2 Sand. 212, 213. S. P. adjudged *per Cur. cont.* Twisden; for he that is of full age may make an attorney, for him that is within age. Mod. 47. 72. 296. adjudged by three judges against Twisden. Vent. 102. adjudged. Sid. 449 adjudged. L.J.

Ld. Raym. 232. 600. 2 Ld. Raym. 1449. 8 Mod. 25. 1 Stra. 784. (e) But if an action is brought against them, he that is under age must appear by guardian. Styl. 318. adjudged; & vide 3 Mod. 236. said to be agreed. 2 Str. 784. acc. (f) This is founded upon another reason, viz. upon necessity; for it is absolutely necessary that all who are appointed executors by the will should be made parties to the action, and where there are several executors, the act of one shall conclude his companion, and therefore the general appearance *per attornatum* is good for all of them. Carth. 124. *per* Holt, C. J.

In replevin in *C. B.* against *A., B., and C.* they all *per J. S. attornat.* made consufance as bailiffs to *J. N.* and at the trial the plaintiff was nonfuit, and the defendants had judgment upon a writ of error in *B. R.* It was assigned for error, that *A.*, one of the defendants, was an infant, and yet had appeared and pleaded by attorney; but notwithstanding, the judgment was unanimously affirmed, though for different reasons; three of the judges held, that it ought to be affirmed because the defendants are *in auter droit*, and they all make but as one bailiff, and that the disability of the servant shall not prejudice his master, and they agreed that the case of executors is the same in reason with the present case; they agreed likewise, that there is a difference where the infant is plaintiff, and where he is defendant, and that an avowant is in nature of a plaintiff, and so are the bailiffs who make consufance: but *Holt, C. J.* differed; he held, that this appearance of the infant was irregular, for he ought to plead *per guardianum*, and the joining the other defendants with him signified nothing, so as to charge the infant, for if the judgment pass against him it shall be for the damages *de bonis propriis*, and he shall be amerced; therefore where he is joined, or where he is single, there is no manner of difference in reason, for in both cases the loss is the same, if judgment is against him; but he agreed that in this case the judgment should be affirmed, (a) because the plaintiff did not take advantage of the infancy in time, according to the general rule which he laid down, viz. that a man shall never assign that for error which he might have pleaded in abatement; for it shall be accounted his folly to neglect the time of taking that exception.

The testator had obtained a judgment, and made a person of full age and two infants executors; he of full age proved the will, and he alone brought a *scire facias*, setting forth the truth of the case, and had judgment, whereon error was brought, and assigned that all ought to have (b) joined in the *scire facias*; but by all the justices, on advice with the civilians, it was ruled not to be error; for the others cannot prove the will during their nonage; and the judgment was affirmed; for the execution of the judgment shall not be delayed till the infants come of full age.

Yelv. 130., where it is held, that an infant cannot be summoned and severed.

The plaintiff being an infant had sued by his guardian, but the entry on the roll was no more but *per T. S. guardianum suum*, omitting the clause *ad hoc per Curiam specialiter admiff.* as the common course is, and as it was alleged it ought to be: but *per curiam* the entry is sufficient; for in fact, if the guardian was not admitted by the court, a writ of error lies.

An

Carth. 122.
179. Coan
v. Bowles,
adjudged.
Show. 13.
165. S. C.
Salk. 93.
pl. 2. 205.
pl. 1. S. C.
adjudged,
because the
plaintiff
might have
pleaded this
in abate-
ment.
4 Mod. 7.
S. C. but
not the S. P.

(a) But one
of the judges
was of opinion,
that this matter
might be
assigned for
error, tho'
it was plead-
able in abate-
ment of the
consufance.
Carth. 123.

Lev. 181.
Hatton and
Masfal, ad-
judged in
the Exche-
quer cham-
ber on a writ
of error out
of *B. R.* &
vide Raym.
198. S. C.

(b) Et vide

Carth. 256.

(a) And therefore any person may bring

a bill as *prochein amy* to an infant without his consent, because it is at his peril that he brings it, to be answerable for the event. Abr Eq. 72. Andrews and Cradock.

Abr. Eq.
260. Lloyd
and Carew.

And it is said, that in Chancery a guardian cannot be otherwise appointed than by bringing the infant into court, or his praying a commission to have a guardian assigned him.

Where a bill is brought against an infant (if in town) he must appear in court, and have a guardian assigned him, by whom he may defend the suit; if in the country, he sues out a commission to assign a guardian, and put in his answer; and whether he pleads, answers, or demurs, still it must be done by his guardian; for if it is the plea, answer, or demurrer of the infant, without doing it by the guardian, it will be irregular.

But when the infant neglects to appear, or to have a guardian assigned, it is a motion of course (he being in contempt to an attachment) to pray for a messenger to bring him into court, and when he is there, the court always assigns him a guardian: But it is doubted whether this can be done against a peer of the realm who is an infant, and whose person, though not sacred, is yet privileged.

Grave v.
Grave,
Cro. El. 33.
Turner v.
Turner, 2 P.
Wms. 297.
2 Str. 708.
The *pro-*

[An infant is not liable to costs, but only his *prochein amy*; and if he refuse to pay them, on demand, the court will grant an attachment against him (b). Yet, where an infant plaintiff was taken in execution for the costs, the court refused to discharge him on motion (c). And it hath been adjudged, that costs are payable by an infant defendant (d).

chein amy being liable to the costs, he cannot of course be examined for the infant. Hopkins v. Neil, 2 Str. 1026., though his declarations may be received against the infant. James v. Hatfield, 1 Str. 548. (b) Slaughter v. Talbot, Barnes, 128. (c) Gardiner v. Hoit, 2 Str. 1217. (d) Dy. 104. 1 Bulstr. 189. 2 Str. 1217.

Doe v.
Alston,
1 Term
Rep. 490.

When an infant sues, it is the practice with the courts of law, to stay the proceedings till the *prochein amy*, guardian, or attorney hath given security for the costs; and where he has appeared to be in low circumstances, or incompetent to discharge the costs, they have, on motion, appointed a new *prochein amy*, or guardian of sufficient ability (e). It hath been said (f) that a similar practice obtains in the court of Chancery, and that if the *prochein amy* be insolvent, the defendant may apply in order to have a solvent *amy* named. But in *Squirrel v. Squirrel* (g), in *Lincoln's Inn Hall*, 17 Dec. 1791, a bill having been filed by a feme covert by her next friend against her husband, it was moved on the part of the defendant, that all proceedings in the cause might be stayed, until the *prochein amy* should give security for costs, or another *prochein amy* be named, which application was supported by an affidavit of the bad circumstances of the *prochein amy*. But Lord Thurlow refused to make any order; and said, he did not conceive the court could inquire into the circumstances of any *prochein amy*, more than those of any common plaintiff, in which case, though the plaintiff should be insolvent, the defendant cannot help him-
self;

(e) 2 Str.
708.
(f) Turner
v. Turner,
2 P. Wms.
297.
(g) 2 Cox's
P. Wms.
297. note.

self; that in the cases of an infant or feme-covert they were obliged to sue by their next friend, in order that there might be some person *sueable* for the costs; (which the infant and feme covert themselves are *not*;) but that the court contented itself with making somebody *amenable* in this respect, without going into an inquiry concerning his ability.—There was in this case indeed a circumstance upon which his lordship in some degree relied, *viz.* that this application was made after the defendant had *answered*, which might be considered as a waiver of any application of this nature, though it was alleged on his part that he had not discovered the circumstances of the *prochein amy* until after answer.]

(L) Of the Privilege of Infancy as to the Parol's demurring: And herein,

1. In what Actions the Parol shall demur.

THE parol's demurring until the full age of the infant is a dilatory plea or temporary bar; and peculiar only to the feudal law; for in the civil law, the guardian was party to the suit instead of the infant; and if there was *mala fides* in his defence, he was to answer it to the infant; but the wardship in the feudal law was of another nature; for the guardian has the whole profits of the estate, and also the marriage of the infant, which was to breed him up to arms, and to marry him to such person as he thought might continue the martial strain, that so the ward might subserve the original design of the tenure.

3 Bulf. 143.
Roll. Rep.
325.

Hence it was, that the guardian was not trusted with the action, nor could the infant, by reason of his imbecility and want of understanding, be admitted to prosecute or defend; but this establishment was confined to such cases where the right of the inheritance was in demand, and was not allowed to actions touching the possession; and the reason was from necessity; for if the infant was not allowed to defend his possession, an infant would be stripped of all he had, during minority; and so of injuries done by an infant the parol shall not demur, because then a general licence would be given for infants to commit injuries; and therefore the prosecution of these actions is committed to the next friend, and the defence of the actions against an infant to a special guardian assigned by the court.

6 Co. 3. b.
Markal's
case.

And therefore in all cases where a naked right in fee * descends from any ancestor to an infant, there in every action ancestral brought by the heir within age, the parol shall demur; for the law in this case judges it less prejudicial that the infant should be delayed of his right, than that he should run the hazard of losing it for ever, which he might be in danger of by his want of knowledge in setting forth his title as he ought to do.

6 Co. 3. b.
Dyer, 133.
* If lands in
fee descend
on an in-
fant, the
parol shall
demur in
equity, as in
law; but

where a lease is made to a man and his heirs for three lives, the heir does not take by descent, but as a special occupant, and shall not demur. 3 P. Will. 365.

Hence,

Roll. Abr. Hence, if an infant brings a writ of right as heir to his ancestor, and lays the esplees in his ancestor, the tenant may pray that the parol demur.

6 Co. 3. b. So, in a *formedon in reverter* the parol shall demur, because he claims as heir in fee-simple to the reversion, and must lay the esplees in the donor.

2 Inst. 89. So, in all cases on the fee, as if an (a) action of debt on the obligation of the ancestor be brought against the heir, there the parol shall demur, because that lays a burden on the fee, which by law is to be preserved entire until the infant come of age.

Moor, 74. (a) In a writ of debt against an heir he shall have his age, because at his full age he may discharge himself by saying he hath *riens per descent*. Roll. Abr. 140. If an ancestor dies indebted by bond, in which the heir is expressly bound, and leaves no personal assets, and the lands descend on an infant heir, whether equity will during the minority of the heir decree satisfaction, is made a *quære*. 1 Vern. 173. and there said, that infants may be sued in equity, and that there is no precedent that the parol should demur; and in 1 Vern. 428. it is said by the master of the rolls, that he thought such a decree reasonable; but the reporter adds a *dubitatur* to it.

6 Co. 3. b. But regularly in all real actions brought by an infant of his own possession the parol shall not demur; for the granting that the parol shall demur is a law introduced, not for the delay or prejudice of the infant, but for his advantage.

467. Therefore in assises of *novel disseisin* and *mort d'ancestor*, the infant has not his age, because these actions are brought of his own seisin, or his ancestor's dying seised, which may be prosecuted during minority.

48 E. 3. 33. So, if in assise the infant pleads a flat bar, and the bar is found against him, yet the assise shall be taken at large; because the law not allowing the parol to demur in this action, which is *festinum remedium*, they inquire of the seisin and disseisin, that the infant's whole title may be before the court, and he not suffer by his pleading.

Roll. Abr. In a writ of annuity against an heir he shall have his age, because he may discharge himself by saying he hath nothing by descent.

Co. Lit. 290. So, if a man sues execution upon a statute merchant against an heir within age, and ousts him thereby, (b) an assise lies for the heir, for he shall have his age.

Roll. Abr. 140. (b) For the extent is void, which is made upon the possession of the infant. Hetl. 54.

3 Co. 13. So, if a man sues execution upon a recognizance against an heir within age, he shall have his age, though he be charged partly as tertenant.

Bro. Statute Merchant, 33. Co. Lit. 290. So, upon a recognizance in nature of a statute staple on the 23 H. 8. cap. 6. the infant shall have his age; for the statute in this particular is founded on the reason, and follows the course of the common law. And this privilege of infancy does not only protect the infant, but (c) all others who are affected by the judgment; as if there be father and two daughters, and the father die, one of the daughters being within age, partition being made, the eldest shall not be charged alone, but shall have

2 Inst. 89.
Roll. Abr. 140.
3 Co. 13.
Co. Lit. 290.
Bro. Statute Merchant, 33.
Co. Lit. 290.
a. Moor, pl. 203.
Dyer, 239.
a. Co.
Ent. 12.
(c) As if the consor

have the benefit of her sister's minority, which puts a stop to the execution. of a statute merchant die, and his

heir within age endow his mother, the land in dower shall not be extended during the minority of the heir. Co. Lit. 290.—But though upon a judgment in debt, or upon a statute or recognizance there can be no proceeding against an infant at common law during his minority, yet it is said there may be in Chancery. 2 Chan. Ca. 164. & vide Lev. 197-8.

So, if a man recovers in an action of debt against the father, who dies, in a *scire facias* against the heir upon this judgment, he shall have his age. Roll. Abr. 140. Co. Lit. 290.

In a *scire facias* against a tertenant to have execution of damages recovered against *J. S.* if the tertenant be within age, and in by descent, he shall have his age. Roll. Abr. 140. Co. Lit. 290.

In a writ of customs and (a) services, which is a writ of right in its nature, in which judgment final shall be given, an infant in by descent shall have his age. Roll. Abr. 139. 141. 9 Co. 85. a. (a) Yet he 9 Co. 95. a.

may be distrained for rent during his minority.

In a *cessavit* by (b) descent, though it be of his own cesser, the infant shall have his age, because he cannot tell what arrears there accrued; and if he does not make a true tender, he loses the whole for ever. Co. Lit. 380, 381. Roll. Abr. 138. 2 Inst. 401. Pig. Recov. 67.

(b) But if it be a purchase it seems otherwise, because that is not an ancient inheritance of the family, for which he was to be in ward; for which vide Plow. 364. b. 6 Co. 4. b. 2 Inst. 401. Foylm. 118. 3 Mod. 222.

In (c) a writ of dower the parol shall not demur for favour of dower; for the wife must be substituted. Roll. Abr. 137. 3 Bulf. 141.

Roll. Rep. 323. Cro. Jac. 393. 2 Brown. 118. (c) So, if a woman brings a *quod ei deforceat* upon a recovery had of land which she claimed to hold in dower, the parol shall not demur, because it is of the nature of a writ of dower. Rol. Abr. 137. 3 Bulf. 135. 138. Rol. Rep. 251.—But if tenant in dower be disseised, and the disseisor die seised, his heir shall have his age against the feme. Rol. Abr. 137. 3 Bulf. 142.

So, in dower against an infant, who makes default upon the *grand cape* returned, it was holden, that judgment shall be given upon the default; for the infant shall not have his age in dower, which being but for life, she may be totally defeated thereof by his frequent defaults. Cro. Jac. 111. Cro. Eliz. 309. 638. 2 Brownl. 118. 2 Leon. 59. Cro. Jac. 392. Moor, pl. 1. 48. Herbert and Binion.

But in error to reverse a fine levied by the plaintiff and her husband, the heir is summoned as tertenant, and appears, and pleads that he is within age, and prays that the parol may demur; plaintiff counterpleads the age, shewing that she was entitled to have dower before the fine levied, and now is barred of her dower by this fine, which is erroneous, and sets forth the errors, and seeks to be restored to her writ of dower: But upon demurrer and solemn argument it was adjudged, that the parol shall demur, and that she shall not have the advantage to take from him his age, having by the fine, so long as it stands in force, barred herself of her dower; and therefore the law shall rather favour the infant, whose privilege is immediate, than hers, which is but mediate after the fine reversed: But in *Moor* it is said, if he had not been tertenant, he should not have had his age in this writ of error; the reason seems, because then he would not have recovered her dower

dower against him, and then it is not reasonable his nonage should stand in the way to hinder her from recovering her dower against another.

Roll. Abr. 137. In an attaint against the heir of the (a) feoffee, the parol shall not demur for the nonage of the defendant, for the mischief of the death of the petit jury, before his full age.
 (a) The same law in an attaint against tenant in dower within age, who was the wife of the recoverer, and is endowed of his possession. 1 Rol. Abr. 738-9.

Roll. Abr. 138. In a *quare impedit* the parol shall not demur for the nonage of the patron defendant, because the lapse may incur during his nonage.
 3 Bulf. 131.
 142.

Roll. Abr. 138. Roll. Rep. 324. So, if the king presents, in right of the heir in ward, to a church of which another is patron, of the grant of the father of the ward, with warranty of the land to which this is appendant, who left assets to the ward, and the patron sues by petition to the king to repeal his presentation, shewing the matter; the parol shall not demur for the nonage of the ward for the mischief of the lapse; and this suit is in the nature of a *quare impedit*.

Dyer, 104. In a writ of estrepement against an infant he shall not have his age, because this action is in nature of a trespass, and this done by himself.
 Pl. 13.
 2 Inst. 328.

6 Co. 4. b. In a writ of partition between (b) coparceners, age does not lie for the defendant, for nothing is demanded but a partition.
 Co. Lit. 171. a.
 (c) The same law of jointenants and tenants in common. Hob. 179. adjudged.

9 Co. 85. In a (c) *per que servitia* the defendant shall not have his age, but
 Co. Lit. 315. shall be compelled to attorn, for he is not prejudiced in the inheritance by the attornment; for when he comes of full age he may
 2 Brownl. 84. Roll. disclaim to hold of him, or say that he held by less service, notwithstanding this attornment.
 Abr. 138. (c) The same law in
 a *quid juris clamat* against an infant. Co. Lit. 315. Rol. Abr. 138.

Roll. Abr. 138. In a *per que servitia* if the tenant says the conusor is dead, his heir within age, the parol shall not demur for his nonage, though it may be the conusor was tenant in tail; for, it seems, the heir, if he was of full age, could not come to plead this, but the tenant may plead it, if it be true.

Roll. Abr. 138. In a *quid juris clamat* by him in reversion, against tenant in dower, the parol shall not demur for the nonage of the demandant; for be he of full age, or within age, he ought to warrant the land to the tenant in dower, because of the reversion, by force of an act in law.

Roll. Abr. 138. But if an infant in reversion brings a *quid juris clamat* against tenant for life, the parol ought to demur; (d) for he hath a warranty against his lessor by special deed, to which the plaintiff who is within age cannot bind himself.
 6 Co. 4. a. (d) So, where the tenant for life hath a privilege not to be impeached of waste, &c. Co. Lit. 320. a. 3 Bulf. 137. 9 Co. 85. Rol. Rep. 323.

6 Co. 3. b. In a writ of *mesne* the parol shall not demur for the nonage of the demandant, because it is brought for the wrong and damage done to the demandant himself.
 9 Co. 85.
 Roll. Abr. 138-9.

In a *contributio facienda* by one coparcener against another, the parol shall not demur for the nonage of the tenant, though he lays that his ancestor died seised, and held *sine contributio facienda*. Roll. Abr. 139.

In a *scire facias* (a) against the heir of him against whom the recovery was had, if the heir be in by descent from another ancestor, than he against whom the recovery was had, he shall have his age. Roll. Abr. 139. (a) But in a *scire facias* brought by an infant,

the parol shall not demur for the nonage of the demandant. Roll. Abr. 139. — But where it shall demur in a *scire facias* to execute a remainder limited to the ancestor, *vide* Moor, 16. pl. 59. 35. pl. 114. And. 24. Dalf. 37. Kelw. 204. N. Bendl. 121. pl. 152.

If a man brings a (b) writ of error against the heir of him that recovered, being within age, and in by descent in the land, the parol shall not demur for his nonage, though perhaps he hath a release, or other matter to bar the plaintiff, which he hath not knowledge to plead within age. Roll. Abr. 139. [But it seems, that in error, where the tenant pleads in-

fancy, and is in by descent, he shall have his age. Herbert v. Binion, 1 Roll. Rep. 251. 333. Cro. Jac. 392. S. C. Moor, 847. pl. 1148. S. C. 3 Bulfr. 138. S. C. Aland v. Mason, 2 Str. 861.] (b) Age lies not in a writ of deceit, 3 Bulfr. 135. Roll. Rep. 251., because the summoners and per- rors may die. Cro. Jac. 392.

In a petition to the king in the nature of a *formedon* in remainder, the parol shall demur for the nonage of the petitioner. Dyer, 136. Dalf. 22. Moor, 35. Kelw. 205.

In an appeal of murder the parol shall not demur for the nonage of the plaintiff, 2 Inst. 320. said to have been adjudged and approved by continual experience of late time; and the reason of failure of battle is of no force; for a man of seventy may have an appeal, and the defendant shall be ousted of battle. Dyer, 137. 2 Hawk. P. C. c. 23. § 30.

At common law, if a man had been disseised, and the disseisee or disseisor had died, the heir within age, in a writ of entry *sur disseisin*, brought by the heir of the disseisee, or against the heir of the disseisor, being within age, the parol should have demurred till the full age of the heir respectively. 2 Inst. 257.

So, notwithstanding the disseisor had died (c) pending a writ of *novel disseisin* against him. 2 Inst. 257. (c) But, by the common

law, if the grandfather had been disseised, and brought an assise, and died pending the writ, and after the father had brought a writ of entry *sur disseisin*, and pending this writ the father had died, if the son had immediately brought a writ of entry, the parol should not have demurred for his nonage. 6 Co. 4. b.

At common law in a *mortdancestor*, *aiel*, *besaiel* or *cosinage*, if the tenant had pleaded a feoffment or release from a collateral ancestor, with warranty, in bar, &c. the parol would have demurred. 2 Inst. 291.

By the (d) statute of *Westm. 1. cap. 47.* it is enacted, "That if one (e) purchase an assise, and the principal disseisor dies before the assise passed, the plaintiff shall have a writ of entry (f) against (g) his (h) heir or heirs, of what age soever; (i) so if the disseisee die before he hath purchased, his heir or heirs shall have, &c., so that for the nonage of the heirs of either, &c. the plea shall not be delayed, but as much as can, fresh suit must be made (k) after the disseisin; so in case of prelates, &c., where there can be no descent, &c." (d) 3 E. 1. c. 47. (e) So, tho' he dies before purchase of the writ; for this is put only to shew the mischief of this particular case, whereas the body of the act is general. 2 Inst. 257. (f) This extends only to a writ in the per, and not in the writ. 12

Vol. III, S f

in the *post*; so that if the heir of the disseisor makes a feoffment in fee, and the feoffee dies, his heir within age, in a writ of entry against him, shall have his age. 2 Inst. 257.—— So, it extends not to the vouchee or *prayer in aid*. 2 Inst. 257. 2 Leon. 148. If the heir of the disseisor takes husband, and has issue within age, and dies, and the disseisor brings a writ of entry against the tenant by the curtesy, and he prays in aid of the heir within age, he shall have his age; for this is a writ of entry in the *post*, being against tenant by curtesy. 2 Inst. 257. (g) This extends to the heir of the heir; so that in this special case a writ of entry in the *per* and *cui* is within the act. 2 Inst. 257-8. (h) Special heir as in gavel-kind, borough-english, &c. within this act. 2 Inst. 258. (i) By this clause express provision is made in case the disseisor dies before purchase of his writ. 2 Inst. 528. (k) Intended after the death of the disseisor, and such suit regularly is within a year and a day after his death, within which time continual claim is to be made. 2 Inst. 258.

(a) 6 E. 1. By the statute of (a) *Gloucester, cap. 2*. "Where an infant is c. 2. "held from his inheritance after the death of his (b) father, cousin, (b) This put "grandfather, &c., so that he is drove to his writ, and the tenant only for ex- "pleads a feoffment, or other matter, whereby the justices award ample; for "an inquest, the inquest shall pass as if of full age." it extends to mother. brother, sister, uncle, &c. after the death of any of which a *nortdancestor* lies. 2 Inst. 291.—— But this act extends not to actions *ancestral droiturel*, but giving the infant a trial during his minority, it gave it in such actions as he might not be foreclosed of his right, but at his full age might have recourse to a writ of a higher nature; and therefore, it extends not to any *formedon, dum non compos, infra statum, sur cui in vita*, &c. 2 Inst. 129.; yet *vide* Ero. Age, 5.

2. Where the Parol shall demur without any Plea pleaded.

6 Co. 3. b. The general rule herein is, that where a naked right in fee de-
4. a. scends, of which the ancestor was once in possession, there, in an
Dyer, 137. action ancestral brought by the infant, the parol shall demur
a. without plea; but the parol shall not demur without plea where the ancestor died seised, or where the action is brought of the seisin or possession of the infant.

6 Co. 3. b. Therefore in a writ of right, as heir to his ancestor, (c) the parol
—And this shall demur without any plea, because there is an action *ancestral*
is not alter- *droiturel*, and he lays the esplees in his ancestor.
ed by the
statute of *Gloucester, c. 2*. 2 Inst. 291. (c) Though the battel may be deraigned by champions.
Dyer, 137. pl. 24.

Roll. Abr. So in a *formedon in reverter*, the parol shall demur without plea,
137. because he claims as heir in fee-simple to the reversion, and not
6 Co. 3. *per formam doni*, and therefore the right of the fee would be
Dyer, 137. bound.

Roll. Abr. But on a *formedon in descender* and *remainder*, the parol shall not
137. demur without plea, (d) because *voluntas donatoris in charta sua*
2 Inst. 291. *manifeste expressa de calero observetur*, and being founded on what is
6 Co. 4. a. exactly expressed in the deeds, though it be a *droiturel* action, yet
(d) Because it may be prosecuted during minority: but if the tenant plead in
this is a writ bar a warranty and assents, there, the parol shall demur, because
of possession. that concerns also all the other inheritance of the infant.
Roll. Abr. 137.

Roll. Abr. In a *sur cui in vita* the parol shall demur for the nonage of the
137. demandant, without any plea pleaded.

Roll. Abr. In a writ of *warrantia chartæ* brought by an infant, the parol (e)
137. shall not demur for his nonage, though the warranty was made to
(e) Other- his ancestor.
wise, if the
descendant denies the deed. Roll. Abr. 141.

In replevin against an infant, if he avows upon the plaintiff, and the plaintiff shews forth the release of the father of the infant to hold by less services, yet the parol shall not demur. Roll. Abr. 140.

In trespass *vi & armis* against an infant, who justifies, for a rent *aut hujusmodi*, as heir to his father, if the other shews forth a deed made by the ancestor in discharge, yet the parol shall not demur, but he ought to answer to the deed immediately. Roll. Abr. 140.

In a writ of (a) right of ward the parol shall not demur for the nonage of the demandant, though this be a writ of right. Roll. Abr. 137.

(a) So, in *escheat, cessavit, droit, sur disclaimer* brought by an infant, because he hath the seignory in possession, in respect of which he claims, and no right to the land was ever in the ancestor. 6 Co. 3. b. Dyer 137. pl. 25.

If an infant aliens within age, and dies within age, and his heir brings a (b) *dum fuit infra etatem*, the tenant may pray that the parol may demur, and yet the action did not descend, but the right only; for the father could not have this action, because he died within age—said in (c) *Markal's case*, and seems to be intended without plea pleaded. Dyer, 104. pl. 10. And this is not altered by the statute of Gloucester, c. 2. 2 Inst. 291.

(b) So, in a *dum non fuit compos mentis*. 6 Co. 4. (c) 6 Co. 4. b.

If in a *scire facias* to execute a fine, by which a remainder was limited to the grandmother of the plaintiff, whose heir, &c. the defendant prays the parol may demur, yet he shall answer over, because he does not plead the deed of his ancestor. And. 24. Sandys and Sir Edward Bray, adjudged. Dalf. 37.

S. C. adjudged; the rather, because no freehold is demanded by the writ, but an execution of the fine only. Kelw. 204. S. C. adjudged, upon the reason in Dalf. Moor 35. pl. 114. S. C. adjudged. Moor 16. pl. 59. seems to be the same case adjudged, though the particular estate was determined in the life of the demandant's father; and there said, if the defendant had pleaded the deed of the ancestor, &c. it should have demurred. N. Bendl. 121. S. C. adjudged. 6 Co. 3. a. S. C. cited. Dyer 138. pl. 27. like point cited.

3. Upon what Plea pleaded the Parol shall demur.

In an action of the possession of the infant himself, the parol shall not demur upon any plea pleaded. 6 Co. 3. b. Roll. Abr. 141.

As in a writ of entry of a disseisin done to himself, brought by an infant, if the tenant pleads the feoffment of the father of the demandant, with warranty to him, yet the parol shall not demur, because this is brought of his own possession. 6 Co. 3. b. Roll. Abr. 141.

So in an assise, the parol shall not demur for the nonage of the demandant, though the deed of his ancestor be pleaded in bar, because this is brought of his own possession, and the circumstances shall be inquired in it. 2 Inst. 411. 8 Co. 50. 6 Co. 4. b.

In a *formedon in descender*, if the tenant pleads the feoffment of the ancestor of the demandant, with warranty and (d) assents, and the demandant (e) denies the deed, the parol shall demur for the nonage of the demandant. Roll. Abr. 141. (d) The same law, if a collateral warranty be

pleaded in bar of this action. Roll. Abr. 141. (e) But whether without denying the deed the parol shall demur, *quare*; & vide Roll. Abr. 141.

In a *quare impedit* if a feoffment of an acre to which an advowson is appendant, with warranty of the ancestor of the defendant, Roll. Abr. 141.

is pleaded, with assets from the same ancestor, though the defendant be within age, yet the parol shall not demur, for the mischief of the lapse incurring in the mean time.

Roll. Abr.
142.

In an action real, if the tenant pleads in bar the feoffment of the ancestor of the demandant, with warranty to *J. S.*, and his assigns, whose assignee he is, and says, that assets descended to the plaintiff; to which the demandant says, nothing descended; in this case the parol shall demur, because though the feoffment and warranty is not in question, but only the assets, which the infant may well try, yet if he takes this issue, the deed of the ancestor shall be holden to be confessed by him.

Roll. Abr.
142.

So, for the same reason, if in a *formedon in descender* the tenant pleads a feoffment by the ancestor of the demandant to *A.* and *B.*, the father and mother of the tenant, and to the heirs of the father with warranty, and that they are dead, and avers that assets are descended to the demandant within age, though the demandant says, that *B.*, the mother of the tenant, is yet living.

Roll. Abr.
142.

(a) But otherwise it is in a *formedon in descender*; for

In an (*a*) assise (*b*) against an infant, if the issue be whether the tenant be a *bastard* or *mulier*, which is to be tried by the bishop, by which his blood is to be bound perpetually, yet the parol shall not demur, because this is of his own wrong, and there shall be no delay in this writ.

there if the issue be, whether the tenant be a *bastard*, the parol shall demur. Roll. Abr. 142. (*b*) But otherwise it is, if the issue be, whether the demandant be a *bastard*. Roll. Abr. 142.

4. For the Nonage of what Person the Parol shall demur.

Roll. Abr.
142.

The parol shall not demur for the nonage of the king, because the law always adjudges him of full age.

Roll. Abr.
142.

In an action brought by baron and feme for the inheritance of the feme, the parol shall not demur for the nonage of the baron, because in the right of the feme.

Roll. Abr.
142.

In a writ of *mesne* brought by baron and feme in right of the feme, the parol shall not demur for the nonage of the feme.

Roll. Abr.
142.

In *detinue* against an executor upon a delivery to the testator, the parol shall not demur for the nonage of the executor.

Roll. Abr.
142.

In an action of debt brought against baron and feme, upon an obligation of the ancestor of the feme, the parol shall demur for the nonage of the feme.

Roll. Abr.
142.

In a *præcipe quod reddat* against baron and feme of land that the feme had by descent, the parol shall demur for the nonage of the feme, though the baron be of full age.

Roll. Abr.
142.

A feme received for default of her husband shall have her age, though the baron was of full age.

5. In respect to what Estate or Interest the Parol shall demur.

Carter, 88.
Roll. Abr.

If an infant be in by (*c*) purchase, he shall not have his age.

143. (*c*) If an infant be in by abatement, and not by descent, he shall not have his age. Roll. Abr. 143. — But if the heir of the disseisee enters, he shall have his age. Roll. Abr. 144. — So, if the tenant's escheat to an infant, who is in by descent in the seignory, he shall have his age. Keilw. 105.

As if there be a lease for life, the remainder to the right heirs of *J. S.*, who is dead at the time, his heir within age, he shall not have his age when he comes in by *aid prayer*, for he hath it by purchase. Roll. Abr. 143.

If an infant hath an estate in possession by purchase sufficient to answer the action, though he hath the residue of the estate by descent, he shall not have his age. Roll. Abr. 143.

As if the father and son and heir purchase to them and the heirs of the father, and after the father dies, and a real action is brought against the son, he shall not have his age, although he hath the remainder in fee by descent. Roll. Abr. 143.

If lessee for life (*a*) surrenders to an infant who hath the reversion by descent, he shall not have his age. Roll. Abr. 143.

quoad strangers the estate for life hath continuance. Co. Lit. 333. b.

If the father enfeoffs his son and heir in fee (*b*) with warranty, and dies, the son shall have his age, because the warranty is extinct, and therefore in lieu thereof he shall be adjudged (*c*) in by descent. Roll. Abr. 143, 144. (*b*) So, if he be enfeoffed by his father without warranty; for he may elect to be in of the one estate or of the other. Roll. Abr. 144. (*c*) So, if tenant in tail enfeoffs his issue, and dies, the issue shall have his age, for he is admitted, and so in by descent. Roll. Abr. 144.

If an infant be enabled by custom to have and alien his land at a certain time, as at fifteen years of age, or when he can measure a yard of cloth, after this time, and before his full age of twenty-one, he shall have his age; for the custom being to be construed strictly, does not extend to this collateral thing. Roll. Abr. 144.

In a *formedon in reverter*, if the demandant makes himself heir to the donor, as heir at common law, and the tenant claims as younger son, as heir to the donor by the custom, and prays the parol to demur for his nonage, yet it shall not demur, because they both claim to be heir to the same person. Roll. Abr. 143.

In a *nuper obiit* by the aunt against the niece, and a demand of the seisin of the father of the aunt, who was the grandfather of the tenant, the tenant, who is in by descent from her mother, shall not have her age, because they are one heir, and of equal condition as to privy of blood, where the common ancestor died last seised, as the case must be intended. Roll. Abr. 143. 6 Co. 4. b. S. P. cited and said, for it is principally to try the privity of blood.

But if land descend to *A.* and *B.*, coparceners, and they enter, and have issue, and die seised, in a *nuper obiit* by one of the issue against the other within age, the parol shall demur for the nonage of the tenant, because their common ancestor did not die last seised. Roll. Abr. 143.

If a devise be to the heir in tail, and if he die, &c., that another shall sell it, the devisee shall not have his age, because he hath the estate-tail by purchase. Roll. Abr. 144.

If a gift be made to the father for life, the remainder in tail to the son, the remainder to the right heir of the father, and after the father die, and the fee descend upon the son within age, yet he shall not have his age, because he hath the estate tail by purchase. Roll. Abr. 144.

So, if a gift be made to the father for life, the remainder to a stranger in tail, the remainder to the son in tail, the remainder to Roll. Abr. 144.

the right heirs of the father, and after the stranger die without issue, and after the father die, and the fee descend upon the son within age, yet he shall not have his age, because he hath the tail by purchase.

N. Bendl.
256.
Waller and
Lamb, ad-
judged.
And. 21.
S. C. ad-
judged.
Carter, 88.
S. C. cited.

If *A.*, being tenant in tail, enfeoff *B.* to the use of *A.* and his wife for life, and after to the heirs of *A.*, and *A.* die, and the wife grant her estate to *C.*, and his heirs, during the life of the wife, and *C.* enter, and die, and the lands descend to his heir, against whom the issue in tail brings a *formedon*, the defendant shall not have his age, because he is in only as an occupant, and no estate of inheritance descended.

6. Where for the Nonage of the Vouchee.

Roll. Abr. 144. (a) When for the nonage of the vouchee in a writ of entry *sur disseisin*, notwithstanding the statute of *Westminster 1. c. 46. vide 2 Inst. 257. Dyer 137. pl. 24.* If an infant be (a) vouched and bound to warranty by the deed of his ancestor, the parol shall demur for the nonage of the infant.

Roll. Abr. 144. If two coparceners in gavelkind are vouched as one heir, the parol shall demur for the nonage of the youngest, if he be seised; yet he is vouched but for his possession.

Roll. Abr. 144. So, if one coparcener be vouched, and have aid of the other coparcener, who is within age, the parol ought to demur.

Roll. Abr. 144. (b) But the parol ought to have demurred, if both had been within age or the feme only. Roll. Abr. 144. 145. If a feme tenant in dower vouches the heir of her husband, and the husband of the heir, the parol shall not demur for the nonage of the (b) baron, his wife being of full age, because the baron is vouched only for the inheritance of the feme.

Roll. Abr. 145. If the youngest son enter into the inheritance descended, the parol shall not demur for his nonage, if he be vouched as heir within age, if the eldest son be of full age, who is heir in right, because he cannot be heir by continuance.

Roll. Abr. 145. Co. Lit. 244. 8 Co. 101. If a bastard be vouched within age by reason of his possession, the parol shall demur for his nonage, because he may be heir by continuance all his life, without claim to the contrary.

Roll. Abr. 145. If an infant be vouched by lessee for life, by reason of the reversion, which he hath by descent, the parol shall demur, although he hath not the freehold by descent.

2 Inst. 455. At common law if the husband had aliened the lands of his wife, with warranty, and died, and in a *cui in vita* by the wife, or a *sur cui in vita* by the heir of the wife, the alienee had vouched the heir of the husband within age, the parol should have demurred till the full age of the vouchee.

(c) 13 E. 1. c. 40. But since the 32 H. 8. c. 28. (by which an entry is given to the wife or her heir after an alienation by her husband) this act is of little use. 2 Inst. 456. (d) Extends only to a *cui* or

ex sur cui in vita, which are the proper actions upon an alienation by the husband; for if the wife is tenant in tail, and the baron aliens, and dies, and she dies, her issue cannot have a *sur cui in vita*, but a *formedon*, in which the purchaser may vouch the heir of the baron, and for his nonage the parol shall demur. 2 Inst. 455. (e) So that it extends only to the heir of the baron that aliened. 2 Inst. 445. (f) Intended only of *ipse emptor*, not his heir. 2 Inst. 456.—So of the immediate purchaser, and not his alienee, though he may vouch the heir of the baron as assignee. 2 Inst. 455. 4 Co. 50. a.—So, intended only where the purchaser is tenant in deed, not where he comes in as vouchee or tenant by receipt, and vouches the heir, &c. 2 Leon. 148. 1 Co. 15. a. 4 Co. 50. a. (g) Of any estate of freehold. 2 Inst. 546. (b) When he shall have a re-summmons. 2 Inst. 456. (i) Whether in law or deed. 2 Inst. 456.

7. Where for the Nonage of the *Prayee in Aid*.

If in (a) action against tenant by the curtesy he prays (b) in aid Roll. Abr. 145.
of the heir within age, the parol shall demur. (a) But if

error is brought against tenant by the curtesy, the parol shall not demur for the nonage of him in reversion, *per* Roll. Rep. 251. said by Houghton *arguendo*, *quod* Coke *concessit*, because he is not tenant. (b) Where for the nonage of the *prayer in aid* and tenant by receipt in a writ of entry, notwithstanding the statute of Westm. 1. c. 46. *vide* Inst. 257. Dyer 137. pl. 24. 2 Leon. 148.

If lessee for life hath aid of him in (c) remainder within age, who Roll. Abr. 145.
is in by descent, the parol shall demur; *secus*, if he were in by (c) So, if
purchase. lessee for life hath aid of him in reversion by descent. Roll. Abr. 145.

If there be lessee for life, the remainder to the right heirs of Roll. Abr. 145.
J. S., who is dead, and after the right heir die, his heir within age, and the lessee have aid of him, the parol ought to demur, for he is in by descent.

So, if J. S., at his death hath two daughters his heirs, and after Roll. Abr. 145.
the one dies, and her part descends to her daughter within age, the parol ought to demur for her nonage, though the aunt is in by purchase.

In an annuity against a parson, if he hath aid of the ordinary and Roll. Abr. 145.
patron within age, yet the parol shall not demur for the nonage of the patron: for the charge lies not upon the patron, but upon the parson. Roll. Rep. 323. S. C. cited.

If two in reversion by descent are received upon default of the Roll. Abr. 145.
lessee, and the one is within age, the parol shall demur.

If a feme in by descent be received for default of her husband, Roll. Abr. 145.
the parol shall demur for her nonage, though the (d) statute be (d) *Viz.* 13 E. 1. c. 3.
parata petenti respondere. which *vide* explained 2 Inst. 341.

In an avowry for a rent-charge reserved upon a purparty, if the Roll. Abr. 145-6.
plaintiff lessee for life hath aid of him in the reversion within age, who is in by descent in the reversion, yet the parol shall not demur, because the land is not in demand.

8. In what Cases if the Parol demur against one it shall against another.

If two are vouched, if the parol demurs for the nonage of one, 45 E. 3. 23.
it shall for the other also. Roll. Abr. 146.

If aid is prayed of two coparceners, *viz.* the aunt and the niece, Roll. Abr. 146.
and the aunt hath the remainder by purchase, and the niece is in within age, and hath the remainder by descent, the parol shall demur for both.

Roll. Abr. 146. So, if aid be prayed by one coparcener of two other coparceners, of which one is within age, and the other of full age, the parol shall demur for all.

Roll. Abr. 146. If the tenant vouch himself and *J. S.*, as heirs, and *J. S.* is within age, the parol shall demur for both.

Roll. Abr. 146. In a (*a*) *dum fuit infra etatem* by two coparceners of the seisin of their ancestor, for the nonage of one demandant the whole parol ought to demur.

non compos mentis by two coparceners of a seisin of their ancestor, the parol shall demur for both for the nonage of one. Roll. Abr. 146.

Roll. Abr. 147. In a writ of entry *sur disseisin* by two coparceners, of which one is within age, *qui non prosequitur* upon the summons, yet the parol shall demur against the other also.

Roll. Abr. 147. If a writ of error be brought against the heir of the recoverer within age, and a *scire facias* against the tertenant, if the parol demur for the heir, yet it shall not demur as to the tertenant; for the heir shall not be at any prejudice, if it is reversed as to the tertenant.

Roll. Abr. 147. If four enter into (*b*) a recognizance, and after one die, his heir within age, in a *scire facias* against the heir and the rest, the parol shall demur against all.

(*b*) So, where two are bound in a statute, and one dies, his heir being within age. Hetl. 59. Lit. Rep. 72.

Roll. Abr. 147. In a *scire facias* against the tertenants to have execution of damages recovered against *J. S.* if the parol demurs against one of the tertenants for his nonage, it shall demur against all.

Co. Lit. 146. a. In a *scire facias* if two coparceners are received upon the default of the lessee, and the parol demurs for the nonage of one of the coparceners, it shall demur for both.

Dyer, 239. pl. 39. If in debt upon an obligation against *B.* and *C.* sons and heirs of the obligor, and against *D.* the daughter and heir of *A.* who was another of the sons and heirs of the obligor in gavelkind, process is continued till the uncles are outlawed, and the niece waived, and after the uncles are pardoned, and bring a *scire facias* against the plaintiff, who thereupon declares against them *simul cum* the niece, and the uncles plead their niece is but of the age of seven, *unde non intendunt quod durante minori etate sua* they ought to answer, &c. yet the parol shall not demur; for the niece is out of court, and *quoad* her the original is determined, and at her full age no re-summons could be sued against her, but the uncles only, because she never appeared in court.

9. In what Cases the Demurrer of the Parol for Part shall be for all.

47 Aff. 4. Roll. Abr. 147. In a writ of error upon a judgment for divers things against an infant upon a recovery by his ancestor, if the infant disclaims for part, by which the judgment is to be reversed for error therein, yet for the nonage of the infant the parol shall demur for the rest, and this shall make the parol to demur also for that in which the infant hath disclaimed, because it is but one record; and

and therefore if he hath his age as to part, he shall have it for the whole.

The same law in an action against an infant, if he acknowledges the action of the demandant for part, (a) yet if the parol demurs for the rest, it shall demur for all.

reddat the tenant may confess the action for part, and pray his age for the rest.

Roll. Abr.
147.
(a) In a *pre-*
cipe quod
Bro. Age 9.

If an infant brings a writ of (b) entry *sur disseisin* to his father, and the tenant pleads the release of the father as to part of the land in demand, by which the parol is to demur for this, yet it shall not demur for the rest.

the *per*, age is taken away by *Westm. 2. c. 47.* which *vide*

Roll. Abr.
147.
(b) In a writ
of entry *sur*
disseisin in
2 Inst. 256.

In an (c) assise by three coparceners, if the tenant claims as tenant by the curtesy of the whole, and prays in aid of one of the plaintiffs in reversion within age, and hath aid of him, by which the parol ought to demur for the third part that belongs to the infant, and not for the rest, yet because the assise shall not be taken by parcels, it shall demur for the whole.

Roll. Abr.
147.
(c) This
must be
intended of
an assise of
mortdance-
tor; for in

an assise of *novel disseisin*, even at common law the parol should not have demurred. Roll. Abr. 141.

10. Of the Prayer of Age and Counterplea.

The granting that the parol shall demur in judgment of law is in favour of the infant, therefore the court *ex officio* ought to grant it, though the tenant will answer.

6 Co. 5. a.

Where age is granted, or the parol demurs, the writ does not abate; but the plea is put without day until full age, at which time there shall be a re-summmons.

2 Inst. 258.
Raft. Ent.
360.

In a *formedon* if the tenant vouches *J. S.* as cousin and heir of, &c. and for his nonage prays that the parol may demur, he ought to shew how he is cousin.

Dyer, 79-
Pl. 48.

If in dower the tenant vouches one within age, in favour thereof, he ought to shew a deed.

6 Co. 5. a.

If a man hath aid of an infant, and of the king, because the infant is in ward to him, after a *procedendo* the parol shall not demur upon demand for the nonage of the ward; though this ought to have been granted, if he had demanded it at the time of the *aid prayer*; for the *procedendo* commands the justices to proceed, and he ought to have shewn this in Chancery to stay the *procedendo*.

Roll. Abr.
146.
4. Leon. 201.
Dyer, 256.
Pl. 4.
N. Bendl.
118. pl. 151.

A counterplea of age is like an estoppel, and therefore ought to be very plain and certain to every intent.

3 Bulf. 144.

If a man says in an action (in which age lies) that his ancestor was seised in fee, and died seised, and this descended to him within age, and prays his age, (d) it is a good counterplea (e) that his ancestor did not die seised.

Roll. Abr.
146.
(d) That he
is a bastard,
hath an el-
der brother,

or that his father was attainted, &c. Dyer 137. pl. 26. 3 Bulf. 144. *vide* and the several authorities there cited; and see Roll. Rep. 325. and the books there cited. Cro. Jac. 393. (e) In a like case the demandant traverses the descent, and day given the tenant to advise what to do. Hob. 266.

32 E. 3. 55.
Roll. Abr.
146.

If an infant upon default of the tenant prays to be received, because the tenant is tenant by the curtesy after the death of his mother, the reversion to him by descent as heir to his mother, and prays the parol may demur, it is a good counterplea of the age, that the land was given to the mother and her first husband in special tail, and the husband died without issue, and she took the tenant for her second husband, so the second husband in by abatement.

Amcotts v.
Amcotts,
Sid. 252.
Lev. 163.
Raym. 118.
Keb. 869.
900. S. C.
adjudged.

In a writ of error out of the Common Pleas the only question was, whether upon a plea by the defendant to have the parol demur, (issue being joined by the infant that sued by his guardian, and it being tried, and found against the infant,) a peremptory judgment should be given against him, or only a *respondeas oyster*: It had been argued and much laboured in *C. B.* that it should be only a *respondeas oyster*; but after great debate, they held the law to be manifestly clear, that every dilatory plea that receives its trial by the country shall be peremptory, let it be of what nature soever, though this case was a case of as much compassion as could be, and the court would have shewn the infant any lawful favour; and of the same opinion was the court of *B. R.* upon the writ of error.

Informations.

- (A) Of the Nature and several Kinds of Informations.
- (B) In what Cases they lie.
- (C) In what Manner they are to be laid.
- (D) Of filing an Information, the Proceedings thereon, and the Provisions made herein by Statute.

- (A) Of the Nature and several Kinds of Informations.

AN information may be defined an accusation or complaint exhibited against a person for some criminal offence, either immediately against the king, or against a private person, which, from its enormity or dangerous tendency, the publick good requires

quires should be restrained and punished, and differs principally from an indictment in this, that an indictment is an accusation found by the oath of twelve men, whereas an information is only the allegation of the officer who exhibits it.

This difference between informations and indictments has made (a) some men conceive, that this kind of proceeding was utterly unlawful, as being not only contrary to the original frame and nature of our laws, but also contrary to (b) *Magna Charta*, and several other statutes, which require that no man be put to answer, &c. but upon indictment or presentment.

And in 2 Hawk. P. C. it is said to have been holden, that the king shall put no one to answer for a wrong done principally to another, without an indictment or presentment, but that he may do it for a wrong done principally to himself; for which is cited Theol. b. 1. c. 4. f. 9. 10. &c. Finch 336. Fitz. *action sur le case*, &c. — Also, from the abuses made of them, they have been complained of as unlawful, as particularly in the reign of H. 7. when by force of a statute made in the 11th year of that reign, which impowered justices of assize and peace to proceed on all penal statutes by information, they were made use of by Empson and Dudley to the great oppression of the people: But this statute was repealed by 1 H. 8. c. 6. 2 Hal. Hist. c. 20. (b) Cap. 29. and 5 E. 3. c. 9. 25 E. 3. c. 4. 28 E. 3. c. 3. and 42 E. 3. c. 3. [And in the very same act of parliament, which abolished the court of star-chamber, viz. 16 Car. 1. c. 10. § 6. a conviction by information is expressly reckoned up, as one of the legal modes of convicting such persons as should offend a third time against the provisions of that statute.]

But though, as my Lord Hale observes, in all criminal causes the most regular and safe way, and most consonant to the statute of *Magna Charta*, &c. is by presentment or indictment of twelve sworn men, yet he admits that for crimes (c) inferior to capital ones, the proceedings may be by information; and this, from the (d) long and frequent practice, is now certainly established as part of the law of the land; and therefore, at this day the following kinds of informations may be exhibited, wherever the nature of the offence deserves such a proceeding.

§ 3. 2 Hal. Hist. P. C. c. 20. (d) That informations were at common law. 5 Mod. 463. *per Holt*, C. J. & *totam curiam*. — Et vide Show. 106. &c.

1st, For an offence principally and more immediately against the king an information may be exhibited in the name of the king's attorney general (e), and such information may be filed without any application or leave of the court, and the party shall be obliged to answer the same: also, the statute 4 & 5 W. & M. cap. 18. which requires a recognizance for payment of costs from persons exhibiting and prosecuting informations, does not extend to informations filed by the king's attorney general, and it is (f) said that the court will not quash such information on motion, but will oblige the party to demur or plead thereto.

ral during the vacancy of the office of attorney-general; and that, without suggesting such the record. Rex v. Wilkes, 4 Burr. 2555.] (f) Salk. 372. pl. 13. Ld. Raym. 370.

2^{dly}, On application, and leave of the court, grounded on motion and affidavit of some misdemour, which if true, doth from its evil tendency merit such prosecution, the court allows of the filing of an information in the name of the master of the crown-office; and of such kind of informations there are numberless precedents in the crown-office.

3^{dly}, Where by many penal statutes the prosecution upon them is by the acts themselves limited to be by bill, plaint, information,

(a) Vide Sir Francis Winnington's argument. 5 Mod. 456. and Show. 106. &c. —

2 Hal. Hist. P. C. c. 8. (c) But no information will lie for a capital crime, or for misprision of treason. 2 Hawk. P. C. c. 26.

2 Hawk. P. C. c. 26. & vide Carth. 465-6. That no such information can be brought on a penal statute. [(e) It may be exhibited by the solicitor-general.

2 Hawk. P. C. c. 26. § 6. 2 Hal. Hist. P. C. c. 20.

But for this vide tit. Actions qui

sum, or Informations on Penal Statutes.

[But if a statute be merely prohibitory, it will be no ground for an information, though in such case an indictment may lie. Croston's case, 1 Vent. 63.]

tion, or indictment, there, without doubt, the prosecution may be by information as well as by any other of these methods: also, of common right, such an information, or an action in the nature thereof, may be brought for offences against statutes, whether they be mentioned by such statutes or not, unless other methods of proceeding be particularly appointed, by which all others are impliedly excluded.

(a) For the writ of *quo warranto*, and how it differs from an information in nature of a *quo warranto*, vide 2 Inst. 282. 495. Latch 46. Sid. 86. Old N. B. 107. Cro. Jac. 259.

260. 528. 3 Buif. 54. Cro. Car. 311.—Of the process on such information, Carth. 503. Ld. Raym. 426. Salk. 55. Comb. 19. pl. 4. Salk. 374. pl. 15.—For the judgment thereon, Palm. 1. 2. 2 Rol. Rep. 113. Cro. Jac. 260. Salk. 374. pl. 15. 4 Mod. 55. 58. Carth. 218. 1 Burr. 402. (b) And being a kind of civil proceeding, there ought to be no great fine set on the party.

4thly, Informations in nature of (a) a *quo warranto* may be, and frequently are, exhibited, with leave of the court, for usurping privileges, franchises, &c. which in some respects is (b) a civil suit, as it is used as a proper means to try a right, though it punishes the misdemeanour, such as the usurpation, &c.

(B) In what Cases an Information will lie.

2 Hawk. P. C. c. 26. § 1., and several authorities there cited. [(c) 2 Str. 1107.

Andr. 310. 2 Str. 1162.]

(d) Skin. 47. pl. 19. S. P.

[An information will lie for attempting to bribe a servant of the crown to procure an office under government, Rex v.

Vaughan, 4 Burr.

2494.; for publishing an obscene book, Rex

v. Curl,

2 Str. 788.; for blasphemy, Rex v.

Woolston;

for procuring a man to marry a pauper in order to exonerate a parish, Rex v. Watson, 1 Wils. 41.; Rex

v. Tarrant, 4 Burr. 2106.; for an undue discharge of a debtor by judges of an inferior court, Moravia's case, Ca. temp. Hardw. 135.; for a refusal by a captain of a ship to let the coroner come on board, Rex

v. Solgard, 2 Str. 1074. Andr. 231.; for keeping great quantities of gun-powder as for a nuisance, Rex

v. Taylor, 2 Str. 1167.; for maliciously impressing a captain, as a common seaman, Rex v. Webb, 1 Bl.

HERE we shall lay down what hath been collected by Serjeant Hawkins, and is, as he says, every day's practice, agreeable to numberless precedents, viz. either in the name of the king's attorney general, or of the master of the crown-office, to exhibit informations for batteries, cheats, seducing a young man or woman from their parents, (c) in order to marry them against their consent, or for any other wicked purpose, (d) spiriting away a child to the plantations, rescuing persons from legal arrests, perjuries, and subornations thereof, forgeries, conspiracies, (whether to accuse an innocent person, or to impoverish a certain set of lawful traders, &c. or to procure a verdict to be unlawfully given, by causing persons bribed for that purpose to be sworn on a *tales*,) and other such like crimes, done principally to a private person, as well as for offences done principally to the king; as for libels, seditious words, riots, false news, extortions, nuisances, (as in not repairing highways, or obstructing them, or stopping a common river, &c.) contempts, as in departing from the parliament without the king's licence, disobeying his writs, uttering money without his authority, escaping from legal imprisonment on a prosecution for a contempt, neglecting to keep watch and ward, abusing the king's commission to the oppression of the subject, making a return to a *mandamus* of matters known to be false; and in general any other offences against the publick good, or against the first and obvious principles of justice and common honesty.

for procuring a man to marry a pauper in order to exonerate a parish, Rex v. Watson, 1 Wils. 41.; Rex v. Tarrant, 4 Burr. 2106.; for an undue discharge of a debtor by judges of an inferior court, Moravia's case, Ca. temp. Hardw. 135.; for a refusal by a captain of a ship to let the coroner come on board, Rex v. Solgard, 2 Str. 1074. Andr. 231.; for keeping great quantities of gun-powder as for a nuisance, Rex v. Taylor, 2 Str. 1167.; for maliciously impressing a captain, as a common seaman, Rex v. Webb, 1 Bl.

Rep.

Rep. 10.; for printing a ludicrous account of a marriage between an actress and a married man, *Rex v. Kinnerley*, *Id.* 294.; for an imposture and conspiracy, *Id.* 292.; for procuring a female apprentice to be assigned, though with her own consent, for the purpose of prostitution, *Rex v. Delaval*, *Id.* 439. 3 Burr. 1434.; for seducing a woman, habituated to drinking, to make her will, *Rex v. Wright*, 2 Burr. 1099.; for bribing persons to vote at a corporation election, *Rex v. Plympton*, 2 Ld. Raym. 1377. It will lie against a justice for any improper official conduct, as for demanding a shilling of a person brought before him for discharging his warrant, and committing the party for refusing to pay it, *Rex v. Jones*, 1 Wils. 7.; for voluntarily absenting himself from a sessions which could not be holden without him, *Rex v. Fox*, 1 Str. 21.; for corruptly discharging a person committed in execution by another magistrate, *Rex v. Brooke*, 2 Term Rep. 190.; for improperly granting as well as refusing a licence, *Rex v. Holland*, 1 Term Rep. 692. But the court will not proceed in this extraordinary way against a magistrate for a mere error of judgment, or a mistake of the law; if he has acted honestly and without any bad intention, *Rex v. Palmer*, 2 Burr. 1162. *Rex v. Jackson*, 1 Term Rep. 653.; and will in general, in such case discharge the rule with costs. *Rex v. Palmer*, 2 Burr. 1162. *Rex v. Fielding*, *Id.* 654. See also *Rex v. Eudem*, *Id.* 722. And where application is made for an information against him for having improperly convicted a person, the party complaining must make an exculpatory affidavit, fully denying the charge. *Rex v. Webster*, 3 Term Rep. 388.]

An information was exhibited against *D.* an attorney of *C. B.* for speaking scandalous and reproachful words of Sir *John Kay*, knight of the shire for the county of *York*, and a justice of peace, &c. concerning his said office of justice of peace, and the exercising thereof; and upon demurrer to this information it was argued, that it would not lie for scandalous words spoken only of a particular person, because he might have an action on the case to recompence him in damages; though it was admitted, that such a proceeding might be warranted for libels, or for dispersing defamatory letters, because by such means the publick peace might be disturbed, and discords fomented among neighbours, which might at last be a publick injury, but that there was no such mischief in the present case. On the other side it was insisted, that this information was founded on sufficient matter, because this prosecution is not only as it respects the person of Sir *John Kay*, but it relates to him as he is a publick magistrate, and one who is subordinate to the government, and therefore such defamatory words are a reproach to the supreme governor, by whom magistrates are intrusted, and from whom they derive their authority, and it will not be denied but that words reflecting on the publick government are punishable at the suit of the king by information; and for this reason the court held that an information would lie, and thereupon gave judgment against the defendant, and fined him an hundred marks.

Carth. 14,
15. The
King v.
Darby.

An information was exhibited by the attorney general for conspiring to destroy the king's revenue of the excise: And whereas the king by indenture, &c. *prolat.*, had farmed the excise of *London*, *Middlesex*, and *Southwark*, to *A.*, *B.*, and *C.*, rendering 11,800*l.* per ann. monthly, &c. that the defendants, and others *ignot.* &c. *illicite, factiose, & seditiose consultaverunt & conspiraverunt ad destruend. & depauperand. farmarios excise predict.*, &c. and many other facts were laid in the information tending to the destroying of the excisemen, depauperating them, destroying the king's revenue of excise, pulling down the excise-house, raising a tumult amongst the poor people, &c. But the jury that were to try the issue were unwilling to find this matter, though expressly proved, fearing it might be construed no less than treason, and so would

Hil. 15 &
16 Car. 2.
in B. R.
Rex v.
Starling and
other brew-
ers of *Lon-*
d., Lev.
125. Sid.
174. Keb.
650. S. C.

only

only find that such and such of the defendants *illicite, factiosè, & seditiosè se assemblerunt, & illicite, factiosè, & seditiosè consultaverunt, & conspiraverunt ad depauperand. farmarios dom. regis excise prædict. prout prædict. attornat. gen. dom. regis, &c. & quoad totam aliam materiam in informatione contentam* find them not guilty, and find *J. S.* not guilty generally. It was moved in arrest of judgment, that here is no offence at all found; for to conspire to depauperate the king's farmers is no offence, for it may be done by lawful means; and that they are laid to be the king's farmers is but a description of their persons, not that it was at the king's revenue of excise the conspiracy struck, and the *assemblerunt* is not the charge, for then it ought to have been laid *riotosè & routosè*, but only leading to the conspiracy; for they must assemble before they can consult and conspire. It was answered by the king's counsel, that the *illicite assemblerunt* is an offence against the law, and as properly and fully laid as could be; for *riotosè* is where the assembly is with intent to commit a riot, and *routosè* for a rout; but an assembly may be illegal and punishable, and yet the intention of that assembling may be good, as 21 H. 7. Bro. tit. Riots 1. per *Fineux*; as if men meet to prevent the breach of the peace between *A.* and *B.* *A.* going to market, and *B.* threatening to beat him there, and to this assembly no properer epithet could be given than *illicite*; but besides, all manner of combinations and confederacies are unlawful without respect to their end, 27 Aff. 44. *Moore*, Lord Gray's case, and *Cro. Jac.* the case of the Puritans petitioning; but this conspiracy, being to depauperate another man, is unlawful in its end. And to answer the objection that hath been made, it might be said, that although the depauperating of another man may be by lawful means, and the consequence of a lawful act, yet that is because it is not in the intention of the party, but it is *damnum absque injuriâ*; but for a number of men to design and conspire the depauperating of another, cannot certainly be lawful, for there the damage to the third party is their only aim and end, and it is as well against the law of charity and common society; and this might be said, if there were nothing of the king's farmers in the case; but here the inducement to the whole charge in the information is, that the defendants, *&c. machinantes defraudare & deprivare dictum dom. regem de redditu suo prædict. & prædictos farmarios, &c. destruere & depauperare*, did so and so; now this inducement in the whole is applicable to every branch of the charge, and the jury having found those charges as they are laid, *scilicet modo & formâ prout, &c.* they have found consequently that it was done by the defendants, *machinantes, &c.* which makes it in their intention to strike at the king's revenue, as well as in consequence. It was also urged for the defendants, that for a bare conspiracy, without any act done in prosecution of it, no information would lie: But *curia cont.* for though there must be some fact to be as evidence of the conspiracy, as 9 Co. *Poulter's case*, yet it is the conspiracy that is the crime, and that being found, it is enough. It was also urged by the king's counsel, that the *modo & formâ prout* in the verdict extends to all the charges

charges of fact that were done in prosecution of this conspiracy, and the acquittal *quoad tot. al. materiam*, &c. extends to the distinct charges of facts that have no relation to this conspiracy: But *Windham* Justice said, the *modo & formâ prout* could by no means make the verdict comprehend other matter of fact than was expressly found. It was moved by the king's counsel, that they might inform the court of the heinousness of this conspiracy, and how it was proved to be upon evidence to the jury that tried it, to aggravate the offence, and induce the discretion of the court to increase the fine; and the case of *Machin* and *Tully* was cited, where a battery being found by *nisi prius* against them, the court informed themselves of the heinousness of it by affidavit, and thereupon vacated a fine that was set in a judge's chamber, and set a high fine upon the defendants: But the court refused it, saying, that were a way to let in those matters of which the jury has acquitted them, by suffering affidavits to be made, but in *Machin's* case the jury found the defendants guilty of the whole; and what needs aggravation of this, which appears so foul as it is found? The court after unanimously concurred, that judgment ought to be given for the king, though as to the offence found there was some variety of opinion. *Windham* distinguished betwixt a confederacy and a conspiracy, that for a conspiracy there ought to be some fact done in execution of it; so an indictment cannot be maintained against a man as a common thief, or chamber-ter, or forestaller, without laying some fact of those offences; and in this he grounded himself upon 29 *Aff.* 45. but he held, that here the defendants are found guilty of a confederacy, which is not a word of art, but may be expressed in other terms, and such an offence will this matter found amount unto; he held the information as to the unlawful assembly not good, because they wanted *vi & armis*; as to all the subsequent facts, he held the defendants acquitted; and as to the intention of defrauding the king of the rent, &c. he held the acquittal did extend, because they were acquitted of the facts to which that was to be applied; but as to the confederacy, the verdict has found enough, and though it were to a private end it were unlawful; but here it is more, and that which will aggravate it highly; for the customers of the king are publick persons, as the king's revenue is of a publick concern, and it is set forth in the information that these were farmers of a very great value; it is one thing to beat a private man, and another thing to beat a publick officer, or the king's servant; if a man should strike the sheriff, that has the character of a publick officer, it would be a high offence. *Twisden* held, that *vi & armis* was not necessary, and that they are found guilty of an unlawful assembly; and in that my Lord Chief Justice concurred; as also that the intention of defrauding and depriving the king of his said rent is implicitly found within the *modo & formâ prout*, &c. for so shall the *machinantes*, &c. be applied. *Twisden* and *Keeling* concurred, that for a conspiracy alone without any prosecution, information lay; and *Twisden* said, a confederacy is a farther degree of a conspiracy; and they all agreed, that

the

the king's revenue being concerned did highly aggravate the offence; 2 *H.* 4 7. and 8 *H.* 5. *b.* were cited, that for maintenance of that a monk should be able to contract, and *probi homines de Dale* should be a corporation. Lord Chief Justice cited old *Magna Charta*, where there is a statute against such as should undervalue lands in the king's hands. So judgment was given for the king; but the settling of the fine was respited, because they would consider as well *qualitatem delinquentis* as *quantitatem delicti*. In this case were cited 3 *E.* 3. 19. 43 *Aff.* pl. 38. Afterwards, the same term, *Starling* was fined 300 marks, and the rest of the brewers 100 marks a-piece, but with some apology by the court for the smallness of the fine.

(C) In what Manner they are to be laid.

Vide tit.
Indictments.
(a) Salk.
375. pl. 18.
Raym. 34.
2 Hawk.
P. C. c. 26.
§ 4.
Carth. 226.
The King
v. Roberts.

Regularly, the same certainty that it is required in an indictment is in like manner required in an information; but it has been (a) holden not to be necessary to repeat the words *dat. cur. hic intelligi & informari* in the beginning of every distinct clause, if the want of them may be supplied by a natural and easy construction.

In an information against *Roberts* the ferryman over the river *Mersey*, which parts *Anglesea* from *Carnarvonshire* in *Wales*, it was laid generally, *viz.* that this was an ancient ferry time out of mind, and that 1 *d.* was the usual rate for the passage of a man and horse, 7 *d.* for 20 cattle, 2 *d.* for 20 sheep, &c. that *Roberts* being the common ferryman, between 7 *Septembris* anno 2. &c. and the day of exhibiting this information, *injustè, oppressivè, & deceptivè cepit & extorsit de diversis ligeis & subditis domini regis ignotis* to the attorney general, passing that way, *diversas denariorum summas exceden. antiquam ratam & pretium pro passagio & transportatione suis & averiorum suorum, videlicet, pro passagio & transportatione cujuslibet personæ cum equo suo 2 d. & pro quibuslibet 20 cattallis 2 s. & sic secund. ratam prædict. pro majori vel minori numero averiorum, &c.* The defendant was found guilty, and it was moved in arrest of judgment, that the information was *too general and uncertain*, because it did not allege that any particular person, or any certain number of cattle, were ferried over within the time laid in the information; neither did it mention any particular person from whom the extorted rates were taken, which it ought to do, that the single offence might certainly appear to the court; and after great deliberation *the whole court was of that opinion*; and *per Holt*, Ch. Justice, in every such information a single offence ought to be laid and ascertained, because every extortion from every particular person is a separate and distinct offence; and therefore they ought not to be accumulated under a general charge, as it is done in this case, because each offence requires a separate and distinct punishment, according to the quantity of the offence; and it is not possible for the court to proportion the fine or other punishment to it, unless it is singly and certainly laid.

(D) Of filing an Information, the Proceedings thereon, and the Provisions made herein by Statute.

IT seems to be the established practice at this day not to admit of the filing of any information (except those exhibited in the name of his majesty's attorney general) without first making a rule on the persons complained of to shew cause to the contrary; which rule is never granted but upon motion made in open court (a), and grounded upon affidavit of some misdemeanour, which, if true, doth either for its enormity or dangerous tendency, or other such like circumstances, seem proper for the most publick prosecution; and if the person, on whom such rule is made, having been personally served with it, do not at the day given him for that purpose give the court good satisfaction by affidavit that there is no reasonable cause for the prosecution, the court generally grants the information; and sometimes, upon special circumstances, will grant it against those who cannot be personally served with such rule; as if they purposely absent themselves, &c. (b)

2 Hawk. P. C. c. 26. § 8. [(a) And the court will require the same evidence in support of such a motion, as would be necessary in support of an indictment. Rex v. Willett, 6 Term Rep. 294. —A joint information against seve-

ral defendants cannot issue upon distinct rules for one or more informations against each, 3 Burr. 1270. (b) Rex v. Badouin, 2 Str. 1044. Ca. temp. Hardw. 271.]

But if he shew good cause to the contrary, as that he has been indicted for the same cause, and acquitted, or that the intent is to try a civil right which has not been yet determined, or that the complaint is trifling or vexatious, &c. the court will not grant the information without some particular circumstances, the judgment whereof lies in discretion.

the merits of the person applying, Rex v. Bickerton, 1 Str. 498. Rex v. Miles, Dougl. 283. Rex v. Hafwell, Id. 387. Rex v. Webster, 3 Term Rep. 388. Rex v. Hankey, 1 Burr. 316. Rex v. Peach, Id. 548. Rex v. Symonds, Ca. temp. Hardw. 240. Rex v. Robinson, 1 Bl. Rep. 541.; by the time of the application, Rex v. Robinson, 1 Bl. Rep. 541.; by the nature of the case, Rex v. Spriggins, 1 Bl. Rep. 2. Rex v. the Inhabitants of Wigan, Id. 47. Rex v. Grosvenor, 2 Str. 1193. 1 Wils. 18. Rex v. Robinson, 1 Bl. Rep. 541. and by the consequences that may possibly result from it. 1 Bl. Rep. 541.—The court will never grant an information on a penal statute, where the penalty vests in the crown only; in that case the attorney-general must file it. Rex v. Hendricks, 2 Str. 1234. Nor will they interfere upon the application of the attorney-general, in cases prosecuted by the crown, for he may exhibit an information himself. Rex v. Philips, 3 Burr. 1564.]

2 Hawk. P. C. c. 26. § 9. [The discretion of the court in granting informations is guided by

As to the provisions made herein by statute, by the 4 & 5 W. & M. cap. 18. reciting, that divers malicious and contentious persons had, more of late than times past, procured to be exhibited and prosecuted informations in their majesties courts of King's Bench at *Westminster* against persons in all the counties of *England*, for trespasses, batteries, and other misdemeanours; and after the parties so informed against had appeared to such informations, and pleaded to issue, the informers had very seldom proceeded any farther, whereby the persons so informed against had been put to great charges in their defence; and although at the trials of such informations verdicts had been given for them, or a *noli prosequi* entered against them, they had no remedy for

obtaining costs against such informers; it is enacted, "That the clerk of the crown in the said court of King's Bench for the time being, shall not, without express order to be given by the said court in open court, exhibit, receive, or file any information for any of the causes aforesaid, or issue out any process thereupon, before he shall have taken or shall have delivered to him a recognizance from the person or persons procuring such information to be exhibited, with the place of his, her, or their abode, title, or profession, to be entered, to the person or persons against whom such information or informations is or are to be exhibited, in the penalty of twenty pounds, that he, she, or they will effectually prosecute such information, and abide by and observe such orders as the court shall direct; which recognizance the clerk of the crown, and also every justice of the peace of any county, city, franchise, or town corporate, (where the cause of any such information shall arise,) are by the said statute empowered to take; and after the taking thereof by the said clerk of the crown, or the receipt thereof from any justice of the peace, the said clerk of the crown shall make an entry thereof upon record, and shall file a *memorandum* thereof in some publick place in his office, that all persons may resort thereunto without fee: And in case any person against whom any information for the causes aforesaid, or any of them, shall be exhibited, shall appear thereunto, and plead to issue, and that the prosecutor of such information shall not at his own proper costs and charges within one whole year next after issue joined therein procure the same to be tried; or if upon such trial a verdict pass for the defendant, or in case the same informer procure a *noli prosequi* to be entered, then in any of the said cases the said court of King's Bench is authorized to award to the said defendant his costs, unless the judge, before whom such information shall be tried, shall at the trial of such information in open court certify upon record, that there was reasonable cause for exhibiting such information; and in case the said informer shall not within three months next after the said costs taxed, and demand made thereof, pay to the said defendant the said costs, then the defendant shall have the benefit of the said recognizance.

"Provided, that nothing herein shall extend or be construed to extend to any other information than such as shall be exhibited in the name of their majesties coroner, or attorney in the court of King's Bench for the time being, commonly called the master of the crown-office."

In the construction hereof it hath been holden,

2 Hawk.

P. C. c. 26.

§ 10.

* The

meaning of this statute is, that the clerk of the crown shall not file any information without leave, nor issue process thereupon, without recognizance. *Per Lord Hardwicke, Ch. temp. Hardw. 248.*

2. That

2. That this statute extends to all informations except those exhibited in the name of his majesty's attorney general, so that an information in nature of a *quo warranto*, though a proper remedy to try a right, in respect of which it may not in strictness come within the words *trespasses*, &c. yet being also intended to punish a misdemeanour, and as the proceedings therein may be as vexatious as in any other, the same is within the purview of the statute, which, being a remedial law, shall receive as large a construction as the words will bear.

Carth. 503.
The King
v. the Town
of Hertford.
Salk. 376.
pl. 19.
Ld. Raym.
426. S. C.
adjudged.
Rex v.
Marlden,
3 Burr. 1812.

3. That no costs can be had on this statute on an acquittal at a trial at bar, not only because the clause that gives costs, unless the judge certify a reasonable cause, seems only to have a view to trials at *nisi prius*, but also because a cause which is of such consequence as to be thought proper for a trial at bar, cannot well be thought within the purview of the statute, which was chiefly designed against trifling and vexatious prosecutions.

2 Hawk.
P. C. c. 26.
§ 11.

4. That if there be several defendants, and some of them acquitted, and others convicted, none of them can have costs.

Salk. 194.
pl. 5.

5. That wherever a defendant's case is such as authorizes the court to award him his costs, he has a right to them *ex debito justitiae*; for it seems a general rule, that where judges are empowered by statute to do a matter of justice, they ought to do it of course.

2 Chan.
Cases, 191.
2 Hawk.
P. C. c. 26.
§ 13.

[6. That to whatever sum the costs of the defendant may amount, he cannot, on this statute, have more than the amount of the recognizance; nor, on the application for the information (a), will the court compel the prosecutor to give security for the costs over and above the 20*l*.]

Rex v.
Howell,
Ca. temp.
Hardw. 247.
Rex v.
Morgan,
2 Str. 1042.
2 Brook, *Id.* 197.

Rex v. Filewood, 2 Term Rep. 145. (a) Rex v. Brook, *Id.* 197.

By the 9 *Anna*, cap. 20. it is enacted, "That in case any person or persons shall usurp, intrude into, or unlawfully hold and execute the office or franchise of mayor, bailiff, portreeve, or other office within a city, town corporate, borough, or place (b) in *England* or *Wales*, it shall and may be lawful to and for the proper officer of the court of Queen's Bench, the court of sessions of counties palatine, or the court of grand sessions in *Wales*, with the leave of the said courts respectively, to exhibit one or more information or informations in the nature of a *quo warranto*, at the relation of any person or persons desiring to sue or prosecute the same, and who shall be mentioned in such information or informations to be the relator or relators against such person or persons so usurping, intruding into, or unlawfully holding and executing any of the said offices or franchises, and to proceed therein in such manner as is usual in cases of informations in the nature of a *quo warranto*: and if it shall appear to the said respective courts, that the several rights of divers persons to the said offices or franchises may properly be determined on one information, it shall and may be lawful for the said respective courts to give leave (c) to exhibit one

[(b) These words, it is now settled, apply only to offices in corporations, not to offices in boroughs and other places not corporate. Rex v. Wallis, 5 Term Rep. 375. Nor do they extend to all offices within corporations. Rex v. Williams, 1 Burr. 407.]
[(c) There is no necessity to state

this leave
on the re-
cord. Sym-
mers v. Re-
gem, Cowp.
489.]

“ such information against several persons, in order to try their
“ respective rights to such offices or franchises; and such person
“ or persons, against whom such information or informations
“ in nature of a *quo warranto* shall be sued or prosecuted, shall
“ appear and plead, as of the same term or sessions in which the
“ said information or informations shall be filed, unless the court
“ where such information shall be filed shall give further time to
“ such person or persons, against whom such information shall
“ be exhibited, to plead; and such person or persons, who shall
“ sue or prosecute such information or informations in the na-
“ ture of a *quo warranto*, shall proceed thereupon with the most
“ convenient speed that may be.”

And it is further enacted, “ That in case any person or persons
“ against whom any information or informations in the nature of
“ a *quo warranto*, shall in any of the said cases be exhibited in
“ any of the said courts, shall be found or adjudged guilty of an
“ usurpation or intrusion into, or unlawfully holding and execut-
“ ing of the said offices or franchises, it shall and may be lawful
“ to and for the said courts respectively, as well to give judgment
“ of *ouster* against such person or persons of and from any of the
“ said offices and franchises, as to fine such person or persons re-
“ spectively for his or their usurping, &c. and also to give judg-
“ ment that the relator or relators in such information named
“ shall recover his or their costs of such prosecution; and if
“ judgment shall be given for the defendant or defendants in such
“ information, he or they, for whom such judgment shall be
“ given, shall recover his or their costs therein expended against
“ such relator or relators; such costs to be levied by *capias ad sa-
tisfaciendum, fieri facias, or elegit*.”

[(a) This
does not en-
able the de-
fendant to
plead more
than one
plea, even

And it is further enacted, “ That the statute for the amend-
“ ment of the law, and all the statutes of jeofails, shall be ex-
“ tended to informations in nature of a *quo warranto*, and
“ proceedings thereon, for any the matters in the said act
“ mentioned (a).”

with the leave of the court. Say. Rep. 56. 4 Burr. 2146. He may indeed plead the statute of limita-
tions of 32 Geo. 3. c. 58. either singly or together with such plea as he might have lawfully pleaded be-
fore the passing of that act, or *such several pleas as the court on motion shall allow*. And where he is
charged with the usurpation of several franchises, he may plead distinct pleas to the several charges. Rex
v. Francis, 2 Term Rep. 484.]

Rex v. Cor-
poration of
Carmar-
then, 2 Burr.
569. 1 Bl.
Rep. 187. 1
Term Rep. 2.

[This act extends only to individuals usurping offices or fran-
chises in a corporation; and not to the corporation itself as a
body: if a corporation, as a corporation, usurp upon the crown,
the information must be by and in the name of the attorney gen-
eral, on behalf of the crown.

(b) Rex v.
Latham,
3 Burr.
1485. 1 Bl.
Rep. 468.
(c) Rex v.
Carter,
Cowp. 58.

The granting of an information is not now a mere matter of
course, as it was formerly considered, but depends upon the sound
discretion of the court according to the particular circumstances
of the respective cases that may be brought before them. Where
the right, or the fact on which the right depends, is disputed (b);
or where the right turns upon a point of new or doubtful law (c),

or where there is no other remedy (*a*), it is usually granted. But if the defendant can shew, that his right to the franchise in question hath been already determined on a *mandamus* (*b*), or that it hath been acquiesced in for a length of time (*c*), or that it depends on the right of those who voted for him, which hath not yet been tried; or that the person upon whose right the defendant's title depends hath enjoyed his franchise so long, that the court would not permit it to be impeached in this mode of proceeding (*d*); or it seems, that such person is dead (*e*); or that so great a number of derivative titles would be affected by a judgment against the defendant, that it would tend to dissolve the corporation (*f*); or that the franchise no way concerns the publick, (as all those which relate to the government of a corporation, or the election of members of parliament (*g*), and fairs and markets (*h*), &c. are said to do), but is wholly of a private nature, as a coney-warren, (*i*) &c.; or that the election, by which he claims, is agreeable to charter; or that he hath never acted under it, that there hath been no user of the franchise (*k*); the court will not grant the information unless there be some particular or extraordinary circumstances in the case; the determination whereof being wholly left to the discretion of the court, cannot well come under any certain stated rules.

Rex v. Godwin, Dougl. 397. (a) Bull. Nt. Pri. 212. (b) 2 Hawk. P. C. c. 26. § 9. (c) The time, within which a title to a corporate office might be impeached by a *quo warranto*, was, by the common law, indefinite; it varied with the circumstances of each particular case: Rex v. Powell, 8 Mod. 165. Rex v. Pyke, *id.*

286. cited 1 Term Rep. 4 n. 3 Term Rep. 311. Rex v. Williams, 2 Str. 677. and it was for some time thought better that it should be unsettled. Rex v. Latham, 3 Burr. 1485. At length however the court set a limit to their discretionary power in granting informations of this kind, and confined it, in analogy to other cases of limitation, within a period of twenty years. Winchelsea causes, 4 Burr. 1961. 2022. 2120. Rex v. Rogers, *Id.* 2523. which limitation was afterwards still further narrowed, and reduced to a period of six years, Rex v. Dickin, 4 Term Rep. 282. This last period hath been confirmed by the legislature, viz. by stat. 32 Geo. 3. c. 58. and is extended as well to informations filed by the attorney-general, on behalf of the crown, as to those promoted at the instance of any private person. (*d*) Rex v. Stephens, 1 Burr. 433. Rex v. Peacock, 4 Term Rep. 684. (*e*) *Vide* Rex v. Spearing, 1 Term Rep. 4 n. But it does not seem to be a reason for refusing an information, that the objection to the defendant's title ariseth from a defect in the title of some other person through whom he claims, provided the application be made within proper time. 8 Mod. 216. For it is admitted, that where judgment of ouster hath been given against a person through whom a title is claimed, that may be a reason for granting an information to impeach the derivative title. 2 Str. 1109. Andr. 389. 5 Burr. 2601. Cowp. 500. It is also admitted, that the title of a defendant to an information may be impeached by an issue introduced on the record, respecting the title of the person under whom he claims, though the latter hath not been ousterd on an information filed against him. *Ibid.* It may, or it may not be possible to impeach the original right on which the derivative title depends, by an information filed against the person who claimed to exercise that right. Whatever may be the case, where that may be done, but in fact has not been done; it has been lately decided, that where it cannot be done, the original right may be impeached in an information against the person whose derivative title depends upon it. Rex v. Mein, 3 Term. Rep. 596. 2 Kyd. 435 6. (*f*) Rex v. Varlo, Cowp. 59. *Secus*, if it be admitted that elections may still be made. Rex v. Bond, 2 Term Rep. 767. (*g*) Case of the borough of Horsham, Hil. 30. G. 3. 3 Term Rep. 599. n. Rex v. Mein, *ibid.* (*h*) *Q. et vide* Rex v. Marfden, 3 Burr. 1812. 1 Bl. Rep. 579. Ibbotson's case, Ca. temp. Hardw. 261. Hardr. 162. *arguendo*. (*i*) Rex v. Sir William Lowther, 2 Ld. Raym. 1409. 1 Str. 637. Ibbotson's case, Ca. temp. Hardw. 261. Rex v. Cann, Andr. 15. Rex v. Dawbeny, 2 Str. 1196. 1 Bott. pl. 326. Rex v. Shepherd, 4 Term Rep. 381. (*k*) Rex v. Ponsonby, Say. Rep. 245. Rex v. Whitwell, 5 Term Rep. 85.

So, the conduct and situation of the relator, will weigh much with the court, in some instances, in granting or refusing an information. Thus, where the persons on whose affidavits the motion is grounded, have lain by, without recently prosecuting, though with a full knowledge of the fact (*l*); where they have concurred with the rest of the corporation in a resolution not to take advantage of the flaw in the defendant's title (*m*); where the

(*l*) Rex v. Wardroper, 4 Burr. 2024. (*m*) Rex v. Mortlock, 3 Term Rep. 300. But a previous

knowledge of the fact in the person on whose affidavit the motion is

made, will not be a ground for refusing the information, if he had no power of remonstrating against the proceedings; if he were in fact merely a witness, as in the case of an application on the affidavit of the town clerk. *Rex v. Binfield*, Cowp. 75. Nor will the relator's concurrence in the election of the defendant be any ground for refusal, if the objection to his eligibility were at that time unknown. *Rex v. Smith*, 3 Term Rep. 573. And where the application is made on the affidavit of several persons, all of whom, but one, concurred in the election of the defendant; if that one will avow himself the relator, and render himself responsible for the costs, his being joined with the others who concurred in the election, will be no reason for refusing the information. *Rex v. Symmons*, 4 Term Rep. 223. (a) *Rex v. Bond*, 2 Term Rep. 771. (b) *Rex v. Stacey*, 1 Term Rep. 33. But where the application is made for the purpose of enforcing a general act of parliament, which interests all the corporations in the kingdom; it is no objection, that the party applying is not a member of the corporation. *Rex v. Brown*, P. 29 Geo. 3. 3 Term Rep. 574. n. The abandonment of a former information for the same cause, is of itself, no reason for refusing an information, as that may have been by collusion. *Rex v. Bond*, 2 Term Rep. 770. Where the application is manifestly frivolous and vexatious, the rule will be discharged with costs. 2 Str. 1039. 2 Burr. 780. 3 Term Rep. 301.

Rex v. Newling,
3 Term
Rep. 310.

Where the affidavit of the relator omits a material fact, as the mode of election; but that fact is afterwards stated in the defendant's affidavit, the court may use the latter affidavit in support of the application.

Rex v. Davies, Say.
Rep. 241.

It seems, that the court will not grant a rule for an information of this kind on the last day of term.

4 Burr.
2523.
3 Term
Rep. 310.

Where a defendant suffers the rule to be made absolute without shewing cause; or, suffers judgment to go against him by default; the court will permit other corporators, whose title may be affected by judgment of *ouster* being pronounced against him, to defend his title, on their undertaking to do so at their own expense, and indemnifying him against all costs.

1 Sid. 86.
2 Kyd. 438.
It hath been
said, that
process of
outlawry

The process usually issued to bring the defendant into court is a writ of *subpœna*, and if that be disobeyed, an attachment: but if the defendant cannot be served with a *subpœna*, it is said, the process is *venire facias* and *disfringas*.

will not lie upon informations in nature of *quo warranto*, and therefore that the defendant cannot plead a misnomer. *Rex v. Mayor of Hedon*, 1 Wils. 245. But *qu.* and see 2 Kyd. 438-9.

Rex v. Elagden,
Gillb. Rep.
145.

The plea in bar must set out the defendant's title at length, and conclude with a general traverse, "without this, that he usurped, &c." and issue should not be taken on the part of the crown, on the general traverse, but the replication should be to the special matter, that the defendant may know how to apply his defence.

Rex v. Hearle,
1 Str. 627.
2 Ld. Raym.
1447. *Rex v. Downes*,
1 Term Rep. 453.

Where several things are necessary to constitute a complete title in the defendant, the crown may take issue on each, and if any one of the issues on a fact material to the title be found against the defendant, there shall be judgment of ouster, and the defendant shall pay the costs on all the issues.

Rex v. Phillips,
1 Str. 104.
cited 1 Burr.
302. 305.

Where the defendant sets forth a bad title to the office, and confesses the usurpation, that amounts to a confession of the usurpation, and if an immaterial issue is joined, and a verdict found

on which the court cannot give judgment, yet they will not grant a replender, but will give judgment on the plea.

But where the defendant, in his plea, confesses an usurpation during part of the time laid in the information, but insists upon an election afterwards under which he continued to hold the office, judgment of *ouster*, as to the time confessed, ought not to be given against him, but only a judgment of "*capiatur pro fine*," as a punishment for his usurpation: for, if judgment of ouster were entered, it would follow, that, when a person has once exercised an office without authority, he becomes, so long as he does so, incapable of being rightfully elected. And, if in such case, a judgment of ouster be actually entered, the court will order the whole to be expunged, but that part which relates to the fine.

If a defendant make title to a corporation office, as being elected under the mayoralty of a particular person; on issue joined whether that person were mayor or not, a record of ouster against him may be read in evidence to shew that he was not mayor, which will be conclusive, if it be not shewn that the judgment was obtained by fraud or collusion.

But if the person under whom the defendant claims be dead at the time when the issue "whether he were mayor or not," is tried, the only evidence that will be admitted, will be to prove whether he were mayor or not in point of fact.

Where the persons, on whose right to vote the validity of the defendant's title depends, were at the time of his election in the actual possession of the franchise in virtue of which they voted; at the trial, no inquiry can be made into their right, unless an issue has been taken upon it.

rived under an election shall be affected on account of a defect in the title of the elector, if he were in exercise *de facto* of his franchise six years at least previous to the filing of the information against the person deriving title, and his title should not have been questioned by any legal proceeding carried on with effect.

As an information of this kind is now considered merely as a civil proceeding, a new trial may be granted as well where there has been a verdict in favour of the defendant, as where it has been given in favour of the crown.

The information cannot be quashed, even with the consent of parties; though with such consent, the court will permit the recognizance to be discharged.

After rules have been made absolute for several informations, the court will give leave to consolidate them at the instance of the defendants.]

Rex v. Bid-
dle, 2 Ld.
Raym. 952.
2 Kyd, 442.

Rex v. Heb-
den, 2 Str.
1109. Andr.
389. Rex
v. Grimes,
5 Burr.
2598.

Rex v.
Spearing,
1 Term
Rep. 4. n.

Symmers
v. Regem,
Cowp. 507.
And now by
st. 32 G. 3.
c. 58. § 3.
no title de-

Rex v.
Francis,
2 Term
Rep. 484.

Rex v. Ed-
gar, 4 Burr.
2297.

Rex v. Fos-
ter, 1 Burr.
573.

Injunction.

- (A) The several Kinds of Injunctions, and when to be granted.
- (B) What shall be a Breach thereof, and how punished.
- (C) How dissolved.
-

- (A) Of the several Kinds of Injunctions, and when to be granted.

(a) An injunction to stay restitution upon

AN injunction is a prohibitory writ, restraining a person from (a) committing or doing a thing which appears to be against equity and conscience.

(b) That the court of Chancery would not grant an injunction in a criminal matter under examination in B. R., and that if it did, the court of B. R. would break it, and protect any that would proceed in contempt of it. 6 Mod. 16. per Holt,

Injunctions issue out of the courts of equity in several instances; the most usual injunction is, to (b) stay proceedings at law; as (c) if one man brings an action at law against another, and a bill is brought to be relieved either against a penalty, or to stay proceedings at law, on some equitable circumstances, of which the party cannot have the benefit at law; in such case the plaintiff in equity may move for an injunction, either upon an attachment, or praying a *dedimus*, or praying a further time to answer; for it being suggested in the bill, that the suit is against conscience, if the defendant be in contempt for not answering, or pray time to answer, it is contrary to conscience to proceed at law in the mean time; and therefore an injunction is granted of course; but this injunction only stays (d) execution touching the matters in question, and there is always a clause giving liberty to call for a plea to proceed to trial, for want of it, to obtain judgment; but execution is stayed till answer, or farther order.

C. J.—But where *A.* having obtained judgment in ejectment in *B. R.* against *B.*, had execution awarded, but the under-sheriff refused to execute it; whereupon, by rule of that court, he was ordered to attend, and for not attending, an attachment was awarded against him; and *B.* after all this proceeding, having, on his bill exhibited in Chancery, obtained an injunction, it was moved in Chancery, that this

this injunction might not extend to stay proceedings against the under-sheriff for his contempt to the court of B. R., for that he was prosecuted for a contempt at the king's suit, and it was unnatural for the king by his injunction to stay his own suit in another court, the offence being committed before the bill exhibited; but the motion was denied. Vern. 25. [So, where the plaintiffs claimed a sole, and the defendant a concurrent, right of fishery, and a bill and cross-bill were brought to establish such several claims, which was a submission of their respective rights to the court, and the plaintiffs afterwards caused the defendant's agents to be indicted for a breach of the peace, in fishing in their liberty, the court of Chancery inhibited the prosecutors from proceeding on the indictment till the hearing of the equity suit and farther order, though it could not strictly grant an injunction. Mayor and Corporation of York v. Pilkington, 2 Atk. 302. For originally and regularly that court cannot grant an injunction to stay criminal proceedings. But where the matter in dispute, and made the subject of an indictment, is a mere civil right, and may be redressed by an action of trespass, the proper course is to apply to the attorney-general for a *nolle prosequi*. Ibid. Lord Montague v. Dudman, 2 Vez. 396.] (c) So, though the court will not proceed against a member that has privilege of parliament, yet if a parliament man sues at law, and a bill is brought in Chancery to be relieved against that action, the court will make an order to stay proceedings at law till answer, or farther order. Vern. 329. (d) If declaration be delivered, but if not, all proceedings at law are stayed. 2 Kel. 17. pl. 15., in the Exchequer all farther proceedings are stayed, be the action in what stage it may. [Though an injunction in the Exchequer, regularly, suspends all the proceedings at law, yet that court will, upon motion, permit the plaintiff in the action to give notice of trial, upon his undertaking not to sue out execution. For though it may be argued, that such notice of trial cannot have its proper effect, because the party served with it, cannot prepare for his defence without the discovery sought by the bill, yet, in effect, he receives no injury by the practice. For if the answer be full, he has gained the desired discovery: if it be exceptionable for inefficiency, or if the injunction be continued on the merits, the notice of trial is a nullity. Legg v. Da Costa, in the Exchequer, Hil. 13 Geo. 3. 3 Wooddef. 410. n. y.]

[Where an estate was settled on a jointress without impeachment of waste except in pulling down houses and felling timber, remainder to her son for life without impeachment of waste generally, remainders over; the son, by leave of the jointress, felled a quantity of timber, and died; after whose death, a daughter entitled to the next remainder in tail, sued her mother at law, to recover treble damages, and the place wasted; there being evidence of an express consent, or a general tacit consent or encouragement to the felling of the timber given by the daughter, she was restrained by injunction from proceeding in her action at law.

Aston v. Aston,
1 Vez. 396.

If a mortgagor bring a bill to redeem, it is at law accounted a breach of the covenant for quiet enjoyment. But if an action of covenant be in such case brought, equity will grant an injunction.

Pr. Reg.
Ch. 211.

If a lord of a manor bring ejectments against his customary tenants on pretence of forfeiture, some of whom file a bill, praying he may shew what breaches of the custom he designs to insist upon at the trial, upon the general issue in ejectment, and he is in contempt for not putting in an answer, or the like, the court will order an injunction.

Pr. Reg.
Ch. 216.

If bond-creditors of the ancestor have obtained a decree for sale against the heir, an injunction will be granted against other bond-creditors proceeding at law, unless they get judgment before the decree,

Martin v. Martin,
1 Vez. 211.
When a court of equity hath,

in any case, once taken the fund into its own hands, it will not suffer any proceedings at law. *Id. ibid.* Morrice v. Bank of England, Ca. temp. Talb. 217. Brooke v. Reynolds, 1 Br. Ch. Rep. 183. Douglas v. Clay, cited *ibid.* Hardcastle v. Chettle, 4 Br. Ch. Rep. 163. Askew v. Poulterers' Company, 2 Vez. 90.

Under the forfeiting act in *America*, the estates of loyalists were directed to be sold for the payment of debts: this was holden

Kempe v. Antill,
2 Br. Ch. Rep. 11.
to

to be no ground for an injunction to restrain an action brought in this country on a bond given in *America*.

Tooke v.
Hardley,
2 Br. Ch.
Rep. 125.

The representatives of a mortgagee, after foreclosure, sold the estate; and the amount not being sufficient to pay their debt, they brought an action upon the bond: the defendant at law filed his bill praying an injunction, and that the bond might be delivered up to be cancelled, insisting, that as the mortgagee had foreclosed the equity of redemption, and taken the pledge, he had made his election, and relinquished his right to a personal remedy. Lord *Thurlow* said, as it was a new case, he would grant the injunction on condition of the plaintiff's bringing the money into court; but his opinion was, that the defendant had a right to proceed at law; and the plaintiff refusing to bring the money into court, the injunction was therefore denied.]

Hard. 96.
Vern. 23.
(a) So, on a
motion to
stay a joint-
ress tenant
in tail, after
possibility,

Where tenant for (a) life is committing waste in cutting down young timber, or (b) breaking up or ploughing ancient meadow or pasture, or doing other waste, the tenant in tail shall have an injunction, upon a certificate of filing the bill, and shewing an affidavit of waste committed; and this, till answer and farther order; for timber once cut down cannot be set up again.

&c. from committing waste, the court held, that she being a jointress within the 11 H. 7. c. 20., ought to be restrained, being part of the inheritance, which by the statute she is restrained from aliening. Abr. Eq. 221. *Cook and Winford*.—So, where *A.* being tenant for life, remainder to *B.* for life, remainder to the first and other sons of *B.* in tail-male, remainder to *B.* in tail, *B.* (before the birth of any son) brought a bill against *A.* to stay waste, on demurrer to this bill, because the plaintiff had no right to the trees, and none that had the inheritance was party; yet the demurrer was overruled, because waste is to the damage of the publick, and *B.* is to take care of the inheritance for his children, if he has any, and has a particular interest himself, in case he comes to the estate. Abr. Eq. 400. *Dayrell and Champness*, 1 Vez. 309.—But where a jointress had a covenant that her jointure should be of such a yearly value, which fell short; though her estate was not without impeachment of waste, yet the court would not prohibit her committing waste so far as to make up the defect of her jointure. Abr. Eq. 400. (b) But where the plaintiff let a farm to the defendant at an annual rent, and part of it being pasture land, the defendant, covenanted, among other things, not to break up or plough any part of it, and that if he did plough any part of it, he would pay at the rate of 20 s. *per annum* for every acre; on motion for an injunction to stay waste in ploughing, the court said, that the parties themselves have here agreed the damage, and have set a price for ploughing, and therefore they would not grant any injunction; and they declared, if the defendant was plaintiff against paying 20 s. *per acre* for ploughing, they would not relieve him. 2 Vern. 119. *Woodward and Gyles*.

Vide Lord
Barnard's
case, 2 Vern.
339. 738.
Saik. 161.
pl. 14.
Preced.
Chan. 454.
Such a ten-
nant not
only injoin-
ed commit-
ting waste,
but decreed
to put the
house, &c.

So, if a man be tenant for life without impeachment of waste, with remainder to his first and every son in tail, though by virtue of that clause, *without impeachment of waste*, he may sell timber, and alter any rooms of the house at his pleasure; yet if he should pull down the house, or any part of the buildings thereunto belonging, equity would enjoin him; but not if he pull down to rebuild; for though the clause, *without impeachment of waste*, gives an (c) absolute property in the timber, that he may do therewith what he will, yet he is but tenant for life of the lands and houses; and therefore if he pulls them down in order to vex a son that has disobliged him, he acts with an ill conscience, and ought to be restrained in equity.

in the same repair it was before. (c) In Vern. 23. it is said, that the estate being without impeachment of waste, no prohibition or injunction is to be granted.—But by Preced. Chan. 454., such a clause does not give leave to sell and cut down the trees, which were for the ornament or shelter of a house, much less to destroy or demolish the house. *Vide tit. Waste*, (N).

Also,

Also, it is every day's practice to grant an injunction for building on another man's ground, and such injunction shall go to stay that new building till answer and farther order; and so in the case of stopping up ancient lights.

[In cases of nuisance, the court will not interfere before answer,

unless the plaintiff state a prescriptive right, or an agreement, and support it by affidavit. *Morris v. Lessees of Lord Berkeley*, 2 *Vez.* 452. *Attorney-General v. Doughty*, *id.* 453. An agreement, supported by affidavit, will indeed be sufficient to give the court jurisdiction in the first instance. *Martin v. Nutkin*, 2 *P. Wms.* 266. *Secus*, if it be a special case founded on a particular right. 2 *Vez.* 453.]

So, injunctions have frequently been granted to stay the printing and selling of (a) almanacks, bibles, and other books, in behalf of patentees and owners of such books; but the patent under seal is ever produced in open court.

2 *Show.* 258. pl. 266. [(a) In these cases, the right must appear by

the bill, and be admitted by the answer, else an injunction will not be granted till after the right has been determined at law. *Anon.* 1 *Vern.* 120. *Hills v. University of Oxford*, *id.* 275. *Jefferys v. Baldwin*, *Ambl.* 164. And *qu.* whether in a bill to restrain the publication of a print or engraving under the 8 *Geo.* 2. c. 13. it be not necessary to state that the requisition of the statute was complied with respecting the insertion on the plate and prints of the date of publication, and name of the proprietor? *Blackwell v. Harper*, 2 *Atk.* 93. 3 *Barnard.* 210. *Harrison v. Hogg*, 2 *Vez. jun.* 323. *Thompson v. Symonds*, 5 *Term Rep.* 41.—If a plaintiff fail in establishing his right to the *whole* of a publication, he may nevertheless have an injunction as to part. *Carnan v. Bowles*, 2 *Br. Ch. Rep.* 80. And if an author has sold *all his interest in the copy-right*, he has no resulting right at the end of the first fourteen years, as against his own assignee, and will be enjoined from re-publishing. *Id. ibid.*]

[So, injunctions have been granted to restrain the receiver of letters from publishing them without the consent of the writer, or of his personal representatives.

Pope v. Curl, 2 *Atk.* 342. *Thomson v. Stanhope*, *Ambl.* 737.

But the court will not interpose in this manner to restrain the publication of a real and fair abridgment of a new book: *secus* if the work be only colourably shortened.

Gyles v. Wylox, 2 *Atk.* 141. *Loft's Rep.* 775.

Injunctions may be granted occasionally even for the purpose of restraining matters of general utility, as, the carrying on of a particular trade; the working of a colliery, or the navigating of a ship; in these cases, however, the court will require a strict proof of the plaintiff's right to such relief.

2 *Ch. Ca.* 165. 1 *Vern.* 127. 2 *Vez.* 112. *Ambl.* 209.

An injunction too, it seems, will go to inhibit defendants from dissolving a commercial partnership.

Chavany v. Van Sommer, in *Canc. M.* 11 *Geo.* 3. 3 *Wooddef.* 416. note p.

So, (b) to restrain a partner from receiving the partnership funds, he being in contempt.

(b) *Read v. Bowers*, 4 *Br. Ch. Rep.* 441.

Injunctions will also be granted to restrain the negotiation of bills of exchange, or promissory notes, obtained by fraud; and in this case, if the plaintiff support his motion by an affidavit of the truth of the facts stated in his bill, the injunction will be allowed immediately upon the bill being filed, lest the defendant should, upon intimation of the suit, by negotiating the security, defeat its object.]

Patrick v. Harrison, 4 *Br. Ch. Rep.* 476. *Fonbl. Eq. Tr.* 38. note (x). Where a motion was

made to restrain a defendant either from bringing an action on a promissory note, suggested to have been given for undertaking to bring about a marriage, or to prevent him from assigning it over, the court made an order upon the defendant to keep the note in his own possession, and not to assign or indorse it over, but would not extend the injunction so far as to inhibit the payee himself from proceeding at law. *Smith v. Aykwell*, 3 *Atk.* 566. *Ambl.* 66. *S. C.* Where the acceptance of a bill of exchange had been declared void by the law of a foreign country, an injunction was granted to restrain the holders from suing the acceptor upon it in this country. *Burroughs v. Jamineau*, *Mof.* 1. *Sel. Cas.* in *Ch.* 69. *S. C.*

There

2 Ch. Caf.
66, 76, 93.

There is also an injunction granted to stay trial at law; this is never granted but upon notice; as where one files his bill, and it appears to the court that the plaintiff's equity must arise out of the defendant's answer; in this case the court will, and often does, grant an injunction, and that the same may extend to stay trial.

Wright v.
Braine,
MSS. —
3 Br. Ch.
Rep. 87.
S. C.
The regular
course is,
first to get
the com-
mon injunc-
tion, for
want of ap-
pearance,
and then to
move, that it may be extended to stay trial.

[An injunction to stay trial may be granted before appearance: but an injunction to stay trial and also execution cannot be moved for at one and the same time. *Wright*, an executor, being defendant in a suit in Chancery, wherein creditors were the plaintiffs, was afterwards sued at law by *Braine*, another creditor, who gave notice of trial in his action. *Wright* now filed his bill against *Braine*, and before appearance, moved for an injunction to stay execution, and that it should also stay trial, the notice of trial being for *Thursday* then next. Lord *Thurlow* said, that they could not be granted as one motion, and therefore granted the first part only.]

[There is one instance of an injunction to be quieted in possession being granted, though the title at law

There is an injunction called a perpetual injunction, for quieting a man in the possession of his estate: this is generally either upon a plain equitable title, or where one, two, or more verdicts have gone against a man; this injunction is to quiet the plaintiff and his heirs for ever, and all claiming by, from, or under him; and it is very often granted, and in many instances the justice of the court calls for it.

was not established. *Bush v. Western*, Pre. Ch. 530. But in later cases, it hath been refused. *Birch v. Holt*, 3 Atk. 726. *Anon.* 2 Vez. 414.]

Preced.
Chan. Lord
Bath v.
Sherwin,
Gibb. Eq.
Rep. 2. S. C.
[But in this
case Lord
Cowper's
decree was
reversed in
the House
of Lords,
and a perpet-
ual injunc-
tion granted.
1 Br. P. C.
266. And
in later
times, these
injunctions
have been
granted with
less reserve.
Leighton v.

Also, it has been attempted in Chancery, after three or four ejectments, by a bill of peace to establish the prevailing party's title; but this has been constantly denied, where the title was merely at law; and my Lord *Cowper*'s reasons herein were, that it would be too great arrogance in him to alter the course of the law; for that every termor may have an ejectment, and every new ejectment supposes a new demise, and the costs in ejectment are a recompence for the trouble and charges to which the possessor is put; but where the suit begins in Chancery, for relief touching pretended incumbrances on the title of lands, and the court hath ordered the plaintiff to pursue an ejectment at law, there, after one or two ejectments tried, and the right settled to the satisfaction of the court, the court hath ordered a perpetual injunction against the defendant, because, there, the suit is first attached in that court, and never began at law; and such precedent incumbrances appearing to be fraudulent and inequitable against the possessor, it is within the compass of the court to relieve against it.

Leighton v. P. Wms. 671. 1 Str. 404. 2 Br. P. C. 217. *Barefoot v. Fry*, Bunb. 158. It is said also, that where a bill in equity is taken *pro confesso*, by reason of the defendant's contempt in disobeying all process, if the suit be to quiet a possession, or to stay proceedings at law, the court will decree a perpetual injunction. Pr. Reg. c. 197. So, where an issue was directed out of Chancery, to try the validity of a will of personalty, and the verdict was given against it, the court granted a perpetual injunction against proving it before the ecclesiastical judge. *Beverham v. Springhold*, 1 Ch. Ca. 80. See *Montgomery v. Clark*, 2 Atk. 379. So, where the party concerned in interest admitted the probate

bate of a will, he was enjoined from contesting it in the ecclesiastical court, for facts are as properly concluded by admission as by a trial. *Sheffield v. Dukes of Buckingham*, 1 Atk. 628.]

A trustee having contracted to sell an estate to one person, and the *cestui que trust* having actually sold it to another, who moved for an injunction to quiet him in the possession, being disturbed by the trustee, it was holden by my Lord Keeper, than an injunction for quieting the possession is only grantable where the plaintiff has been in possession for the space of three years before the bill exhibited (*a*), upon a title yet undetermined, or in case the cause hath been heard, and judgments passed upon the merits of the cause by the court.

Vern. 156.
Lady
Poinces's
case.

[(*a*) The
injunction
in this case
is drawn
from the
equity of
the statutes

upon forcible entries. 2 Vez. 415.]

There is an injunction to prevent multiplicity of suits; as where many suits are depending, and are likely to happen, from one and the same thing, the court will here interpose, and grant an injunction; they will direct a proper issue to try the whole, and all the rest shall be bound by the verdict, else there might be twenty actions, and as many verdicts, where one (*b*) proper direction or issue ends the whole; and it is only directing one issue to prevent many more.

Vern. 22.
508.
Show. P.C.
17.

(*b*) As,
where se-
veral tenants
of a manor
claim the
profits of a

fair. 1 Vern. 266.—So, to settle the boundaries of lands. Preced. Chan. 261.

If a person is sued at law for irregularly serving the process of the court of Chancery, it is said, that an injunction will be granted to stay the proceedings at law; for the irregularity is only punishable in that court.

Vern. 269.

Where two courts have a concurrent jurisdiction of the same thing, that court shall retain the cause which is first possessed of it; as between the Exchequer and Chancery, the Counties Palatine and Chancery: but if legacies are given to infant children by a stranger, and their father, being appointed their guardian by the spiritual court, sues the executor there for recovery of them, Chancery will grant an injunction against his proceeding in that court; because the spiritual court cannot order the legacies to be put out at interest for the children's benefit, as the Chancery may do, though they may compel the father to give good security with good sureties. So, where a husband sues in the spiritual court for a legacy given his wife, an injunction will be awarded, because that court cannot compel him to make an adequate settlement or provision for his wife: but if the executor be ordered by such a time to bring in the money, which he neglects to do, no injunction will be granted, because the bill might have been brought only for delay, and the executor might at any time he pleased dismiss his own bill.

[3 Atk. 629.
Pr. Ch.
548. 2 Atk.
420.

In the case
of Montgo-
mery v.
Clark,
2 Atk. 378.
where a will,
consisting of
real and per-
sonal estate,
which had
been set aside
at law for
the insanity
of the testa-
tor, was li-
tigated in
the ecclesi-
astical court,
Lord Hard-
wicke is re-
ported to

have holden, that the court of Chancery had no power to interpose, so as to stop the proceedings in the spiritual court. But see *Sheffield v. Dukes of Buckingham*, 1 Atk. 628. *supr.*—In the case of legacies, where the ecclesiastical court have clearly an original jurisdiction, if there be a trust, or any thing in the nature of a trust, the court of Chancery will grant an injunction, trusts being proper only for the cognizance of that court. 1 Atk. 491. On a bill to establish a *modus*, the court of Exchequer will inhibit the spiritual court, though the plaintiff in equity have not pleaded to the libel, as that court is not competent to try the *modus*. *Blacket v. Finney*, Bunb. 176. *Salmon v. Rake*, *ibid.* But courts of equity do not grant an injunction where the ecclesiastical court proceeds without jurisdiction, but where there are some equitable circumstances between the parties. An injunction supposes the ecclesiastical court to have jurisdiction: a want of jurisdiction is a ground for a prohibition. 1 Atk. 630. 3 Barnard. 29.]

There

There are other injunctions which are never denied; as in an ejectment, where the party agrees to give judgment in ejectment to prevent trial, to give a release of errors, and to consent not to bring a writ of error, and to this it is sometimes added, to deliver possession, as the court upon hearing shall direct; this forwards the defendant at law, and he could have no more if he were to proceed to trial.

2 Vern. 401.

Amburst
and Daw-
ling.

(a) An in-
junction is
never to be
granted be-
fore bill
filed.

4 Inst. 92.

Vern. 156.

S. P. said.

Where a mortgagee brought a bill to foreclose, and, pending the suit, an advowson appendant to the mortgaged manor became void, and the mortgagee, being hindered from presenting, brought his *quare impedit*; and (a) though the mortgagor had no bill filed, yet being ready and offering to pay the principal, interest, and costs, if the mortgagee will not accept his money, interest shall cease, and an injunction to stay proceedings in the *quare impedit* be granted; for the mortgagee, till a foreclosure, is but in nature of a trustee for the mortgagor.

[See 4 Ann. c. 16. § 22.]

Abr. Eq.

285. Duke

Hamilton

v. Maccles-

field.

Where a cause abated by the death of the Lady Gerard, and the defendant was her executor, who being served with a copy of the bill of revivor, and my Lord Keeper's letter, would not appear, being in privilege; and upon motion an injunction was granted, though the cause was not revived; and the case of *Armstrong and Jackson* was cited, where before a demurrer determined, the plaintiff had an injunction on motion.

Abr. Eq.

285. Ro-

binson and

Ld. Whar-

ton.

So, where the Lord Wharton had an injunction to quiet him in the possession of the mines in question, and upon the hearing of the cause an issue was directed to try, whether the mines in question were within the plaintiff's or defendant's manor; the issue was tried at bar, and found for the plaintiff; then the plaintiff died, and a bill of revivor was brought, and before the time for answering was out, or the cause revived, the plaintiff moved for an injunction to stay the Lord Wharton's working the mines, having affidavit that since the verdict against him he had trebled the number of workmen, and between that and *Candlemas* would work out the mines; and an injunction was granted, though the cause was not revived.

Anon.

2 Vez. 650.

[Where a bill by a principal debtor for an injunction is dismissed, the bail cannot bring another upon the same equity. If indeed there is collusion, or a charge of collusion in the bill between the principal and the plaintiff at law, and the injunction is dissolved by collusion in order to charge the bail at law, the bail might take up the equity: but it would be then a new equity; for fraud and collusion affect every thing, and would give a right to resort to the original equity.]

Stone v.

Tuffin,

Amb. 32.

An injunction to stay proceedings against the principal extends to proceedings against the bail; and where bail is only put in below, to proceedings on the bail-bond.

Savory v.

Dyer,

Amb. 70.

Davila v.

Peacock,

Regularly, it seems, a proper writ of injunction cannot be granted unless expressly prayed by the bill; for the prayer of general relief will not extend to an injunction. If however the injunction issue upon such a general prayer, and the defendant put
in

in his answer, and move in the common form, that upon the coming in of the answer, the injunction may be dissolved, this is a submission to the regularity of the injunction, and will cure the original defect.

3 Barnard.
27. In special cases an injunction hath been
2 Vern. 401.

granted, though no bill hath been filed. *Amhurst v. Dawling*, 2 Vern. 401.

When an injunction is dissolved on the merits, and the plaintiff amends his bill, or files a supplemental bill for the same matter, he cannot of course move for an injunction till answer; though upon special motion he may obtain it, without any affidavit in support of the amendment or equity of the bill.

Anon.
3 Atk. 694.
Travers v. Lord Stafford, Ambler.
104. 2 Vez.
19. Ed-
wards v. Jenkins, 3 Br. Ch. Rep. 425.

The practice of a court of law in compelling a plaintiff on a bond not to take out execution beyond his real debt, does not oust the jurisdiction of courts of equity in awarding an injunction.

Codd v. Woden,
3 Br. Ch. Rep. 73.
Neale v. Wadefon,
1 Br. Ch. Rep. 574.

Where a bill is referred for impertinence before the time for answering is out, the plaintiff is not, upon the expiration of the time, entitled to the injunction as of course, but must move it upon notice and affidavit of circumstances.

An ejectment was brought by a person abroad to recover an estate as devisee against the heir at law; the heir thereupon filed a bill, charging fraud in the manner of obtaining the will, by the devisee and other defendants in the cause; and moved for an injunction to stay proceedings in the ejectment till the coming in of the answer upon an affidavit charging fraud in the defendants generally, but not particularizing the plaintiff at law, who was abroad. The Lord Chancellor was of opinion, that when the defendant was here, and could put in his answer easily, the general form was sufficient: but when the defendant was abroad, there should be a special ground to shew that the discovery from him was material.

Revet v. Braham,
2 Br. Ch. Rep. 640.

Where the plaintiff at law is abroad, it is the practice of the Exchequer to insist upon an affidavit of merits upon moving that service of the subpoena upon the attorney shall be good service; and a similar practice seems at one time to have been admitted in the court of Chancery.

Delancy v. Wallis,
3 Br. Ch. Rep. 12.
But see
Burke v. Vickers, *id.* 24.

In common cases, affidavits cannot be read against the defendant's answer in order to obtain an injunction. But this rule does not hold where irreparable mischief would follow from the delay of entering into the plaintiff's case till the hearing, as in cases of waste, patents, fraud, &c.

Isaacs v. Humpage,
3 Br. Ch. Rep. 463.
and the cases there cited.

In injunctions to inhibit the commission of waste, or to stay proceedings at law, the statute for the amendment of the law allows the subpoena to issue before the bill is filed.]

4 Ann.
c. 16. § 22.

(B) What shall be a Breach thereof, and how punished.

Lane, 96.
Bent's case.

IF there be a suit in equity concerning title to a close, and thereupon an order made, that the defendant shall suffer the plaintiff to enjoy the close till, &c. and notwithstanding the defendant upon a title of common put in his cattle, this is no breach of the injunction; for the common was not in question by the bill.

Salk. 322.
pl. 9.
Booth and
Booth.
6 Mod. 288.
S. C. in
B. R.
(a) That a
common
law court
will not en-

A. obtained judgment against *B.* but was hung up from taking out execution for a year and a day by injunction out of Chancery, and the question was, whether he could after take out execution without a *scire facias*, and it was holden, that he could not: 1st, Because the common law court cannot take (a) notice of Chancery injunctions. 2^{dly}, Because it had been no (b) breach of the injunction to have taken out a writ of execution, and to have continued it by *vicecomes non misit breve*.

large the term in ejectment where the plaintiff has been hung up by an injunction out of Chancery. Salk. 257. pl. 8. (b) That a person may enter so as to entitle himself to an action for recovery of the mesne profits, notwithstanding an injunction. 2 Vern. 519. [So, notwithstanding the injunction, the plaintiff at law is allowed to proceed so far, as that he may be at liberty *eo instante* that the injunction is dissolved, to take out execution: if therefore the defendant be in execution, and plead *plene admistravit*, and the plaintiff at law enter judgment *de bonis testatoris cum acciderint*, he may proceed to a *scire facias* to inquire of assets, and enter judgment thereupon. *Morrice v. Hankey*, 3 P. Wms. 146. See also *Sidney v. Etherington*, *ibid.*]

Vern. 207.
Childers
v. Saxby.

Where a defendant had taken out execution in breach of an injunction of the court of Chancery, and some of the bailiffs who served the execution had, as was alleged, found out a place in a wall in the plaintiff's house, that was made up again with bricks, wherein was hid 150*l.* and had taken away the money, and done great spoil to the plaintiff's goods, it was ordered by the Lord Chancellor, that the defendant should make good this money to the plaintiff, and should satisfy all other damage which the plaintiff would swear he had sustained; and this order was confirmed by the succeeding Lord Keeper; though it was objected, that the order was unreasonable, in making the plaintiff judge of his own damage; that the defendant came into possession by course of law, and the bailiffs were legal officers, who, if they did any thing amiss, the party ought to take his remedy at law against them, and the defendant ought not to be answerable for their misdemours. But the Lord Keeper held the order to be just; and he thought it an idle practice in the court to put a thief to his oath to accuse himself; for he that has stolen will not stick to forswear it; and therefore *in odium spoliatoris* the oath of the party injured should be a good charge upon him that has done wrong.

As concerning the breach of injunctions, it hath been of late practised to commit the party on affidavit of the breach, and personal notice given to him, but never on notice to his clerk; whereas by the ancient rule where a man is guilty of the breach of an injunction, upon an affidavit made thereof, the plaintiff's clerk in court

court issues out an attachment against him of course, he is arrested thereon, gives bail to the sheriff, enters his appearance with the register; so the court has hold of him; the plaintiff files interrogatories in the examiner's office to examine him; the interrogatories are *verbatim* according to the affidavit; and if the party does neglect to attend and be examined, it is a motion of course to examine him in four days, or stand committed; if he confesses the contempt, he must submit, own his fault, beg pardon, and pay costs; but if he denies it by his examination, the plaintiff descends to prove it upon him; then the plaintiff moves to refer it to a master, to see whether the party is guilty of the contempt laid to his charge, or not; here again he hath liberty to be heard, and may except to the report, and bring it on for the judgment of the court; and if the court is of opinion that he is guilty of the contempt, he must stand committed, and pay the costs; but if the court is of a contrary opinion (as it sometimes happens) he is acquitted with costs.

[It is no excuse for proceeding at law after an injunction, that it is not sealed: for where a defendant, or his attorney, have been present upon an order for an injunction, and they have proceeded at law before it has been sealed, the court has considered it as a contempt, and committed the parties.] Anon.
3 Atk. 567;

(C) How dissolved.

THE methods of dissolving injunctions are various; when the answer comes in, and the party hath cleared his contempt by paying the costs of the attachment, (if there is one,) he obtains an order to dissolve *nisi*, and serves it on the plaintiff's clerk in court; this order takes notice of the defendant's having fully answered the bill, and thereby denied the whole equity thereof; and being regularly served, the plaintiff must shew cause at the day, or the defendant's counsel, where there is no probability of shewing cause, may move to make the order absolute, unless cause, fitting the court.

The plaintiff must shew cause, either on the merits, or upon filing exceptions (a); if upon the merits, the court may put what terms they please on him; as bringing in the money (b), or paying it to the parties, subject to the order of the court, or giving judgment with a release of errors, and consenting to bring no writ of error, or to give security to abide the order on hearing, or the like; and to this order is generally added a clause, that the plaintiff shall speed his cause to a hearing.

[(a) If no exceptions are filed, the court, upon the master's report, will dissolve the injunction, and sometimes will commit the clerk in court to the Fleet for taking out such injunction, and also make him pay all costs, and sometimes the damages the injured party hath sustained, by reason of such irregular injunction. 2 Harrison's Pr. 264. (b) The securing the fund is an usual condition annexed to injunctions. Culley v. Hickling, 2 Br. Ch. Rep. 182. In an interpleading bill, it seems to be necessary that the money should be actually brought into court before the motion for an injunction; though the practice hath been, to bring it in upon shewing cause against the motion to dissolve the injunction. Dungey v. Angove, 3 Br. Ch. Rep. 36.]

If the plaintiff shews cause upon exceptions filed, he must procure the report in four days of the insufficiency of the answer; and if the motion is made at either of the last seals after *Hilary* or *Trinity term*, the court sometimes puts the plaintiff upon opening the exceptions, and they judge whether they are material or not; the reason of this is, because the defendant, if the answer should be reported sufficient, hath no opportunity to move the court till the seal before the next term, and is thereby very greatly delayed; if the court think the exceptions material and necessary, they will grant the motion; if otherwise, they will deny it, as the case appears; and to this is sometimes added a clause to the order, especially when the motion is made at the last seal, that the plaintiff shall procure the report in four days, or his injunction to stand dissolved without further motion; whereas it is not so in open term, or at any of the seals save the last; and this clause being added, the court needs not to hear the exceptions opened, which oftentimes take up too much time.

If the master reports the answer sufficient, it is a motion of course to dissolve the injunction on the answer's being reported sufficient; but yet the plaintiff may shew cause on the merits; for there are many instances where the plaintiff's counsel may think the answer not full, and yet may be mistaken, and, notwithstanding this, the plaintiff may have good cause on the merits for continuance of his injunction; and it seems reasonable that he have liberty to do it; but this must be done on notice given to the other side; he cannot do it when the defendant's counsel come to move to dissolve the injunction, on the answer's being reported sufficient; because, as this is a motion of course, the party is not prepared to speak to the merits; but he may have liberty on notice given.

• Harrison's
Pr. 262.

[When a plea or demurrer is argued by counsel, and allowed, there is generally, though not always, an end of the injunction; for it may happen that some equity may be shewn for continuing it, arising out of the defendant's answer put in with such plea or demurrer; and upon a plea or demurrer being allowed, or on the coming in of the answer, the court will not absolutely dissolve the injunction on the first motion, though upon affidavit of notice, but only *nisi*: so, if the master's report is not procured in a reasonable time, after exceptions filed, or if the answer is reported insufficient, the injunction will be dissolved *nisi*, though sometimes absolutely on the first motion.

2 Kel. 43.

An injunction for want of an answer was dissolved, because not served till several months after the answer came in. On cross bills, if when the first is answered, the second is not answered in eight days, the injunction will be dissolved on motion: but the court will not dissolve an injunction continued on exceptions, if they have not been filed a reasonable time before motion made.

Pr. Reg.
200.

If there be two defendants, the court will not ordinarily dissolve the injunction till both have answered.

If

If the defendant do not sign his answer, regularly, the injunction will be continued; though if the plaintiff take a copy of the answer, this may amount to a waiver of the informality. Anon.
Bunb. 251.

If exceptions, which are put in only to continue an injunction, are over-ruled, the injunction is dissolved of course without motion. Walter v.
Ruffel,
Bunb. 30.

If the plaintiff who hath an injunction dies pending the suit, in strictness the whole proceedings are abated, and the injunction with them; but even in this case the party shall not take out execution without special leave of the court; he must move the court for the revival of the suit within a time limited, or the injunction to stand dissolved; and as this is never denied, so if the suit is not revived, the party takes out execution. There are some instances where a plaintiff may move to revive his injunction; but as that rarely happens, so it is rarely granted, especially where the injunction hath been before dissolved. But where a bill is dismissed, the injunction and every thing else is gone, and execution may be taken out the next day.

Inns and Innkeepers.

(A) Inns by what Authority erected, and how far within the Statutes concerning Alehouses.

(B) Who shall be said a common Innkeeper: And herein of the Privileges allowed him by Law.

(C) Of the Duties enjoined Innkeepers by Law: And herein,

1. To what Things the Duty of an Innkeeper extends.
2. Of the Offence of selling corrupt Commodities, or at exorbitant Prices.
3. Of the Offence of refusing to harbour or entertain a Guest.
4. In what Cases chargeable for things stolen or lost.
5. Who is such a Guest as may charge an Innkeeper.
6. Of the Manner in which he is to be charged.

(D) Of the Innkeeper's Remedies against his Guests.

(A) Inns by what Authority erected, and how far within the Statutes concerning Alehouses.

2 Roll. **I**T seems to be agreed at this day, that any person may set up
 Abr. 84. a new inn, unless it be inconvenient to the publick, in respect
 Palm. 367. of its situation, or to its increasing the number of inns, not only
 Bulf. 109. to the prejudice of the publick, but also to the hindrance and
 Gadd. 315. prejudice of other ancient and well-governed inns: For the keep-
 2 Roll. ing of an inn is no franchise, but a lawful trade, open to every
 Rep. 345. subject, and therefore there is no need of any (a) licence from
 2 Keb. 506. the king for that purpose.
 Salk. 45. (a) It is said, that in an-
 cient times inns were allowed in the Eyre. 2 Roll. Rep. 345.—But this is made a *quære* in Palm.
 374; and in Hutton 100., it is said, that there was no such thing in the Eyres; but because that stran-
 gers, who were aliens, were abused and evilly intreated in inns, it was, upon complaint thereof, provided
 that they should be well lodged, and inns were assigned to them by the justices in Eyre.—In Cro. Jac.
 528. there is an instance of one outlawed on a *quo warranto* for keeping an inn.

Cro. Car. But as inns from their number and situation may become nui-
 549. Dalt. sances, they may be suppressed, and the parties keeping them may
 Justice, c. 7. at common law be (b) indicted and fined, as being guilty of a
Vide the au- publick nuisance; and in like manner may they be dealt with, if
thorities they usually harbour thieves, or persons of scandalous reputation,
supra. or suffer frequent disorders in their houses.
 (b) Four persons were indicted for erecting four several inns *ad communem necumentum*; and it was ruled, that for several offences
 of the same nature several persons may be indicted in the same indictment; but then it must be laid
separatim exerunt, and for want of the word *separatim* the indictment was quashed. 2 Hal. Hist.
 P. C. 174.

2 Roll. He who has an inn by prescription may lawfully enlarge it
 Abr. 84. upon the same land which has been used with it, either by erect-
 ing new buildings thereon, or turning stables into chambers of
 entertainment; and he shall have the same privilege in such new
 part, as in any other part of his house.

Hutton, 99. Also it is agreed, that the statute of (c) 5 & 6 E. 6. cap. 25.
 Salk. 45. and other statutes concerning the licensing of alehouses, &c. do
 (c) For the not extend to inns, unless an inn degenerate into an alehouse by
 construction suffering disorderly tippling, &c. in which case it shall be deemed
 hereof *vide* as such.
 Mod. 34.
 Sand. 249.

4 Mod. 144. Carth. 151, 263. Skin. 293. Show. 398. Comb. 405. 2 Ld. Raym. 1303. Stra.
 497. And note, that as to the licensing of alehouses the justices of peace are the sole judges, and have a
 discretionary power of granting or refusing such licence, and will not be compelled thereto by *mandamus*,
 or otherwise.

(B) Who shall be said a common Innkeeper: And therein of the Privileges allowed him by Law.

Palm 374. **A** Person who makes it his (d) business to entertain travellers and
 2 Roll. passengers, and provide lodging and necessaries for them and
 Rep. 345. their horses and attendants, is a common innkeeper; and it is no
 (d) If one way material whether he have any sign before his door or not.
 who is not a common

inn be assigned *per licentiatorem domini regis* to harbour a man, he is not bound to take charge of the goods
 of

of his guest. Roll. Ab. 2. Dyer 158 in margin.—An infant innkeeper not chargeable. Roll. Abr. 2. *secus*, of a person *non compos*. Cro. Eliz. 622.

But though it be, the entertaining of passengers that makes a man an innkeeper, yet it is said, that if a person having put up a sign before his door, afterwards pull it down, he thereby discharges himself of the burden of an innkeeper; but if after the taking down his sign he uses to harbour men, it is as much a common inn as if he had a sign.

Palm. 374.
Godb. 346.

It hath been adjudged, that a person living at *Epsom*, and lodging strangers for drinking the waters in the season, and selling them victuals and beer, and to no other persons except such lodgers, is not an innkeeper, so as to have soldiers quartered on him, pursuant to the statute 4 & 5 W. 3. cap. 13. for he is not such an *hospitator* against whom an action lies for refusing to entertain a guest; also in this case the lodgers have such an interest in their rooms, that they may maintain an action of trespass against any one who should enter into them against their will.

Carth. 417.
Ld. Raym. 479.
12 Mod. 254, 255.
Salk. 387.
pl. 1.
5 Mod. 427.
S. C. Parkhurst and Foster adjudged.

[Nor will the privilege of a common inn extend to a livery-stable, so as to protect a carriage standing at livery there. *Francis v. Wyatt*. 3 Burr. 1498. 4 Term Rep. 567.]

A person who receives cattle to agist, on an agreement to pay so much a week for them, cannot retain them till payment, as an innkeeper may the horse of his guest, unless there be a special agreement to that purpose.

Cro. Car. 271. Chapman v. Allen.

An innkeeper is distinguished from other traders, in that he cannot be a bankrupt; for though he buys provisions to be spent in his house, yet he does not properly sell them, but utter them at such rates as he thinks reasonable, and the attendance of his servants, furniture of his house, &c. are to be considered; and the statutes of bankruptcy only mention merchants that use to buy and sell in gross, or by retail, and such as get their living by buying and selling, so that their principal subsistence is by buying and selling; but the contracts with innkeepers are not for any commodities *in specie*, but they are contracts for house-room, trouble, attendance, lodging, and necessaries, and therefore cannot come within the design of such words, since there is no trade carried on by buying and bartering commodities.

Cro. Car. 549.
Jones, 437.
March, 35.
S. C. Crisp and Pratt.
3 Lev. 209.
& 3 Mod. 327.
12 Mod. 159. Ld. Raym. 287.
Comb. 181.
Carth. 14.
S. P. adjudged between New-

ton and Trigg. See Vol. I. 388-9.

For the security and protection of travellers, inns are allowed certain (a) privileges, such as that the horse and goods of a guest cannot be distrained, &c.

3 Belf. 270.
Co. Lit. 47.
2 Vern. 129.
(a) In 1 Roll.

Abr. 650. it is said, that, by some opinions, travellers horses depastured by an innkeeper pay no tithes by the common law. — But the contrary hereof is holden in *Hard*. 35.

Also the law takes care of the reputation of an innkeeper; and therefore where in case for words the plaintiff declared, that he was possessed of certain stables *quodam loco vocat. Bell-Savage Inn*, that he had accommodation for travellers, and that he got his living by the exercising of that faculty; that the defendant was possessed of another inn, and that a person, not known, inquiring for the *Bell-Savage Inn*, (whither he was directed, to set up his horse,) the defendant said these words, *This is Bell-Savage Inn*; and at another time he said to another person, *You have nothing to do there*,

Hil. 25 &
26 Car. 2.
Southwell and Aulam.
Raym. 251.
S. C.

he is broke and run away, there is no entertainment for man or horse; by reason of which words he lost his customers; on not guilty pleaded, the jury having found for the defendant as to the first words, and as to the last for the plaintiff, it was adjudged clearly for the plaintiff; and *Hale, C. J.* held farther, that if a man keeps an inn, and another that lives just by him, designing to get away his customers, tells a person who inquires for such inn, that no one lives there, this is actionable; also, it was said by *Hale* to have been adjudged actionable to dissuade a person from going to an inn, by telling him the small-pox was there.

(C) Of the Duties enjoined Innkeepers by Law: And herein,

1. To what Things their Duty extends.

9 Co. 87.
Dyer, 158.
Bro. *Affion*
sur Case,
76. 92.

THE duty of innkeepers extends chiefly to the entertaining and harbouring of travellers, finding them victuals and lodgings, and securing the goods and effects of their guests; and therefore, if one who keeps a common inn refuse either to receive a traveller as a guest into his house, or to find him victuals or lodging, upon his tendering him a reasonable price for the same, he is not only liable to render damages for the injury in an action on the case, at the suit of the party grieved, but also may be indicted and fined at the suit of the king.

Saik. 18.

For he, who takes upon himself a publick employment, must serve the publick as far as his employment goes; therefore, an innkeeper shall not only answer for his own neglects, but also for the neglects of those who act under him, though he should expressly caution against it.

2 Roll.
Rep. 79.

But the duty of an innkeeper does not extend to the finding of his guest with clothes or wearing apparel.

8 Co. 32.
in *Cayle's*
case.

Also, if the guest be assaulted and beaten within the inn, he shall have no action against his host; for the charge of the host extends to the moveables only, and not the person of the guest.

8 Co. 32. b.
Cayle's case,
adjudged.
4 Leon. 96.
S. P. ad-
judged.
2 Brownl.
255. S. P. *per Cur.*

If a man comes to a common inn to harbour, and desires that his horse be put to grafs, and the host puts him to grafs accordingly, and the horse is stolen, the host shall not be charged; because by law the host is not bound to answer for any thing out of his inn, but only for those things that are *infra hospitium*.

8 Co. 32. b.
4 Leon. 96.
2 Brownl.
255. S. P.
per Cur.

But if the owner does not require the host to put his horse to grafs, but the host does it of his own head, if the horse be stolen, he shall answer for it.

Roll. Abr.
4. Mollay
and Foffet.

Also, if the host upon the command of the guest puts the horse to grafs, and by the voluntary and wilful negligence of the host the horse is stolen, as if the host voluntarily leaves open the gates of the close, by which means the horse strays out,

out, and so is stolen or lost, an action (a) on the case lies against the host.

(a) This, it seems, must be intended

a special action on the case, and not on the custom of the realm; for which *vide* Rob. Ent. 23, 24. *Hern's Plead.* 250.

2. Of the Offence of selling corrupt Commodities, or at exorbitant Prices.

Inholders are restrained from selling at exorbitant prices, and may be indicted if they extort any greater or larger sums than those rates and prices that are (b) imposed on their commodities.

Carth. 150.
Skin. 291.
pl. 2. An inn-keeper indicted for taking too

great a price for oats. *Cro. Jac.* 609. (b) Proclamation was made in court for the county of *Middlesex* for the rates and prices of hostlers, viz.; hay for a night and a day for one horse 9d. with litter, hay for one day 4d. for one horse, without hay 2d. Oats 8d. by the peck, and not more. *Raym.* 162.

And to this purpose it is enacted by 21 *Jac.* 1. cap. 21. "That all hostlers or innholders shall sell their horse-bread, and their hay, oats, beans, pease, provender, and all kind of victual, both for man and beast, for reasonable gain, having respect to the gain for which they shall be sold in the markets adjoining, without taking any thing for litter. And it is further enacted by the said statute, that every hostler, and innkeeper dwelling in any town or village being a thorough-fare, and no city, town corporate, or market-town, wherein any common baker, having been an apprentice to the trade for seven years, is dwelling, may make within his house horse-bread, sufficient, lawful, and and of due assise according to the price of grain and corn. And it is further enacted, That if the horse-bread which any of the said hostlers or innholders shall make be not sufficient, lawful, and of due assise according to the price of grain and corn as abovesaid, or that if any of them shall offend in any thing contrary to this act, the justices of assise, justices of oyer and terminer, justices of peace in every shire, liberty, or franchise within this realm, sheriffs in their turns, and stewards in their leets, may inquire, hear, and determine the said offences of the said hostlers and innholders, who shall be fined for the first offence according to the quantity of the offence, and for the second offence shall be imprisoned for one month, and for the third offence shall stand upon the pillory."

Et vide 23 E. 3. c. 6. and *Hawk.* P. C. 235.

[By 2 *Geo.* 3. cap. 14. "No brewer, innkeeper, victualler, or other retailer of strong beer or ale shall be sued, empleaded, or molested by indictment, information, popular action, or otherwise, for advancing the price of strong beer or ale in a reasonable degree." But it is also enacted, "That if any brewer, innkeeper, victualler, or retailer of beer or ale, shall mix, or cause or suffer to be mixed in any vessel, &c. any strong beer, ale, or strong worts with any small beer, or small worts, or with water, after the gauge of such strong beer, ale, or strong worts shall have been taken by an officer of excise, he shall forfeit fifty pounds."]

9 H. 6. 53.
Roll. Abr.
95.

If an innkeeper sell corrupt wine or victuals, an action lies against him: also, if his servant sell such corrupt wine or victuals, an action on the case lies against the master, though he did not order the servant to sell it to any particular person.

3. Of the Offence of refusing to harbour or entertain a Guest.

Dyer, 158.
pl. 33.
2 Brownl.
254. 2 Roll.
Rep. 345.
Keilw. 50.
Palm. 367.
Godb. 146.
Salk. 388.
Carth. 150.

It has been already observed, that if one who keeps a common inn (*a*) refuse either to receive a traveller as a guest into his house, or to find him victuals or lodging, upon his (*b*) tendering him a reasonable price for the same, he is not only liable to render damages for the injury in an action on the case, at the suit of the party grieved, but may also be indicted and fined at the suit of the king.

S. P. admitted. (*a*) Without a reasonable excuse; and therefore if he refuse under pretence that his house is already full of guests, if this be false, an action on the case lies. Dyer 158. Roll. Abr. 3. (*b*) That he is not bound to let him have meat unless paid before-hand; for the host is not bound to trust. Bro. *Ailin Jur Case*, 76. Bro. *Contract*, 43. 9 Co. 87. b.

5 E. 4. 2. b.
Dalt. c. 7.
Show. 268.
Moor, 867.
pl. 1229. In
2 Brownl.
254., it is
said by Coke,
C. J. that
an inn-

Also it is said, that an innkeeper may be compelled by the constable of the town to receive and entertain a person as his guest.

Also, an innkeeper, or a person keeping a livery stable, (*c*) is obliged to receive a horse, though the owner does not lodge in his house; for by taking upon him a publick employment, he is obliged to serve the publick as far as his employment extends.

keeper is not bound to receive a horse, unless the master be lodged there.—And herewith in 1 Salk, 388. my Lord C. J. *Holt* agrees; but the other three judges differ from him, because by the keeping of the horse the innkeeper has gain, though it would be otherwise of a trunk, or other dead thing. [(*c*) But *qu.* as to a livery stable keeper? *Francis v. Wyatt*, 3 Burr. 1498. 1 Bl. Rep. 483.]

4. In what Cases chargeable for Things stolen or lost.

Dyer, 266.
8 Co. 32. a.
Poph. 178.
Noy, 79.
Latch. 179.

Innkeepers are clearly chargeable for the goods of guests stolen or lost out of their inns, and this without any contract or agreement for that purpose; for the law makes them liable in respect of the reward, as also in respect of their being places appointed and allowed of by law, for the benefit and security of traders and travellers.

Fitz. Host-
ler, 5. Bro.
Action sur
le Case, 41.

And this duty and burthen enjoined innkeepers by law, they cannot discharge themselves of, under pretence of (*d*) sickness, want of understanding, (*e*) absence from their houses, &c.

(*d*) Therefore if an innkeeper be so distempered that he is not of a sound memory, and a guest knowing thereof inns there, where his goods are stolen, an action on the case lies against the innkeeper; for he cannot disable himself by saying he was not then of a sound memory. Cro. Eliz. 622. Crofts and Andrews, adjudged. Roll. Abr. 2. S. C.—But an infant innkeeper shall not be charged, for his privilege shall be preferred and take place of the custom. Roll. Abr. 2. *Vide head of Infancy and Age*. (*e*) If the innkeeper goes abroad, he must answer for the goods of his guest; for he ought to have a servant to take care of them in his absence. 11 H. 4. 45. Roll. Abr. 4.—But if an inn is broke open, and the goods of guests taken away by the king's enemies, the innkeeper is not answerable. Plow. 9. b.

Bendl. 60.
pl. 101.
Dyer, 158.
And. 29.

But if a person comes to an innkeeper, and desires to be entertained by him, which the innkeeper refuses, because his house is already full, whereupon the party says, he will shift among the rest

rest of the guests, and there he is robbed, the host shall not be adjudged.
be charged. [But where an inn-

keeper refused to take charge of goods till a future day, because his house was full of parcels, and the owner afterwards stayed in the inn as a guest, and the goods were stolen during his stay, it was holden, that the innkeeper was bound to make good the loss. *Bennett v. Mellor*, 5 Term Rep. 273.]

It is said in *Dyer*, that if the host require his guest to put his goods in such a chamber under lock and key, and that then he will warrant their safety, else not, and notwithstanding the guest suffer them to lie in an outer court, where they are stolen, no action lies against the host; for they were not lost through the neglect of the host, but of the guest. *Dyer*, 266. Spencer's case.—But in *Moor*, 78. pl. 207. 158. pl. 299., the S. P. seems to be holden

otherwise, and that the host cannot discharge himself of this branch of his duty by such a declaration as this. a declaration

If the host delivers the key of the chamber where the goods are to the guest, and he leaves the door open, and the goods are stolen, yet an action lies against the host; for at his peril he ought to keep safely the goods of his guests. 8 Co. 33. a. in *Cayle's* case.

If the guest is robbed by his servant, or by one who comes with him, or by one who desires to be lodged with him, he shall have no action against the host; for it was the folly of the guest to keep such a servant or company, and there is no default of good custody in the host. 8 Co. 33. a. in *Cayle's* case, Cro. El. 2. 285. *Fitz. Hostler*, 1, 2. S. P.

It seems the host is answerable, though the guest does not acquaint him what goods, &c. he has. 8 Co. 33. a. 51 *em Rep.* 275. 6.

But it is said, that if an host demands of his guest what money or goods he has, and he tells him none, or less in truth than he has, if afterwards they are lost, the host is not answerable. *Moor* 158. pl. 229. *per Anderson*. But *Windham*, *periam cont.*

5. Who is such a Guest as may charge an Innkeeper.

If an host invites one to supper, and, the night being far spent, invites him to stay all night, if he is after robbed, yet shall not the host be charged; for this guest was no (a) traveller. 2 *Brownl.* 214. 8 Co. 32. b. *Roll. Abr.* 3.

S. P. *Skin*. 276. S. P. (a) By the ancient law the first day he was called a traveller, the second day a hogenhind, and the third day a menial servant, whom the host should answer in the next for, as his servant, *per Latch*. 88. See *Fortesc. Rep.*

If a man comes to an inn with a hamper, in which he hath several goods, and goes away, leaving this with the host, and (b) two days after comes again, but in the time of his absence this is stolen, he shall have no action against the host; for at the time of the stealing he was not his guest, and by the keeping of the hamper the host had no benefit, and therefore shall not be charged with the loss of it in his absence. *Roll. Abr.* 3. 338. *Cro. Jac.* 188. *Noy*. 126. S. C. adjudged between *Jelly and Clerk*. (b) Other-
wise, if he had returned the same night. *Moor*, 877. *Popa*. 179.

But if A. comes with goods to an inn in *London*, and stays there for a week, month, or longer, and is there robbed of them, he shall have an action against his host; though perhaps, being at the end of his journey, he cannot then be said *transiens*, according to the writ in the register. *Latch*. 127. *Popa*. 179. *Dyer*, 158. b. in margin.

But

- Moor, 877. But if an attorney hires a chamber in an inn for the whole term, he is *quasi* a lessee, and if robbed, the host is not answerable.
- Latch. 127. So, if a man upon a special agreement boards or sojourns in an inn, and is robbed, the host shall not answer for it.
- Hetley 49. Roll. Abr. 3. So, if the guest (*a*) deliver the goods to the host upon another account, he shall not be charged if lost or stolen.
- (*a*) But how far a man shall be charged with the safe custody of goods by a general acceptance, *vide* Co. Lit. 89. Roll. Abr. 338. and tit. *Bailment*.
- Roll. Abr. 3. If a man comes to an inn with a horse which he rides, and leaves it with the host, and goes away from the inn for several days, and in his absence the horse is stolen, yet shall the host be charged for it, because he had benefit by the continuance of the horse with him, inasmuch as he is to be paid for it, and so the owner is a sufficient guest to maintain an action.
- Secus, of goods left in an inn, because the innkeeper has no advantage by them.]
- Cro. Jac. 224. If a man's (*b*) servant, travelling on his master's business, comes to an inn with his master's horse, which is there stolen, the master may have an action against the host, because the (*c*) absolute property is in him.
- Yelv. 162. Dyer, 158. in margin. Noy, 79. Roll. Abr. 3. (*b*) But if a person takes another's horse and rides him to an inn, where he is stolen, the owner shall not have an action against the host, but must pursue his remedy against the taker. Roll. Abr. 3. (*c*) It is said, that if a common carrier is robbed in his inn, the owner, and not the carrier, shall have the action. Dalt. 8. But this, it seems, is not law, being founded on supposition that the carrier is not answerable to the owner.
- Yelv. 162. So, if *A.* sends money by his friend, and he is robbed in his inn, *A.* shall have the action.
- Latch. 127. If one joint-tenant of goods is robbed, both may have the action.
- Poph. 179.

6. Of the Manner in which he is to be charged.

- 8 Co. 32. b. The (*d*) form of the writ is thus, *cum secundum legem & (e) consuetudinem regni nostri anglie hospitatores, qui hospitia communia tenent ad hospitand. homines, &c., transseuntes, & in eisdem hospitantes, eorum bona, &c., absque subtractione seu amissione custodire tenentur, (f) quidam malefactores quendam equum (g) ipsius A. &c. (h) infra (i) hospitium ejusdem B. &c., invent. pro defectu ipsius B. ceperunt, &c.*
- (*d*) For this *vide* Reg. 104. a. 105. a. F. N. B. 94. b. (*e*) This is the course, for it is not a custom confined to a particular place, but it is such as is extensive to all the king's people. 3 Mod. 227. Fitz. Hostler, 2. Bro. *Action sur Case*, 41. (*f*) He need not name them, because by presumption of law he hath no knowledge of them. Plow. 129. a. (*g*) Per Hetley 49. it ought to be shewn that the guest *transseunt* *hospitavit*; yet *quare*; for perhaps he was at the end of his journey. Latch 127. Poph. 179., and all the entries are otherwise. (*h*) The writ was, *rcol.* of the plaintiff in *hospitio* of the defendant *hospitati ceperunt, &c.* and though objected in *hospitio* referred to the person, and not to the money, and that he might harbour in the house of the defendant, and his money be stolen elsewhere, and that it should have been *ibidem invent. ceperunt*, yet the writ was adjudged good. Fitz. Hostler 2. Bro. *Action sur le Case*, 58. (*i*) And this is well enough, though not shewn by what authority or license held. 2 Roll. Rep. 346. Palm. 374. Godb. 346.
- 8 Co. 32. a. The writ need not mention that the defendant (*k*) keeps *commune hospitium*, for it must be so intended; for the recital of the writ is, *hospitatores qui communia hospitia tenent, &c.*, and the latter words depend upon the former; (*l*) but the plaintiff ought to count that he kept *commune hospitium*.
- (*k*) In the writ he may be named yeoman, but in the declaration it must be shewn that he is a common hostler. Bro. General Brief, 16. Bro. *Action sur Case*, 58. Fitz. Hostler, 2. (*l*) *Vide* Dyer, 266. pl. 9. Hob. 245. 2 Leon. 162.

If in such action brought (a) by the master for goods stolen from his servant, the plaintiff lays the custom that innkeepers ought safely to keep the goods of their guests, and all other goods brought into their inns, the custom is sufficiently alleged to maintain the action, notwithstanding it was objected, (b) that there was no such custom to keep the goods of others safely.

writ in the register; but by the statute of *Westminster 2.* the clerks shall agree to make a special writ. *Dalf. 8, 9.* (b) That the misfeital thereof is immaterial, for it is the common law. *Latch 127. per Jones and Dod. 1 Sid. 245. Hcb. 18. 3 Mod. 227.*

Cro. Jac. 224. Beedle Morris, adjudged. Yelv. 162. S. C. (a) In this case there is no direct

If in his declaration the plaintiff lays the custom for common inns, and then lays that he was *hospitatus in hospitio, &c.*, this is well enough, for it must be intended that it was *commune*, else, it is *domus, & non hospitium*.

The declaration against an innkeeper was thus, *pred. D. com. hospit. adtunc & ibidem existen. in stabulum deliberavit* a certain gelding, to be by him safely kept, at a reasonable rate, and to be by him safely re-delivered to the plaintiff; and after verdict for the plaintiff, it was objected, that for aught appears the horse was put into the defendant's stable without his privity, in which case he is not bound to take any care of it; for the words being *pred. D. com. hospit. existen.*, may as well be taken in an ablative as dative case: but the court held, that the words being indifferent to an ablative or dative case, they ought to be taken in that case which makes the declaration good, and therefore gave judgment for the plaintiff.

Hob. 245. & vide Raft. Ent. 405. Rob. Ent. 22. 6 Mod. 223. Stanyon and Davis. Salk. 404. pl. 1. S. C. but not S. P.

(D) Of the Innkeeper's Remedies against his Guests.

Innkeepers may detain the (c) person of the guest who eats, or the horse which eats, till payment, and this they may do without any agreement for that purpose; for men, that get their livelihood by entertainment of others, cannot annex such disobliging conditions that they shall retain the party's property in case of non-payment, nor make so disadvantageous and impudent a supposition, that they shall not be paid; and therefore the law annexes such a condition without the express agreement of the parties.

son of his guest. *Show. 269.* For it would be hard to oblige him to sue for every little debt, and a greater hardship that he might not be able to find him who was his guest. — But if a person goes into an inn or tavern, and calls for wine, and goes away without paying for it, no action of trespass lies against him; for the going into the inn or tavern was lawful, and therefore the vintner must pursue his remedy by action of debt. *8 Co. 147. or on the case.*

39 H. 6. 18. 5 H. 7. 15. 2 Roll. Abr. 85. Cro. Car. 271. Carth. 150. Salk. 388. pl. 2. (c) May detain the per-

If *A.* injuriously take away the horse of *B.*, and put him into an inn to be kept, and *B.* come and demand him, he shall not have him until he hath satisfied the innkeeper for his meat; for when an innkeeper takes a horse into his keeping he is not bound to inquire who is the owner of the horse which he is obliged to keep, let him belong to whom it will, and therefore no reason that the innkeeper should be obliged to deliver him till he is satisfied.

If *A.* deliver a horse to an innkeeper, and *B.* promise, that in consideration that the innkeeper will deliver over the horse to *A.*, that

Yelv. 67. 3 Bulf. 269, 270. 2 Roll. Abr. 85. Poph. 128. 179. 2 Ld. Raym. 867.

Hutton, 101.

that he, *viz.* *B.*, will satisfy him for his meat; this is a good promise, for here is a good consideration, inasmuch as the innkeeper loses the detainer, which is a damage, and *A.* regains his horse, that is to his advantage.

Moor, 877.
2 R. ll.
Rep. 438.

An innkeeper that detains a horse for his meat cannot use him, because he detains him as in the custody of the law, and by consequence, the detention must be in the nature of a distress, which cannot be used by the distrainer.

Moor, 876.
3 Bulf. 271.
Yelv. 67.
Roll. Rep.
440.
(a) Vent. 71.
S. P. 1 Str.
557.

But by the custom of *London* and *Exeter*, if a man commit an horse to an hostler, and he eat out the price of his head, the hostler may take him as his own, upon the reasonable appraisement of four of his neighbours; which was, it seems, a custom arising from the abundance of traffick with strangers, that could not be known, to charge them with the action; (a) but the innkeeper hath no power to sell the horse, by the general custom of the whole kingdom.

2 Roll.
Abr. 85.

But if *A.* commit the horse of *B.* to a hostler in *London*, and he eat out his head, yet cannot the hostler sell him: for all customs being derogatory to the common law, are to be taken strictly; and there is no custom of *London* that hath gone so far as this case, to authorize one man to sell and convey the property of another.

2 Roll.
Abr. 85.

If a man commit his horse to an innkeeper, and he put him to pasture, he may detain the horse until he be satisfied for the meat; for the pasture of such persons, set up by the law for entertainment, hath the same privilege with the stables.

2 Roll. Rep.
438. & vide
2 Roll.
Abr. 85.

If a horse be committed to an innkeeper, it may be detained for the meat of the horse, but not for meat of the guest; for the chatelets are only in the custody of the law for the debt that arises from the thing itself, and not from any other debt due from the same party; for the law is open for all such debts, and doth not admit private persons to take reprisals.

2 Roll.
Rep. 438.
[If a horse
be once
parted with
by the inn-
keeper, he
cannot, up-
on his com-
ing in again,
detain him
for what was
due before.]

If an horse be committed to an innkeeper, and be detained by him for his meat, and the owner take him away, the innkeeper must make fresh pursuit after him, and retake him, otherwise the custody of him is lost; for he cannot retake him at any other time: for if a distress be rescued, and the party upon fresh pursuit do not retake it, the distress is lost; for no man that has only a naked custody can make a reprisal, when the thing is out of his custody; for it is in the power of an owner and proprietor, and of him only, to retake such his property, wherever he finds it.

[*Jones v. Pearle*, 1 Str. 557.]

2 Roll.
Rep. 438.

But if an horse be committed to an hostler, and he detain him for his meat, and after the owner come to an agreement that the hostler shall retain him till he is satisfied, here he hath not only the custody of him as a distress, but also the property in him as a pledge; and if the owner take it from him, he shall not only retake it upon fresh pursuit, but wherever he meets it; because he had a property by such contract, and a man that hath a property may retake his own where he meets with it.

Skin. 648.
pl. 6.

Upon evidence the case was, a man had a horse in an inn, and came thither and directed that the innkeeper should not give him any

any more food, for he would not be responsible for it; and the question was, whether for the food after this direction given by the innkeeper to the horse, he who brought the horse thither shall be charged, or not; and *Holt C. J.* at first inclined that this is a discharge, and that the horse (though he might be retained by the innkeeper) yet is but in the nature of a distress, and it being in the custody of the innkeeper in his inn, this is a pound covert, and the horse afterwards ought to be found and maintained at the peril of the innkeeper; but after, *mutatâ opinione*, he directed, that this was not a discharge; for then any innkeeper might be deceived, and it is the lessening of the security of an innkeeper, who may detain, and, by the custom of *London*, sell the horse for his keeping.

Gilber v.
Berkley.

Joint-tenants and Tenants in common.

- (A) Of the Nature of their Estates: And herein of the Difference between Joint-tenants and Tenants in common.
- (B) What Persons may be Joint-tenants or Tenants in common.
- (C) Of what Things there may be a Joint-tenancy or Tenancy in common.
- (D) How a Joint-tenancy is created.
- (E) How a Tenancy in common is created.
- (F) What Words create a Joint-tenancy, and not a Tenancy in common, & *e converso*.
- (G) Of the Duration and Continuance of the Estate, whether given jointly, or in common: And herein where the Inheritance shall be said to be joint or several.
- (H) Of the joint and distinct Interest of Joint-tenants and Tenants in common, as to Acts done by or to them: And herein,

1. In what Acts they must all join.
2. Where the Acts of one will be equally advantageous as if done by both.
3. Where the Acts of one will bind the other, whether to his Advantage or Prejudice.

(I) Of Severance and Survivorship: And herein,

1. Of the Right of Survivorship, and what Things will survive.
2. At what Time the Right of Survivorship is to take place.
3. What Disposition will work a Severance, and defeat the Right of Survivorship: And herein,
 1. *What Disposition with a Stranger will work a Severance.*
 2. *What Disposition or Conveyance by one Joint-tenant or Tenant in common, with his Companion, will work a Severance.*
 3. *At what Time such Disposition must be made to take effect.*
4. What shall be a total Severance, or but for a limited Time.
5. How far the Charges or Incumbrances of one Joint-tenant shall affect the Survivor.
6. Of Severance by Operation of Law.
7. Of Severance by Compulsion of Law; and therein of the Writ *de partitione faciendâ*.

(K) Joint-tenants and Tenants in common how to sue, and be sued: And herein of Summons and Severance.

(L) Of the Remedies which Joint-tenants and Tenants in common have against each other.

(A) Of the Nature of their Estates: And herein of the Difference between Joint-tenants and Tenants in common.

Lit. § 277.
(a) Or may be created by other conveyances, such as fine, recovery,

WHERE (a) a feoffment is made to two or more, and their heirs, or a lease is made to them for term of their (b) lives, they are joint-tenants; for being jointly enfeoffed, &c. they shall jointly hold *per mie & per tout*, and shall jointly emplead and be empleaded, which property is common between them and coparceners;

ceners ; but joint-tenants have a sole quality of survivorship which neither coparceners nor tenants in common have.

bargain, and sale, release, confirma-

mation, &c. Co. Lit. 180. b. (b) Or by other limitations, as if a rent-charge of 10 l. be granted to A. and B., to have and to hold to them two, viz. to A. until he be married, and unto B. till he be advanced to a benefice, they are joint-tenants in the mean time, notwithstanding the several limitations, and if A. die before marriage, the rent shall survive ; but if A. had married, the rent should have ceased for a moiety ; & sic e converso on the other side. Co. Lit. 180. b.

Tenants in common are those that come to the land by several titles, or by one title and several rights ; as if there be three joint-tenants, and one alien his part, the other two are joint-tenants of their parts that remain, and hold them in common with the alienee : so, if joint-tenants make several feoffments or gifts in tail, or leases for life, the feoffees, donees or lessees are tenants in common.

Lit. § 292.
Co. Lit.
189. a.

And as the essential difference between joint-tenants and tenants in common is, that joint-tenants have the lands by one joint title, and in one right, and tenants in common by several titles, or by one title and by several rights ; this is the reason, says my Lord Coke, that joint-tenants have one joint freehold, and tenants in common have several freeholds, though this property is common to them both, viz. that their occupation is undivided, and neither of them knoweth his part in several.

Co. Lit.
189. a.

Hence it appears, that the wife of a joint-tenant cannot be endowed ; as if lands are given to two men and their heirs, or the heirs of their two bodies, and one of them dies, his wife shall not be endowed, but it shall go to the survivor, who then is in from the first feoffor or donor, and may plead it as an original feoffment or gift to himself, and so is paramount her title of dower, which is not complete till her husband's death ; and one book says, it was the ancient course in mortgages to make the estate to two, in order to prevent the mortgagee's wife of dower.

3 Co. 27.
Co. Lit. 30.
a. 31. b.
37. b. Bro.
tit. Dower,
4, 84. Cro
Eliz. 503.
Perk. § 334.

But the wife of a tenant in common shall be endowed ; for there, no survivorship takes place, but each moiety (a) descends to the respective heirs of the respective tenant in common, and in such case the dower shall be assigned in (b) common too ; for she cannot have it otherwise than her husband had.

Lit. § 44,
45. Co.
Lit. 34. b.
37. b.
(a) And it
hath been
adjudged

that a writ of dower will lie against the heir of the tenant in common before partition made. Sutton and Relf. (b) And not by metes and bounds ; for which vide Brownl. 127. Roll. Abr. 682. Perk. § 413.

3 Lev. 84.
Roll. Abr. 682.

Also, if there be two joint-tenants, and one release to the other, this passeth a fee without the word heirs, because it refers to the whole fee, which they jointly took, and are possessed of by force of the first conveyance ; but tenants in common cannot release to each other ; for a release supposeth the party to have the thing in demand ; but tenants in common have several distinct freeholds, which they cannot transfer otherwise than as persons who are sole seised.

Co. Lit. 9.
200. b.

If lands be given to A. and B. and the heirs of A., B. who is only joint-tenant for life, cannot surrender his estate to A., for he is seised with him per mie & per tout.

22 H. 6. 51.
2 Roll.
Abr. 86.

If land be given jointly to two, upon condition that they shall not alien, and one of them release to the other, it is no breach of the condition.

Winch. 3.
Raym. 413.

Owen, 152.
Butler and
Archer.

If there be two joint-tenants of land holden by heriot service, and one die, the other shall not pay heriot service; for there is no change of the tenant, the survivor continuing tenant of the whole land.

Salk. 392.
pl. 4.
Reading's
case.

And although tenants in common have several freeholds, yet one tenant in common cannot disseise the other, otherwise than by an actual disseisin, as turning him out, and hindering him to enter; but a bare perception of the profit is not enough.

(B) What Persons may be Joint-tenants or Tenants in common.

Co. Lit.
180. b.

AN alien and subject may be joint-tenants, & *nullum tempus occurrat regi*; therefore, if an alien and subject born purchase lands to them and their heirs, the survivorship shall take place till office found; but the office found entitles the king, and severs the joint-tenancy.

Co. Lit.
186. a.

If a villein and another person purchase lands to them and their heirs, the lord of the villein may enter into a moiety.

Co. Lit. 189.
b. 190. a.
Moor, 202.
2 Sand. 319.

Bodies politick or corporate cannot be joint-tenants with each other, neither can a corporation, whether sole or aggregate, be joint-tenant with a natural person; and therefore, if land be given to two bishops, or abbots, or parsons, and their successors, they are tenants in common at first, and have no joint estate for life; for they take in their politick capacities in right of their churches or houses: so, if land be given to the king and a subject, and their heirs, or if the crown descend to a joint-tenant, or if lands be given to a layman and a parson, and to the heirs of one, and successors of the other, they are tenants in common, for the fee vests in them, in several capacities.

Co. Lit.
190. a.

But if a lease for years or other personal thing be given to a layman and bishop, &c., they are not tenants in common, but joint-tenants; for as no chattel personal can go in succession, they must both take in their natural capacities.

21 E. 3. 50.
b. 2 Roll.
Abr. 87.

Disseisors may be joint-tenants, and upon the death of one of them the survivor shall have the whole; for the right, such as it was, continued jointly in them.

21 E. 3. 50.
b. 2 Roll.
Abr. 87.

Infants may be joint-tenants, and if there be two infants joint-tenants, who alien in fee, and one of them die, the survivor shall have the whole; for notwithstanding the alienation, the joint-tenancy is not severed, by reason of the possibility of defeating it by writ *dum fuit infra etatem*.

Lit. § 291.
(a) A. purchased a copyhold estate, and took surrender thereof

Baron and feme may be joint-tenants; but herein it is to be observed, that husband and wife being considered but as one person in law, if an estate be made to husband and wife, and a third person, and their heirs, the husband and wife take but one (a) moiety, the third person the other.

In the names of himself, his wife, and daughter, and their heirs, which he afterwards, as visible owner thereof, mortgaged to J. S. On a bill brought by the mortgagee against the mother and daughter, to discover

discover their title and to set aside their estates as fraudulent against the mortgagee, who was a purchaser; it was holden by the court not to be fraudulent, and that the husband and wife took one moiety by entirety, which the husband could not alien, nor dispose of so as to bind the wife, and that the other moiety was well vested in the daughter. 2 Vern. 120. Buck v. Andrews.

Also, baron and feme being one person in law, there can be no Co. Lit. 187. a.
moieties between them of an estate given to them jointly during coverture; and therefore if lands be given to husband and wife, and their heirs, the husband cannot during the wife's life dispose of any part of them, but the whole must go to the survivor.

But if an estate be made to a man and a woman, and their heirs, before marriage, and after they marry, the husband and wife have Co. Lit. 187. b.
moieties between them.

And as there can be no moieties between husband and wife of an Co. Lit. 187.
estate given to them during marriage, it hath been holden, that if the husband be attainted and executed, the wife shall by her petition regain all such lands conveyed jointly to her and her husband.

If an estate be made to a villein and his wife being free and Co. Lit. 187.
to their heirs, albeit they have several capacities, viz. the villein to purchase for the benefit of the lord, and the wife for her own, yet if the lord of the villein enter, the wife surviving shall enjoy the whole; because there are no moieties between them.

It is said, that if a deed of feoffment or grant of a reversion be Co. Lit. 187.
made to them whilst sole, and then they intermarry before livery or attornment, that they take no moieties; but if they had been seised of an use by moieties before 27 H. 8. cap. 10. and such use had been executed, by the statute, they should have had the estate of the land by moieties; for they should have the estate in such plight as they had the use.

If husband and wife vouch, and recover by force of a warranty Co. Lit. 187.
made to them when sole, yet they shall have no moieties in the estate recovered.

If A. make a feoffment to the use of himself and such wife as he Co. Lit. 188.
shall marry, and afterwards take a wife, he and his wife are joint-tenants, though he were seised of a qualified fee before the marriage, and the wife had nothing; for by the marriage the contingent estate vested in them both at the same time by the said limitation. Co. 101. Dyer, 340.

If A. purchase a *walk in a chase*, and take the patent thus, to 2 Vern. 67.
himself and his wife, and one J. S., for their lives, and the life of decreed between King-
the longest liver of them, and afterwards A. die indebted, this dom and
purchase is not assets; for it shall be presumed to be intended an Bridges.
(a) advancement and provision for the wife; for she cannot be a (a) If father
trustee for her husband, and therefore she shall enjoy the benefit and son join
of it during her life; but after her decease in case J. S. should in purchase
survive her, then to be a trust for the executor of the husband, and of lands on
applied towards the payment of his debts. a valuable
consideration, and
the father afterwards devises those lands, the court of Chancery will not suppose the concurrence of the son was only in trust for the father, but that he was made joint-tenant for his own advantage; and this, it is said, was the ancient way of purchasing to avoid wardships. Chan. Ca. 28. Scroope v. Scroope.

A lease is made to A. and to husband and wife, viz. to A. for Co. Lit. 187. b.
life, husband in tail, wife for years; in this case each of the three has a several estate.

2 Co. 61. If an estate be limited to husband and wife and the heirs of the
Cro. Eliz. body of the husband, they are joint-tenants for life, and the inheritance is so executed in him, that if he makes a feoffment, this
470. 481. will be a discontinuance to his issue; but if he suffers a common
Poph. 52. recovery with single voucher, this will bind neither the issue, nor
Dyer, 9. any remainders, because his wife was seised of the whole jointly
pl. 22. Cro with him, and not of part, and there are no moieties between them,
Car. 320. and therefore it cannot be good for any part; but the feoffment
3 Co. 5. deals with the possession, and gives it away by solemn livery; and
Moore, 210. therefore to preserve the warranty, this amounts to a discontinuance,
Yelv. 131. and the issue shall be put to his *formedon in descender*, and
Lev. 37. those in remainder to their *formedon in remainder*; and if the husband levies a fine, this will bind the issue, by the statutes 4 H. 7.
Sid. 83. *cap.* 24. and 32 H. 8. *cap.* 36.

Roll. Abr. And as the husband, being jointly seised with his wife of the
346. lands, cannot alien them; so neither can he charge such lands; and therefore, where the husband in such case acknowledged a recognition, and died, it was holden, that the wife should hold the lands discharged.

43 E. 3. 10. Husband and wife may be joint-tenants of a lease for years, or
Roll. Abr. other chattel (a) real, as well as of a freehold or estate of inheritance.
349. (a) But if goods are given to a husband and wife, the wife shall not have them by survivorship, but the executor of the husband. 43 E. 3. 10. Roll. Abr. 349.

48 E. 3. 12. So, if (b) a statute be acknowledged to baron and feme, they
b. Bro. are joint-tenants of this, and the feme shall have all by survivorship.
Baron and Feme, 24.
Roll. Abr. 342. 389. S. C. (b) So, if an obligation be made to baron and feme. Roll. Abr. 342.

2 Vern. 683. Also, it hath been ruled in Chancery, that where the husband lends out money in the names of himself and his wife, upon mortgages and bonds, and dies, that the wife is entitled to the money by survivorship, if there are assets sufficient to pay the husband's debts.

Roll. Abr. But where the husband is jointly possessed of a leasehold interest,
343. or other personal thing, he may dispose of it in his life-time without the consent or concurrence of his wife.

Co. Lit. 351. But if a lease be made to baron and feme for years, the baron
Roll. Abr. cannot devise the term; for the feme is in by survivorship before the devise takes effect.
344.

10 Co. 51. Also if a lease be made to baron and feme for their lives, remainder to the survivor, or to the executors of the survivor of them, and the baron grant the term, and die, this will not bar the wife surviving; because the wife had but a possibility, and no interest.
Godb. 139.
4 Leon. 185.
Hutton, 17.
2 Roll. Abr. 48. pl. 3.
Poph. 5.
Cro. Eliz. 841. Co. Lit. 46. b. Roll. Abr. 344.

8 Co. Lit. If the baron be indebted to the king, and purchase land for
171. But in years, to him and his wife, and die, this land shall be put in execution for the debt, because the baron hath power to dispose of the term.
1 Roll. Abr. 74. this is made a
quarta

If a (a) rent-charge be granted to a man and a woman for years who afterwards intermarry, and after arrearages incur, and after the baron die, the feme shall have the residue of the rent, and also the arrearages in a writ of annuity, because they participate of the nature of the principal.

rent-service for their lives, the rent incurs, and after the baron dies, the feme shall have the arrearages incurred during the coverture. 29 E. 3. 140. Moor 887. pl. 1248. Hob. 208. Cro. Eliz. 791.

Roll. Abr. 350.
(a) So, if baron and son and feme are seised of a

If there be a baron and feme joint-tenants for life, and the baron sow the land, and die before severance, his executor shall have the emblements, and not the feme; and it is said, there is no diversity between this and where the baron is seised in right of the feme.

Roll. Abr. 727. Co. Lit. 55. b. Noy, 149. S. C. and the court divided

thereupon. Dyer 316. S. C. cited in margin to have been adjudged accordingly. Cro. Eliz. 61. cited to have been adjudged; & vide Owen 102. and 2 Vern. 322. where J. S., on his marriage settled lands to the use of himself and his wife for their lives, and of the survivor of them, remainder to the heirs of their two bodies; and the husband dying and leaving the ground sown with corn, the question was, whether the emblements on the land settled as aforesaid should go to the wife, or to the executors of the husband, and the court of Chancery proposed to each to take a moiety, which was agreed to. 2 Vern. 322-3.

(C) Of what Things there may be a Joint-tenancy or Tenancy in common.

THERE may be a joint-tenancy not only of lands and tenements but also of chattels personal, as well as real, such as leases for years, a horse, &c. for where two come to these by a joint gift or purchase they shall survive, and not go to the executors of the party.

Co. Lit. 181. b. 2 Roll. Abr. 87.

But an exception is to be made of two joint-merchants; for the wares, merchandizes, debts, or duties that they have as joint-merchants or parceners shall not survive, but shall go to the executors of the deceased; and this *per legem mercatoriam*, which is part of the laws of this realm, for the advancement and continuance of trade and commerce; which being *pro bono publico*, the rule is, that *Jus accrescendi inter mercatores pro beneficio commercii locum non habet*.

Co. Lit. 182. a.

But though there is no survivorship between merchants, yet if there are two joint-merchants, or two who are jointly possessed of goods in the way of trade, who casually lose them, and afterwards one of them dies, the survivor alone may, it seems, bring trover for them; for the action must necessarily survive, though the interest doth not, otherwise there would be a failure of justice; because the survivor and the executor of him who is dead cannot join in the action, for that their rights are of several natures, and there must be several judgments; but it being holden clearly, that if this was any plea, it must have been in abatement, for this reason the books say the principal point was not determined.

Carth. 170-1. Kemp and Andrews, Show. 183. Comb. 474-3 Lev. 290. S. C.

Also, there may be tenants in common of chattels real or personal, entire or several, as leases for years, wards, horses, &c. as when any of those who were joint-tenants of them grant

Lit. § 320. Co. Lit. 199. a.

over their interest to a stranger, the grantee and the other are tenants in common.

Co. Lit.
199. a. Also, if there be two tenants in common of a seignory, and a ward fall, they are tenants in common of the wardship as well of the body as land; and so it is, if the land escheat to them, they shall be tenants in common thereof.

Co. Lit.
190. a. If a corody be granted to two men and their heirs, in this case, because the corody is uncertain, and cannot be severed, it shall amount to a several grant, to each of them one corody; for the persons are several, and the corody is personal.

Vern. 217. If two take a lease jointly of a farm, the lease shall survive; but the stock on the farm, though occupied jointly, shall not survive; neither shall a stock used in a joint undertaking in the way of trade survive; and therefore, it is laid not to be necessary in articles of copartnership to provide against it.

(D) How a Joint-tenancy is created.

Co. Lit.
180. b. A Joint-tenancy may be created by (a) fine, recovery, bargain, and sale, release, confirmation, &c.

(a) But it is said, that a fine *sur corouzan e de droit cime coo*, &c. cannot be levied to two, and their heirs; for the end of fines being to settle the possession not only for the present, but for ever, the admittance of such fine would not answer that end; for besides the uncertainty which of the conusees should survive and enjoy the land, the fine itself cannot operate according to the limitation; for the survivor, by the privilege of joint-tenancy, shall enjoy the whole, and for ever exclude the heirs of the other conusee; besides, the fine, being equivalent to a judgment, ought to decide and settle the right of the fee. 2 Roll. Abr. 19. Co. Reading on Fines, 5. 9.

Lit. § 278. Also, a joint-tenancy may be created by (b) a disseisin; as, if Co. Lit.
180. b. two or more disseise another of lands, &c. to their own use, they are joint-tenants, but if to the use of one of them, he to whose (b) And as there may be joint-tenants by disseisin, so there may be joint-tenants by abatement, intrusion, or usurpation. Co. Lit. 181. a. & vide Vaughn. 189.

Co. Lit.
188. a. If a disseisin be made to the use of two, and one agree at one time, and another at another time, yet they are joint-tenants; for every subsequent assent is equal to a command precedent, and if both had commanded the disseisin, the first act had been the act of both, and therefore, from that act done, they are now esteemed as joint-disseisors. Co. 56.
2 Leon. 223.

Co. Lit.
188. a. Yet it is laid down as a general rule, that joint-estates must vest at once, and that, therefore, if a lease for life be made to A. remainder to the heirs of J. S. and J. N. then living, the heirs cannot be joint-tenants; but it seems that in this case they are tenants in common; for when J. S. dies, his heir hath either a sole property of the fee, or hath it with others, because there is none in being to take it with him; and if he had a sole property of the fee, it cannot alter without some act of his own; but he cannot have a sole property in the whole remainder, for that were expressly contrary to the conveyance; he must, therefore, have a sole property of the fee in a moiety, which is a tenancy in common.

But in case of a use, persons may be joint-tenants that do not take at the same time; as, if a man enfeoffs such a one to the use of himself for life, and of such a wife as he shall afterwards take, they are joint-tenants; for here, the husband has no property in the land, neither *jus in re* nor *ad rem*, but the feoffee has the whole property, at first to the husband only, and upon the contingency of the marriage, to them both entirely; and this is the only rule in equity to support the trust in the same manner the parties have limited it; and now by the statute of uses it is executed in the same form it was governed in equity.

Co. Lit. 188. a.
13 Co. 56.
Dyer 340.
Co. 101.
The unity of time, or necessity that the estate of each joint-tenant should be veited at the same period,

which is insisted upon by Sir Wm. Blackstone, 2 Comm. 180, is, if not contradicted, rendered doubtful by several authorities. Aylor v. Chep, Cro. Ja. 259. Earl of Suffex v. Temple, 1 Ld. Raym. 311-2. Stratton v. Best, 2 Br. Ch. Rep. 240.]

If a man enfeoffs or levies a fine to *A.* in fee, to the use of himself and *B.* and their heirs, they are at common law joint-tenants of the use; for the estate in a use vests according to the intent of the parties, which was to place the entire use in them, and the possession only in *A.* and since the statute executes the possession in the same manner as the use was, they are not tenants in common, as one in by the common law, and the other by the statute, but joint-tenants by the words of the statute.

Roll. Abr. 791.
13 Co. 55.
Hutton 112.

If a man enfeoffs *A.* to the use of *A.* and *B.* they are joint-tenants, though *B.* gave no consideration, because the use is disposed of expressly to him.

2 Roll. Abr. 791.

If a charter of feoffment be made between *A.* of the one part, and *B.* and *C.* of the other part, and *A.* give lands to *B.* *habendum* to *B.* and *C.* and their heirs, *C.* takes nothing by the *habendum*, because all the lands were given to *B.* and consequently, *C.* cannot hold those lands which are given before to another; but in this case if the *habendum* had been to *B.* and *C.* and their heirs, to the use of *B.* and *C.* this had been a good limitation of the use, and consequently the statute would carry the possession to the use, and *B.* and *C.* thereby become joint-tenants.

13 Co. 54.
Poph. 126.

If lands are given to a woman and the heirs of the body of her husband who is then dead, it is said that the wife and the issue of the husband are joint-tenants for life, with remainder to the issue in tail; for since they are named to take in possession with the wife, if they should only take an estate for life, the donor would have the land again, though there were still heirs of the body of the husband; and whoever answers that description is comprised within the words of the gift; therefore, they shall also have a remainder in tail.

2 Roll. Abr. 416.
6 Co. 17.

If a man has issue only two daughters, and devises his lands to them and their heirs, this, though it be a devise to the heir at law, (for so are the daughters,) makes them joint-tenants, in which survivorship shall take place; for, by the will, the quality of the estate is altered.

Cro. Eliz. 431.
2 Sid. 53.
3 Lev. 127.

If lands be devised to two, to have and to hold to one for life, and the other for years, they are not joint-tenants; for an estate of freehold cannot stand in jointure with a term for years; nor can a reversion upon a freehold, stand in jointure with a freehold and inheritance in possession.

Co. Lit. 188. a.

(E) How a Tenancy in common is created.

Co. Lit. 139. a. **T**ENANTS in common, as hath been said, are those that come to the land by several (a) titles, or by one title and several rights, and they have the possession in common, though several rights, and it may be by purchase, descent or prescription. (a) As if the one and his ancestors, or they whose estate he hath in one moiety, have holden in common the same moiety with the other tenant, which hath the other moiety, and with his ancestors, or with those whose estate he hath, undivided, time out of mind. Lit. § 310. Co. Lit. 195.

Co. Lit. 189. If there be three joint-tenants, and one alien his part, the other two are joint-tenants of their parts that remain, and hold them in common with the alienee.

Lit. § 309. So, if there be two coparceners, and one of them alien her part, the alienee and other coparcener are tenants in common.

Co. Lit. 189. b. Also, if joint-tenants make several feoffments or gifts in tail, or leases for life, the feoffees, donees, or lessees are tenants in common.

Co. Lit. 190. a. If land be given to two, *habend.* the one moiety to one and his heirs, and the other moiety to the other and his heirs, they are tenants in common.

Co. Lit. 190. b. So, if one seised in fee, enfeoff another of a moiety, or third or fourth part, without any assignment of it in severalty, the feoffee and feoffor are tenants in common.

Co. Lit. 191. If there be two joint-lessees for life, and one grant all that belongs to him to another, the grantee and the other lessee are tenants in common as long as both lessees are alive, and the lessor shall enter into a moiety by the death of either of them; because by such grant the jointure was severed; and it makes no difference in this case, if the joint-lease was made by these words *habend.* to them two for their lives, and to the survivor; for *expressio eorum quæ tacite insunt nihil operatur.*

Lit. § 304. If there be three joint-tenants, and of them release to one of the other two all his right, as to this third part, he to whom the release was made and the other joint-tenant are tenants in common; but as to the other two thirds, they continue joint-tenants as before. Co. Lit. 193. a.

(F) What Words create a Joint-tenancy, and not a Tenancy in common, & *e converso*.

2 Roll. Abr. 90. **A**S to the words which create a joint-tenancy, and not a tenancy in common, we must distinguish between the operations words have in a conveyance, and in a last will or testament, in which the intention of the testator is chiefly to govern; if therefore, an estate be given to two equally divided, or equally (b) to be divided, these words in (c) a conveyance do not make them

3 Co. 39.
2 Vern. 323.
(b) That there is no difference where it is to

them tenants in common, or sever the joint-tenancy, which was at first jointly conveyed to them.

two equally divided, and where to

two equally to be divided. 2 Vent. 365, 366. Show. Par. Cases 210. (c) Copyhold lands were surrendered to the use of A., B., and C., and their heirs, equally to be divided between them and their heirs respectively; and Gould and Turten, Justices, held it a tenancy in common, by reason of the apparent intent of the parties; but Holt, Chief Justice, held it a joint-tenancy, and that the word *equally* imported no more than to have alike, and as to the word *divided* he held, that did not import a tenancy in common, for their possession must be entire & *pro indiviso*; to divide would be to destroy it; and it is strange to create an estate from a word which implies only what would destroy it. Salk. 391. pl. 3. Ld. Raym. 622. Comyn. Rep. 88. pl. 58. 3 Salk. 206. 13. See 12 Mod. 296. But this case being cited Mich. 1730. in *Can.* in the case of Stringer and Phillips, was said to have been reversed, according to Lord Holt's opinion. [But Lord Hardwicke says in *Rigden v. Vallier*, 2 Vez. 256., that upon search, he could not find that this judgment was reversed, or that a writ of error was brought. And in cases of surrenders of copyholds, it seems to be an acknowledged authority. *Rigden v. Vallier*, *ubi sup.* Goodtitle v. Stokes, 1 Willf. 341. Denn v. Gaskin, Cowp. 660.]

Therefore it hath been holden, that in case of a conveyance, there are but two ways of making a tenancy in common: 1st, Either by limiting the estate to take expressly as tenants in common: Or, 2^{dly}, By limiting a moiety, or a third, or other undivided part to one, and the other moiety or a third to another, &c. and that the words *equally divided* or *equally to be divided*, would not create a tenancy in common in a deed; but they should be joint-tenants where the chance of survivorship is equal, and that chance is the meaning of the words *equally to be divided*, or an equal perception of the profits.

Stringer v. Phillips, 1730. at the Rolls.

Also, if a man make a feoffment in fee of 20 acres to A. and B. *habendum* one moiety to A. and the other moiety to B. this *habendum* makes them tenants in common; for though the premises be joint, and therefore of themselves would operate to give a joint estate and possession, yet the *habendum* explaining the manner of possessing, is not inconsistent or repugnant, because it makes no division of that undivided possession which was given in the premises.

Co. Lit. 138. b. 190. b. Hob. 172.

But if a man conveys his house and four farms to trustees, upon trust that his two sisters may cohabit in the capital house, and equally divide the rents and profits of the four farms betwixt them and the whole to the survivor of them, this shall be a joint-tenancy; for although the words *equally to be divided betwixt them* do sometimes in a will make a tenancy in common, yet it is only by way of construction, and in compliance with the intent of the testator (a).

2 Vern. 323. Clerk v. Clerk. [(a) For if the context of the will manifests a contrary intention, these words will not]

have that effect. As, where a testator devised the residue of his estate to trustees, in trust to pay the interest and profits thereof to his four grand-daughters, equally between them, share and share alike, for and during their respective natural lives; and after the decease of the survivor of them, in trust to pay the principal money to and among the children of his said grand-daughters, equally to be divided between them, share and share alike; and two of the grand-daughters died, leaving children; it was holden, that the two living grand-daughters took the whole interest by survivorship, for that notwithstanding the words "equally to be divided, share and share alike," the context shewed that a joint-tenancy was intended, as the interest was to be divided amongst four whilst four were alive; amongst three, whilst three were alive; and nothing was to go to the children whilst any of their mothers was living. *Armstrong v. Eldridge*, 3 Br. Ch. Rep. 215.—But it is not only in wills, that the words "equally to be divided," import a tenancy in common: they admit of the same construction in deeds, which receive their operation from the statutes of uses. *Fisher v. Wigg*, 1 P. Wms. 14. *Rigden v. Vallier*, 2 Vez. 252 & 3 Atk. 371. *Goodtitle v. Stokes*, 1 Willf. 341. *Denn v. Gaskin*, Cowp. 660. It is otherwise in common law conveyances. *Stones v. Hartley*, 1 Vez. 165.; for although deeds to uses must be construed like common law conveyances, as to words of limitation, yet Lord Hardwicke said, that as to words of regulation or modification of the estate, he saw no harm in construing them differently. *Rigden v. Vallier*,

Vallier, 2 Vez. 257. But this doctrine, that deeds of uses are to receive a different construction from common law conveyances, hath been impugned by a late decision. Stratton v. Eest, 2 Br. Ch. Rep. 233. See too Staples v. Maurice, 7 Br. P. C. 48.]

Moor 558. Thus a devise to two equally, and their heirs, was holden to make them tenants in common; for in a will the intention of the testator is to govern, and no words which have a meaning and tend to illustrate his intention can be rejected; and therefore, the word *equally* must be construed to have been inserted to make them tenants in common, else it can have no meaning at all; and in this case it was said by one of the judges, that if the word *equally* had come after the devise to the two and their heirs, it had been more strong to make them joint-tenants than tenants in common.

Abr. 89. several cases to this purpose. [2 Vez. 256. Cowp. 657.]

Lit. Rep. 46. So, a devise of several houses to five, their heirs and assigns, all of them to have part and part alike, the one of them to have as much as the other, was holden a tenancy in common.

Collins. Cro. Car. 75. S. C. adjudged.

Cro. Jac. 448. King v. Rumbal, Roll. Abr. 833. S. C. 2 Roll. Abr. 89. S. C. 3 Co. 37. So, where a man devised to his wife for life, and after her decease to his three daughters, equally to be divided, and if any of them die before the other, then the survivors to be her heirs, equally to be divided; and if they all die without issue, then to others, &c. it was holden, that the daughters were not joint-tenants, but that they had several inheritances in tail.

S. P. reversed. 3 Mod. 210. S. C. cited, and like point reversed.

3 Lev. 373. So, if a man devise lands to his two sons and their heirs for ever, and the longer liver of them, to be equally divided between them after his wife's death, this shall be a tenancy in common in the sons: adjudged by three judges (a) against one, and that the latter words being in a will shall controul the former.

[[a] The opinion of the three judges, hath been confirmed by Lord Hardwicke in Stones v. Heartly, 1 Vez. 165. But where a testator devised lands to trustees and their assigns, till A. and B. attain twenty-one, to receive the rents, and apply them to their maintenance; and then to A. and B. for their lives without waste, and from and after their deceases to the use of the heirs of A. and B. as tenants in common, and not as joint-tenants; it was holden, that A. and B. were joint-tenants for life. Trodd v. Downs, 2 Atk. 304.]

Heathe v. Heathe, 2 Atk. 121. [b] Trundell v. Eames, before Lord Bathurst, [So, a devise to and amongst all the children *respectively*, male or female, of the testator's brother and sister, hath been holden to make a tenancy in common by reason of the word *respectively*: it appears indeed from a later case (b), that the word "amongst" would of itself sever the interest.]

11 Feb. 1773, cited in 4 Br. Ch. Rep. 17.

Sheppard v. Gibbons, 2 Atk. 441. So, where a testator devised an estate in trust for his three sisters, and as they should severally die, he gave the premises to their several heirs; Lord Hardwicke held, that the words, as they severally die, &c. imported a tenancy in common.

Ettricke v. Ettricke, Amb. 656. So, where there was a devise of the profits of freehold and leasehold estates, in trust for the testator's six younger children, to be distributed among them in joint and equal proportions; it was holden, that the children took as tenants in common; that the

the word "joint" was not to be considered as giving a joint interest; but the same as if the testator had said, "to my children all together."

So, where a sum of money was bequeathed to two persons, *jointly and between them*; the words "between them" were adjudged to sever the interests, and prevent a survivorship.

But where a testator gave two thirds of a residue *unto and amongst* the children of *A.* and *B.* and the remaining third to the children of *C.* it was holden, that though the children of *A.* and *B.* took as tenants in common, yet that from the omission of the words of severance in the bequest to the children of *C.* they took as joint-tenants.]

A man having three sons, *William*, *John*, and *Daniel*, and lands in *D. S.* and *E.* devised his lands in *D.* to his son *John* and his heirs, and his lands in *S.* to his son *Daniel* and his heirs, and devised that his wife should have all his freehold lands for five years, paying 10*l.* a year to *John*, and 6*l.* a year to *Daniel*; and if either of his three sons died before the five years expired, they to be divided equally by them that should be living: *William* and *John* both died during the five years; and it was holden, that *William's* part, who died first, should be divided betwixt *John* and *Daniel*, and they should be tenants in common thereof; but it was likewise holden, that when *William* was dead, and his part divided, that that clause was executed, so that upon the death of the second, the will would not carry his part to the third.

In trespass for breaking and entering the plaintiff's close, it was found by special verdict, that *A.* was seised in fee of such a place, whereof the close in question was parcel, and being so seised, made his will in writing, wherein, *inter alia*, he gave to *Jane* the wife of *B.* and to *Elizabeth* the wife of *C.* all his estate, &c. to be equally divided between them, during their natural lives, and after the deceases of the said *Jane* and *Elizabeth* to the right heirs of *Jane* for ever; and found further, that the said *Jane* and *Elizabeth* were heirs at law to the said *A.* and that after the death of *A.* their husbands entered in their rights; that *Jane* died before the trespass, one of the defendants being her issue and heir, and that *C.* entered into the whole in right of *Elizabeth* his wife, and let to the plaintiff, and thereupon the defendant entered; and the only question was, whether this devise made *Jane* and *Elizabeth* joint-tenants for life, so as upon the death of *Jane* the whole survived to *Elizabeth* for life; or whether upon the words *equally to be divided between them*, they were tenants in common, so as a cross-remainder of the moiety was not to go to the heirs of *Jane* till after the death of *Elizabeth*: and it was argued for the plaintiff, that though the words *equally to be divided* do often in a will make a tenancy in common, yet it is not so much the words themselves, as the intention of the testator, that makes such an estate; for they have no force of themselves to make such an estate, but according to the intent of the testator; for a joint-estate is equally liable to be divided with an estate in common, 1 *Inst.* 186. and one joint-tenant has no more than a moiety to grant, to charge or

Perkins v.
Baynton,
1 Br. Ch.
Rep. 113.

Campbell v.
Campbell,
4 Br. Ch.
Rep. 15.

Hill, 15 &
16 Car. 2.
in B. R.
Ride v. At-
wick, Keb.
692. 754.
773. S. C.

Trin.
6 Annæ, in
B. R. Tuck-
ermon and
Jefferies.
11 Mod. 108.
S. C.
Holt 370.
S. C.

to dispose of; and therefore the words *equally to be divided* are no more than what the law implies; and the only difference between joint-tenants and tenants in common is the conveyance by which they claim. *Lit. sect.* 292. 298. And in this case being in a will, if it had gone no farther than to be equally divided between them, it was agreed it would have been a tenancy in common. *Styl.* 211. 2 *Roll. Abr.* 89, 90. But here was a manifest intent that it should go to the survivor; for it is limited after the deceases of the said *Jane* and *Elizabeth* to the right heirs of *Jane*; which is as if he had said, to them and the survivor of them, for their lives; for the right heirs of *Jane* are to take nothing till *Jane* and *Elizabeth's* death, and they are to take the whole estate at the same time, and not one moiety at one time, and another at another; and if his intent had been so, he would have said so, *viz.* And after the decease of them, or either of them; for in such case if the devisees should take as tenants in common, the remainder in the one moiety must be contingent; so that if the tenant in common in fee should survive the other tenant in common for life, the remainder to the right heirs of *Jane* will be void as to the other moiety, and there is no other way to make the whole devise good, but by making them joint-tenants for life; and admitting they were tenants in common, yet the defendant has no title but to the moiety till after both their deaths, which has not happened, *Elizabeth* being still living; and to this purpose were cited *Moor* 7. 4 *Leon.* 14. 2 *Jones* 172. *Raym.* 452. *Holmes*, and *Meynel*.

On the other side it was argued, that they were tenants in common, and that in a will the words *equally to be divided between them* have been always construed to make a tenancy in common, because of the intent of the testator, which in a will is chiefly to be regarded; as, if one devise lands to one and his assigns for ever, this passes a good estate in fee: besides, in this case there was no intent to make them joint-tenants; for, 1st, There are no words of survivorship; for the words *after the deceases of the said Jane and Elizabeth*, are no more than what the law would have implied, for it could not take effect otherwise for the whole, as it will do when it is limited to a stranger, and his heirs, and if he die without issue, then to *B.*; and these words in the principal case do not carry a necessary implication that they should be joint-tenants; for in the mean time it may descend to the heir at law, as to a moiety; and the reason why *equally to be divided* makes a tenancy in common in a will is because otherwise those words would be idle, for they import a division in the interest. 3 *Lev.* 373. *Styl.* 434. *Bendl.* and *Dalif.* 77.

Holt, C. J. pronounced the opinion of the court, that they were joint-tenants, notwithstanding the words *equally to be divided between them*, and the lands ought to survive to *Elizabeth*: 1st, For though upon such words generally they are tenants in common, yet if it should be so in this case it would be expressly against the intent of the testator, and would defeat the heirs of *Jane* of part; for they are to take all together, and not by moieties, one, at one
time

time, and one, at another, but all at once; and if they should be tenants in common, they must take by moieties at several times. 2dly, It is express that the heirs of *Jane* are not to take till after both their deceases. 3dly, If they should be tenants in common, then the heirs of *Jane* would be in danger to lose a moiety; for as to that one moiety, it must be a contingent remainder; so that if *Elizabeth* should die during the life of *Jane*, the contingency for that moiety not happening, it must descend to the heirs at law of the testator, who are *Elizabeth* and the issue of *Jane*, as coparceners. 4thly, *Jane* and *Elizabeth* are heirs at law to the testator, and as such the whole would have descended to them in coparcenary, if no will had been made; but here by this will it is plain the testator intended to prefer the heirs of *Jane* to the whole; and it was adjudged for the plaintiff.

A. devised lands to trustees, and their heirs in trust that the profits should be equally divided between his wife and daughter during the wife's life, and after her death he devised the same to the use of his daughter in tail, with remainders over; the daughter died during the mother's life; it was holden in (*a*) Chancery, that this was a tenancy in common, and should go to the administrator of the daughter during the mother's life, and should not be a resulting trust for the benefit of the heir.

must take place as well in equity as at law.

J. S. devised a term for years, and all her interest therein to her two daughters, they paying yearly to her son 25*l.* by quarterly payments, viz. each of them 12*l.* 10*s.* yearly out of the rents of the premises during his life, if the term so long continued; and my Lord Chancellor held it clearly a tenancy in common, the 25*l.* being to be paid by the two daughters equally in moieties.

A man having a mortgage for years makes his will, and thereby devises all his personal estate, of what nature soever, to his executors, in trust for the payment of his debts, and afterwards devises the residue and overplus of his personal estate to his two daughters, equally to be divided between them, and dies; the debts being satisfied, the daughters contract with the mortgagor for the purchase of the equity of redemption to them and their heirs; one of the daughters devises her share and interest to the plaintiff, and dies; and it was holden, that this purchase of the equity of redemption and inheritance was a tenancy in common, the mortgage devised to the daughters being so, and this purchase being founded on the mortgage.

J. S. devised his leasehold house to his wife for life, and after her death he devised it to *A.* and her three sons equally amongst them; and it was decreed, that they took it as tenants in common, though there was no mention of any division to be made.

A man assigns a term to trustees, in trust to permit himself to receive the profits thereof during his life, and after his death in trust to permit his two daughters *B.* and *C.* their executors and administrators to receive the profits during the residue of the term,

2 Vern. 430.
Phillips and
Phillips.
Preced.
Chan. 167.
S. C.
(*a*) *Vide*
2 Vern. 556.
where it is
holden, that
survivorship

Vern. 353.
Kew and
Rouse.

Abr. Eq.
292. Ed-
wards and
Fashion,
Preced.
Chan. 332.
S. C.

Abr. Eq.
2 2 War-
ner v. Hone.

Preced.
Chan. 153;
Hamel v.
Hunt.

term, equally to be divided between them, they paying so much within two years to his two other daughters: it was holden, that this being a trust of a personal thing, they were tenants in common, the father's intention appearing to be to make several and distinct provisions for his two daughters; and paying the sums appointed to the sisters makes them purchasers.

Carth. 15.
25 Can.

One devises 200 *l.* to be laid out in the purchase of lands, and settled by trustees to the use of her daughter, and the heirs of her body, and if she died without issue, then to the use of the children of *A.* (who then had issue *B.* and *C.*); the daughter died without issue before the money was laid out, after whose death the trustees laid out the money in a purchase of lands, and settled the same on *B.* and *C.* jointly in fee according to the will, who accordingly enjoyed the same for some time; and one of them dying, it was holden, that this was a joint-tenancy, which went to the survivor: But it is said to have been holden by the court, that if the money had not been actually laid out in a purchase, the survivor would have been entitled but to a moiety only.

At the head of
Trusts.

Carth. 16.

Also it is said, that if 500 *l.* a-piece is devised to two legatees, who take a mortgage jointly to them both, for securing the payment of their legacies with interest, and one of them dies, the other shall have nothing by survivorship, because in this case the mortgagees are trustees for each other, and the mortgage, which is only as a security, makes no alteration in the case.

Abr. Eq.

292-3.
Stringer and
Phillips, at
the Rolls.

[The words
of the decree
in this case
are these:

"His ho-

"nour de-

"clared,

"that the

"devise of

"the said

"100*l.*, af-

"ter the

"death of

"the said

One devised 100 *l.* to five, equally to be divided between them and the survivors and survivor of them, and if *A.* (one of the five) died before marriage, her share to go over to another person: it was decreed, that they took this 100 *l.* as tenants in common, and that the words *and the survivors or survivor of them* to make them joint-tenants would be a contradiction to the first words, whereby they were made tenants in common, and that they should be construed to extend only to such as were survivors at the death of the testator, and thereby inserted to prevent a lapse; and this is the stronger by the limitation over of *A.*'s share upon a contingency, by which it is plain the testator did not intend her to be a joint-tenant with the rest, and as the devise was to all five, they must all take alike, and not *A.* be tenant in common, and the other four joint-tenants.

"testator's sisters *Lucy* and *Katherine*, unto the said *Margaret Wiskey*, *Mary Harris*, *Elizabeth Tucker*, *Mary Parker*, and *Alice Stringer*, to be equally divided between them, and the survivors, and survivor of them is a tenancy in common, and not a joint-tenancy, and that the words *survivors* and *survivor of them*, are to be understood of such of them as shall be living at the testator's death."

Reg. lib 1730. fol. 177. In wills, the courts have been apt to construe *survivorship* into some other meaning than a joint-tenancy, and have therefore laid hold of some particular time. In *Lord Bindon v. Earl of Suffolk*, 1 P. Wms. 96., Lord Cowper referred it to the death of the testator, as in the above case of *Stringer v. Phillips*: but the House of Lords reversed his decree, referring it, from the nature of the debt which was the subject of the bequest, to the time of payment; concurring with him, however, in the propriety of some particular time. 1 Vez. 14. In *Haws v. Haws*, 3 Atk. 524., and 1 Vez. 14., Lord Hardwicke fixed the time to the devisees dying under twenty-one, there being a precedent clause in the will in which the testator had made a similar disposition of his personal estate, and given the benefit of survivorship at that period. In that case, Lord Hardwicke is made to say, that the construction of Lord Cowper, in *Bindon v. Suffolk* was too nice, though if no other reasonable construction could be put on the words, the court ought to resort to it. That construction, however, hath been adopted in a later case, where the words "*survivors and survivor*" were holden to relate to the death

death of the testator. *Rose v. Hill*, 3 Burr. 1881. See further as to this point, *Earl of Salisbury v. Lambe*, Ambl. 383. *Wilson v. Bayly*, 5 Br. P. C. 388.]

It seems to be the doctrine of the courts of equity, that where two or more purchase lands, and advance the money in equal proportions, and take a conveyance to them and their heirs, that this is a joint-tenancy, that is, a purchase by them jointly of the chance of survivorship, which may happen to the one of them as well as to the other: but where the proportions of the money are not equal, and this appears in the deed itself, this makes them in the nature of partners, and however the legal estate may survive, yet the survivor shall be considered but as a trustee for the others in proportion to the sums advanced by each of them: so, if two or more make a joint-purchase, and afterwards one of them lays out a considerable sum of money in repairs or improvements, and dies, this shall be a lien upon the land, and a trust for the representative of him that advanced it; and in all other cases of a joint undertaking or partnership, either in trade, or any other dealing, they are to be considered as tenants in common, and the survivors as trustees for those who are dead.

As, where the commissioners of sewers had sold and conveyed lands to five persons, and their heirs, who afterwards, in order to improve and cultivate those lands, entered into articles, whereby they agreed to be equally concerned as to profit and loss, and to advance each of them such a sum to be laid out in the manurance and improvement of the land; it was holden, that they were tenants in common, and not joint-tenants, as to the beneficial interest or right in those lands, and that the survivor should not go away with the whole; for then it might happen that some might have paid or laid out their share of the money, and others, who had laid out nothing, go away with the whole estate.

*If a joint-estate is assigned in trust, and one of the *cestui que trusts* dies, the trust survives for the benefit of the surviving *cestui que trusts*, against the creditors of the deceased, in equity as well as law.*

(G) Of the Duration and Continuance of the Estate, whether given jointly, or in common: And therein where the Inheritance shall be said to be joint or several.

IF an estate is limited to husband and wife during their joint lives, this is no absolute estate for their lives, so as to go to the survivor; but the death of either of them determines that estate.

If a man covenants, grants, demises, and to farm lets land to A. and B. and the heirs of B. *habendum* to A. and B. for 300 years, this is but a term for years in A. and B. though there be words of inheritance; for it was plainly the intention of the lessor to create a term only by his using the common words of demise;

Vide Vern.
33. 217.
361. [*Rigden v. Val-lier*, 3 Atk. 731. 2 Vez. 258. S. C. *Partridge v. Pawlett*, 1 Atk. 467. 2 Atk. 55. S. C. *Hall v. Digby*, 4 Br. P. C. 224.]

Abr. Eq.
290-1. *Lake and Gibson*, 3 P. Wms. 158. S. C.

Rex v. Williams, Bunb.
342.

5 Co. 9.
Sid. 247.
Raym. 126.

2 Co. 23. 24.
Baldwin's case.
And, 223.
Owen, 48.

mise; besides, the lessees by the premises could have but an estate at will, because the words of inheritance in the premises of the deed were not sufficient to carry the freehold without livery which was not made in this case.

2 Roll. Abr.
150.

If a lease be made to *A.* and *B.* for their lives, and the life of the longer liver of them, and they make partition, and then *A.* die, the lessor shall enter into his part, and there can be no occupancy, for *B.* has no title to it, because the right of survivorship was lost by the partition, which destroyed the joint-tenancy; nor will the words *to the longest liver* be of any use to *B.* because they were void at first, being no more than the law implied in their joint-estate; nor can there be any occupancy, because after the partition each of the lessees hath but an estate for his own life in his respective moiety, and consequently the reversion, which is to commence when the particular estate determines, must necessarily take place.

Lit. § 285.

If a lease be made to two, and to the heirs of one of them, they are joint-tenants for life, and one has a freehold, and the other a fee; and if he that has the fee die, the survivor shall hold the whole during his life.

Lit. § 283.

If lands be given to two men and the heirs of their bodies begotten, they have but a joint-estate for life, and several inheritances; for though the gift be limited to the descendants of their bodies, yet it being impossible there should be one descendant of both their bodies, they cannot have a joint estate-tail.

So, if lands be given to one man and two women, and the heirs of their body begotten, they have a joint-estate for life, and several inheritances, because there can be no one issue of both the women's bodies; and if the man should marry one of them, yet it is not limited in the donation which of them, in case of such intermarriage, should first take.

Flow. 35. a.
Co. Lit. 183.

So, if land be given to two men and their wives, and the heirs of their bodies begotten, they have a joint-estate for life, and several inheritances, but no joint-estate in tail; because though the husband and the wife of the other may die, and the survivors may marry, yet the gift being made to them all, and the heirs of their bodies, it is impossible that there should be one heir or descendant of all their bodies, and therefore it can be no joint-estate in them all, but they all four take jointly for life, and each husband and his wife have a several inheritance in a moiety.

Co. Lit. 25.
b. Bro. Estate 22.
Tail, 16.

But if land be given to a man and a woman unmarried, and the heirs of their bodies, this is a tail special, for the possibility that they may marry, and then the descendants of that marriage only can inherit: So, if the gift be made to a man that hath a wife, and to a woman that hath an husband, and the heirs of their bodies, this is a tail special presently in them, for the possibility that they may marry, and the descendants of such marriage may inherit according to the limitation of the gift.

3 H. 6. 48.
7 H. 7. 16.
(a) So, if
lands be

If an estate be limited to husband and wife, and the heirs of their bodies, and they are divorced *a vinculo matrimonii*, they are only tenants for life, because they shall not be (a) presumed

fumed to intermarry after they are once legally divorced by church censures.

given to a man and his mother, and

the heirs of their bodies begotten, they have but a joint-estate for life; but in this case, the mother and son have several inheritances. Co. Lit. 184. a.

And in all the cases above-mentioned where the inheritances are several, the reversion depending thereon is several also; and if any of the donees die without issue, the donor shall after the death of all the donees enter into a moiety, or a third part, &c.

Co. Lit. 183. b.

If lands be given to two men, and the heirs of their bodies begotten, remainder to them two and their heirs, they are joint-tenants for life, tenants in common of the estate-tail, and joint-tenants of the fee.

Co. Lit. 183-4.

[If lands be given to two men and the survivor of them, and their heirs, equally to be divided between them, share and share alike; they are joint-tenants for life with several inheritances.

Barker v. Giles, 2 P. Wms. 280. 3 Br. P. C. 297.

If an estate be given to two and the survivor of them, and the heirs of the survivor, they are not joint-tenants in fee, but have only an estate of freehold during their lives, with a contingent remainder in fee to the survivor.

Vick v. Edwards, 3 P. Wms. 372. See Fearne's Contingent Remainders 4th ed. 522. Co. Lit. 15th ed. 191. note 1.

But where there was a devise to three persons, to have and to hold to them as *joint-tenants*, and the survivors and survivor of them *and the heirs and assigns of such survivor for ever*, it was holden to be a joint-tenancy in fee.]

Goodtitle v. Layman, K. B. Tr. 12 G. 3. ub. sup.

(H) Of the joint and distinct Interests of Joint-tenants and Tenants in common, as to Acts done by or to them: And herein,

1. In what Acts they must all join.

IF a feoffment be made to two or more jointly, they shall all do homage and fealty; but if a feoffment be made by them, homage and fealty done to any one of them is sufficient.

Co. Lit. 67. b.

Joint-tenants or tenants in common of an advowson are regularly to join in presentation; and therefore if one joint-tenant or tenant in common present, or if they present severally, the ordinary may either admit or refuse to admit such a presentee, unless they join in presentation, and after the six months, he may, in that case, present by lapse.

Co. Lit. 186. b. Where joint-tenants of an advowson made partition by deed of covenant

to present by turns, and held good. Carth. 505. Ld. Raym. 535. 12 Mod. 321. Salk. 43. pl. 1.

If one tenant in common of an advowson present alone, this doth not put the other out of possession, for at the next avoidance they may join in presentment.

2 Roll. Abr. 372. And. 63.

Or if there be two joint-tenants seised of an advowson, and the one present without the other, this is no (a) usurpation upon

27 H. 8. 11. b. Co. Lit. 186. b. (a) So, if

there be two joint-tenants, and the one present the other, upon his companion, but he may allege this presentment in a *quare impedit* as a title for himself to the next avoidance, and this by reason of the privity there is betwixt them. *14 H. 8. 2. b.*

Co. Lit. 168. Joint-tenants and tenants in common may, according to the interests they have, join or sever in making leases, and such leases shall bind whether made to commence *in presenti* or *futuro*.
 Bro. tit. Grants, 154.
 Roll. Abr. 848.

2 Roll. But if there be two joint-tenants, and they make a lease by parol or deed poll, reserving rent to one only, yet it shall enure to both; but if the lease had been by deed indented, the reservation should have been good to him only to whom it was made, and the other should have taken nothing. The reason of the difference is this: Where the lease is by deed poll or parol, the rent shall follow the reversion, which is jointly in both lessors, and the rather, because the rent being something in retribution for the land given, the joint-tenant to whom it is reserved ought to be seised of it in the same manner he was of the land demised, which was equally for the benefit of his companion as himself; but where the lease is by deed indented, they are estopped to claim the rent in any other manner than is reserved by the deed, because the indenture is the deed of each party, and no man shall be allowed to recede from, or vary, his own solemn act.

Roll. Abr. 877. If two tenants in common of lands join in a lease for years by indenture of their several lands, this shall be the lease of each for their respective parts, and the cross confirmation of each for the part of the other, and no estoppel on either part, because an actual interest passes from each respectively, and that excludes the necessity of an estoppel, which is never admitted if by any construction it can be avoided, as being one of those things which the law looks upon as odious, because it chokes and disguises the truth.

2. Where the Acts of one will be equally advantageous as if done by both.

Co. Lit. 70. b. If there be two joint-tenants who hold by knight's service, and one of them perform the service by going with the king to war, &c. this shall suffice for both; for though they be two tenants, yet they hold only by one tenure.
 2 Init. 34.

Owen, 152. If there be two joint-tenants of land holden by heriot-service, and one die, the other shall not pay heriot-service; for there is no change of tenant, the survivor continuing tenant of the whole land.
 Butler v. Archer.

Salk. 285. It hath been holden, that the possession of one joint-tenant is the possession of the other, so far as to (a) prevent the statute of limitations.
 pl. 17.
 6 Mod. 44.
 [So, in the

case of tenants in common. In order to enable the statute of limitations to run, there must be an adverse possession; a disseisin, and a disseisin strictly proved: the bare taking of the profits by the one is not an actual disseisin. Reading v. Rawlsterne, 2 Ld. Raym. 830. Fairclain v. Shackleton, 5 Burr. 2604. But the perception of rent and profits, though not of itself an actual ouster, seems to be evidence of an ouster;

ouster; and therefore Lord Hardwicke said, that a fine and non-claim by one tenant in common will bar his companion, if he do not call the person levying it to an account of the profits. *Story v. Lord Windsor*, 2 Atk. 632. *Earl of Suffex v. Temple*, 1 Ld. Raym. 312. And in the case of *Doe v. Prosser*, Cowp. 217., it was adjudged, that an uninterrupted possession for thirty-six years by one tenant in common of the rents and profits without any account to, demand made, or claim set up by, his companion, was sufficient ground for a jury to presume an actual ouster of such companion; and it was said, that in the above case of *Fairclain v. Shackleton*, a possession of twenty-six years by receipt of rents and profits, was holden not to be an actual ouster of the co-tenant, because it was a fact which the jury had not found, which it had not been left to them to presume, and which, therefore, the court could not presume.] (a) So, if two joint-tenants be disseised, and one enter, this is in law the entry of both, and so it shall be pleaded. *Bridgm.* 129.

Also, if two joint-tenants be of an advowson, and the one present to the church, and his clerk be admitted and instituted, this, in respect of the privity, shall not put the other out of possession; but that if that joint-tenant who presenteth dieth, it shall serve for a title in a *quare impedit* brought by the survivor. Co. Lit. 186. b.

If there be two joint-tenants by disseisin, abatement, or intrusion, and the disseisee or owner of the land release to one of them, this, shall enure only for the benefit of him to whom the release was made, who being seised *per mie et per tout* is capable of such a release, and by the delivery of the release the whole freehold and inheritance by operation of law vesting in him, the interest of his companion, being by wrong, is immediately devested and vanishes. Lit. § 306, Co. Lit. 194. a.

But if two men usurp by a wrongful presentation to a church, and their clerk is admitted, instituted, and inducted, and the rightful patron releaseth to one of them, this shall enure to them both, for that the usurpers come not in merely by wrong, but their clerk is in by admission and institution, which are judicial acts. Co. Lit. 194.

So, if a man be disseised, and the disseisor make a feoffment to two men in fee, if the disseisee release by his deed to one of the feoffees, this release shall enure to both the feoffees, because they come in by title and purchase, and not by wrong, and are presumed to have a warranty annexed to their estate, which is greatly favoured in law. Lit. § 207, Co. Lit. 194. b.

If a feoffment be made to *A.* and *B.* by deed, and livery be made to *A.* in the absence of *B.* in the name of both, the livery is good to pass the estate to both; but if the feoffment had been without deed, and the livery given to one in name of both, it should operate to him only; because the parties are united in a deed, they all take as one; therefore livery to one in the name of the rest, is an actual delivery to them all; but without deed they are not so united; and therefore the delivery to one in the name of several, is no actual delivery to the rest, but the whole estate must reside in him to whom it is delivered, and a subsequent assent cannot take it out of him, such assent being not so solemn as the feoffment; besides, in the case of the feoffment by deed *A.* may be looked upon as the attorney of *B.* to receive livery, and therefore the estate shall immediately vest in *B.* because every man is presumed to assent to a grant for his advantage; but the feoffment without deed will admit of no such construction, because no man can receive livery as attorney to another without an appointment by deed. Co. Lit. 49, b. 359. 2 Vent. 202. 205. 5 Co. 95. a. 2 Roll. Abr. 9. 2 Leon. 23. Mutton's case.

Co. Lit. 49.
2 Roll.
Abr. 8.

So, if a feoffment be made to *A.* and *B.* and the feoffor give a letter of attorney to deliver seisin, and the attorney give livery to *A.* in the absence of *B.* in the name of both, this is a good livery; for though the entire possession be delivered to one only, yet they being joint-tenants by the deed of feoffment, such livery to one makes no alteration or change of the possession, because if the livery had been made to both, each had been placed in the possession.

Co. Lit. 49.
5 Co. 94.
2 Roll.
Abr. 8.

So, if a lease for years is granted to *A.* and *B.*, the remainder to *C.* in fee, and livery is made to *A.* in the absence of *B.* whether the conveyance be by deed or without, the livery is good, and vests the remainder in *C.* because by the bare demise *A.* and *B.* have an interest, each being equally entitled to the whole possession, either may invest himself in the whole possession by entry, or receive the possession from the lessor by the solemnity of livery; and therefore when the whole possession is delivered by the lessor, and livery is made to *A.* in the absence of *B.* in the name of both, this livery is sufficient to vest the remainder in *C.* because *A.* had as much power to receive the possession of the whole, as if the lease for years had been made to him only, he and *B.* being joint-tenants by the demise, and thereby seised *per mie & per tout*.

Yelv. 1. ☞
vide cit.
Copyhold.

If a surrender be made of a copyhold estate to *A.* and *B.* and their heirs and *A.* come in within the time of the proclamations, but *B.* do not, whether *A.* shall have the whole, or a moiety shall be forfeited, *dubatur*.

3. Where the Acts of one will bind the other, whether to his Advantage or Prejudice.

Bridgm.
129.
2 Co. 67.

Herein we must observe, that regularly every act done by one joint-tenant for the benefit of him and his companion shall bind the other; but no injurious act of one joint-tenant alone shall prejudice his companion.

Co. Lit.
148. b.
9 Co. 135. b.

Therefore, if there be two joint-tenants of a feignory, and one disseise the tenant, this shall suspend but a moiety of the feignory; for his companion shall not be prejudiced by his injurious act, to which he was no party, and therefore after such disseisin the disseisor is liable to the distress of his companion for his moiety of the feignory.

2 Inst. 516.

If there be two joint-tenants, and one of them levy a fine, this does not bar his companion, unless he omit to make his claim within five years after his title accrued.

Co. Lit.
197. b.

If there be two tenants in common of an advowson, and they bring a *quare impedit*, and the one release, yet the other shall sue for and recover the whole presentment.

Dalf. 44.
Pl. 33.

If two joint-tenants make a feoffment on condition that if they pay such a sum before a certain day they may re-enter, and before the day one of them release this condition to the feoffee, this shall not bind his companion.

Co. Lit.
197. b.

If two tenants in common be of the wardship of the body, and a stranger ravish the ward, and the one tenant in common release

to

to the ravisher, this shall go in benefit of the other tenant in common, and he shall recover the whole, and this release shall not be any bar to him.

But if two joint-tenants be of a ward, and the one disparage the heir, both shall lose the wardship; for those words of the statutes are, *Et omne commodum, &c.*

Co. Lit.
80. b.
Bridgm.
129.
2 Inst. 302.

Two joint-tenants for years, or for life, one of them doth waste, this is the waste of them both as to the place wasted; yet the words of the statute of *Gloucester* are, *homo que tient*; but treble damages shall be recovered against him who did the waste only.

If there be two or more joint-tenants of land whereof a woman is dowable, and one of them assign her dower thereout, this is good, and shall bind the others, because they were compellable to assign it in such manner; but if one of them had assigned her a rent thereout, in lieu of dower, this would not bind the rest, because they could not have been compelled to it by suit.

Co. Lit.
25. a.
2 Co. 67.
Perk. 397.

(I) Of Severance and Survivorship: And herein,

1. Of the Right of Survivorship, and what Things will survive.

THE *jus accrescendi*, or right of survivorship, takes place only between joint-tenants; as where lands are given to two men and their heirs, the survivor shall have the whole; for being limited to them and their heirs, the feoffor or donor hath thereby transferred the absolute property to them; but how the word *heirs* came to signify the heirs of one of them, so as to exclude the heirs of him who died first, is not easy to be determined, and can be accounted for no otherwise than that both joint-tenants being entitled to the whole during their respective lives, the survivor having continued longest in possession was therefore presumed to have done most service to the feud, and upon that account was allowed to transmit it to his heirs: also, says my Lord Chief Justice *Holt*, the common law does not love to multiply tenures.

Co. Lit. 181.

So, if land be given to two men for life or years, they are joint-tenants, and the survivor shall hold the whole for his life, or according to the number of years limited in the conveyance.

Co. Lit.
181. b.

But if a man let lands to *A.* and *B.* during the life of *A.*, if *B.* die, *A.* shall have all by survivorship; but if *A.* die, *B.* shall have nothing.

Co. Lit.
181. b.

A naked trust or authority cannot survive; but a trust coupled with an interest shall survive together with it.

Co. Lit.
181. b.

But for this *vide* head of *Trusts*.

If a lease be made to *A.* and *B.* for their lives, and the life of the longest liver of them, and they make partition, and then *A.* die, the lessor shall enter into his part; for *B.* has no title to it, because the right of survivorship was lost by the partition, which

Co. Lit.
101. a.
2 Roll.
Abr. 150.

destroyed the joint-tenancy; nor will the words *to the longest liver* be of any use to *B.* because they were void at first, being no more than the law implied in the joint-estate.

33 H. 6. 20. Two joint-tenants of a rent-charge or rent-service, and one
b. 1 c. E. 3. of them dies, the survivor shall recover all the arrearages which
Affix, 18. incurred and became due in the life-time of his companion.
2 Roll.

Abr. 86.

Roll. Abr.

727. (a) So, Two joint-tenants sow their land with corn, and one of them
if two joint-tenants sow dies, the corn sown shall go to the survivor, and the moiety shall
their land, not be to the executors of the person deceased; for they are sup-
and one of posed to carry on the cultivation of the soil by (a) joint-stock.

them lets his moiety for years, and he who did not let dies, the other shall have the corn as survivor.
Owen. 102.

Roll. Abr.

727. & vide

supra, letter
(B), and the
authorities
there cited.

But if husband and wife are joint-tenants, and the husband
sows the land with corn, and dies, the crop shall go to the exe-
cutors of the husband, as it seems; for this land is not cultivated
by a joint-stock, but it is totally the corn of the husband, and the
property of it seems not to be lost by committing it to the joint-
possession, any more than if it had been sown in the land of the
wife only.

Perk. § 523. So, if there be two tenants in common, and one of them sow
the land, and die, his executors shall have the corn; because
they have different interests, and are supposed to cultivate by dif-
ferent stocks, and not by a joint one.

2. At what Time the Right of Survivorship is to take place.

Co. Lit. This right is to take place immediately upon the death of the
181. b. joint-tenant, whether it be a natural or civil death; as if there
be two joint-tenants, and one of them enter into religion, the
survivor shall have the whole.

Co. Lit. Also it is laid down as a rule, that there shall be no right of
188. b. survivorship, unless the thing be in jointure at the instant of
the death of him who first dieth; *nihil de re accrescit ei qui nihil*
in re quando jus accresceret habet.

Co. Lit. Therefore, if there be two joint-tenants of a rent, and one of
188. b. them disseise the tenant of the land, this is a severance of the
jointure for a time; for the moiety of the rent is suspended by
unity of possession and therefore cannot stand a jointure with the
other moiety in possession, so that if during such suspension one
joint-tenant die, there can be no survivorship.

Co. Lit. Two femes joint-tenants, of a lease for years, one of them
185. b. taketh husband, and dieth, yet the term shall survive; for though
all chattels real are given to the husband, if he survive, yet the
survivor between the joint-tenants is the elder title, and after the
marriage the feme continued sole possessed; for if the husband
dieth, the feme shall have it, and not the executors of the hus-
band; but otherwise it is of personal goods.

3. What Disposition will work a Severance, and defeat the Right of Survivorship: And herein,

1. *What Disposition with a Stranger will work a Severance.*

Although joint-tenants are seized *per mie & per tout*, yet to divers purposes each of them hath but a right to a moiety; as to enfeof, give or demise, or to forfeit or lose by default in a *præcipe*; and therefore, where there are two or more joint-tenants, and they all join in a feoffment, each of them in judgment of law gives but his part.

Co. Lit. 186. a.

So, if there be two joint-tenants, and they both make a feoffment in fee, a gift in tail, or lease for life, &c. upon condition, and that for breach thereof one of them shall enter into the whole, yet he shall enter but into (a) a moiety, because no more in judgment of law passed from him.

Co. Lit. 186. a.
(a) But every joint-tenant may warrant the whole, be-

cause a man may warrant more than passeth from him. Co. Lit. 186. a.

If one joint-tenant bargains and sells his moiety, and dies before the deed is enrolled, yet the deed being afterwards enrolled shall work a severance *ab initio*, and support by relation the interest of the bargainee.

Co. Lit. 186. a.

But if one joint-tenant bargains and sells all the lands, and before enrolment the other dies, his part shall survive; for the freehold not being out of him, the jointure remains, and though afterwards the deed is enrolled, yet only a moiety shall pass; for the enrolment by relation cannot make the grant of any better effect than it would have been if it had taken effect immediately.

Cro. Jac. 53. Co. Lit. 186. Bull. 3.

If a recovery be had against one joint-tenant, who dies before execution, the survivor shall not avoid this recovery, because that the right of the moiety is bound by it.

Co. Lit. 185.

If one joint-tenant agree to alien, and do not, but die, this will not sever the joint-tenancy, nor bind the survivor.

2 Vern. 63. That such an agree-

ment does not bind at law. Co. Lit. 184 b. 185. a.

Two joint tenants of a church lease, one whereof being taken sick in a journey, to sever the jointure and provide for his wife sends for the schoolmaster of the town, (who was the only person he could get to come at him) and acquainted him with his intentions, and desired him to prepare an instrument for that purpose; the schoolmaster drew a kind of deed of gift of the lease from the sick man to his wife, which he executed, and died: and this being to the wife, and void in law, she would have made it good in equity, but was dismissed, being voluntary and without consideration.

Preced. Chan. 124. Moyse and Gile., 2 Vern. 385. S. C.

[A recital in a marriage settlement to which one only of two joint-tenants was party that she should enjoy her moiety of personal estate to her separate use, and a covenant on the part of her husband that she should enjoy it quietly, &c. and that *for want of issue of her own body*, it should go to the next of kin of her own family, was holden by Lord *Hardwicke* not to sever the

Patrick v. Powlett, 2 Atk. 54.

jointure; for where there is no agreement for that purpose, there must be an actual alienation to make it amount to a severance; and in this case there was nothing more than a declaration of one of the parties.]

2. *What Disposition or Conveyance by one Joint-tenant or Tenant in common, with his Companion, will work a Severance.*

22 H. 6. 42. The proper conveyance by one joint-tenant to another, and
 b. Perk. what will most effectually sever the joint-tenancy, is a release;
 § 193 197. but one joint-tenant cannot enfeoff his companion, because they
 Co. Lit. 193. are both already seised (a) *per mie & per tout*; and this manner of
 b. 200. b. conveyance passing by livery, cannot operate so as to give him
 2 Roll. what he already hath. But tenants in common cannot release to
 Abr. 86. each other, for a release supposeth the party to have the thing
 (a) And in demand; but tenants in common have several distinct free-
 therefore, holds, which one cannot transfer to the other without the so-
 if there be lennity of livery.
 two joint-tenants, and one release to the other,
 one release this passeth a fee without the word *heirs*, because it refers to the whole fee, which they jointly took, and
 are possessed of by force of the first conveyance. Co. Lit. 9. 200.

Vent. 78. But though a release be the proper conveyance from one joint-
 Sid. 452. tenant to another, yet if the jury find that the one joint-tenant did
 2 Sand. 96. grant or convey to another, this amounts to a release; for they
 2 Keb. 641. having found the substantial part, the court is to apply the words
 Raym. 187. according to the operation they have in law; but every such con-
 S. C. veyance must be pleaded as a *release*.
 Chester v. Wilkins,
 4 Mod. 151. S. P. 8 Mod. 240. Fitzgib. 275.

2 Roll. So, if there be two joint-tenants for life, and one be a feme co-
 Abr. 86. vert, and the baron and feme levy a fine to the other joint-tenant,
 403. Cro. and thereby grant *totum & quicquid* in the land for the life of the
 Jac. 698. wife, upon the death of the other joint-tenant the lessor may enter,
 Eustace v. for the fine enured by way of release, and then the other joint-
 Scawen; tenant must have claimed the whole from the first feoffment, so
 & vide could have had the whole but for his own life.
 6 Co. 78. b.
 S. P.

Carth. 505. An agreement between joint-tenants of an advowson, that they
 Salc. 43. should be tenants in common, and that each of them should present,
 S. C. Ld. amounts to a severance and release.
 Raym. 535.
 12 Mod. 321.

Leon. 167. If there be two joint-tenants of a rent, the one may release to
 the other; but if the rent be behind, the one cannot release his in-
 terest in the arrearages to another.

Co. Lit. One joint-tenant or tenant in common may let his part for (b)
 186. a. years or at will to his companion; for this only gives him a right
 Owen, 102. of taking the whole profits, when before he had but a right to the
 Cro. Jac. moiety thereof, and he may contract with his companion for that
 83. 611. purpose, as well as he may with any stranger.
 Moor, pl. 194.

(b) If father and son be joint-tenants for 100 years, and the son take a lease from the father of lands for
 15 years to begin, &c. the same shall conclude the son to claim the whole term or parcel of it by sur-
 vivorship. 2 Leon. 159. said by Plowden, and agreed to by the court.

A partition or severance between joint-tenants of a (a) freehold must be by deed, because by the notoriety of investiture they take it jointly; and to alter that, a matter of solemnity is required, which is a deed; but tenants in common may make a partition without deed; because that is only a setting out by metes and bounds, according to the first investiture, which gave each of them distinct moieties.

2 Roll. Abr. 255. Co. Lit. 169. a. (a) But joint-tenants for years might partition without

deed before the statute 29 Car. 2. c. 3. of frauds and perjuries. Co. Lit. 187. a.

[If two joint-tenants enter into articles to make partition, and such articles amount in equity to a severance of the joint-tenancy, they will be enforced against the survivor.

Hinton v. Hinton, 2 Vez. 634.

If a bequest of the residue of personal estate, which is a joint-tenancy, be employed by mutual consent *in trade*, this shall not amount to a severance, or defeat the right of survivorship.

Hall v. Digby, 4 Br. P. C. 224.

So, where two executors, joint-tenants of the residue of their testator's personal estate, divided the same, except a sum of 500l. 4 per cent. bank annuities, which they set apart to answer a life annuity of 20l. bequeathed by the will, and then one died, making the plaintiffs his executors; it was in vain attempted to be argued, that this amounted to evidence of an intended severance of the whole property, for the lord chancellor determined, that in respect of the bank annuities, the claim of survivorship must prevail.]

Baldwin v. Johnson, in Ch. 7th Feb. 1792. The prayer of the bill being, that the bank annuities should be transferred

in trust to answer the annuity, in order to be forthcoming at the annuitant's death, and these divided in moieties, or to that effect, the bill was dismissed with costs. 2 Wooddef. 132.

3. At what Time such Disposition must be made to take effect.

Regularly, every disposition by one joint-tenant to bind his companion must be (b) an immediate disposition; for the surviving joint-tenant claiming the whole by the original investiture, the whole must descend to him, unless his companion hath disposed of it from him in his life-time.

Co. Lit. 168. Roll. Abr. 848. (b) That if one joint-tenant covenants to

stand seised to the use, &c. of the moiety of his companion after his death, no use shall arise, because but a bare possibility. Noy 14. And though he survive his companion. Moor 776. — if two joint-tenants be of a term, and the one of them grant to J. S., that if he pay to him 10l. before Michaelmas, that then he shall have his term; the grantor die before the day, J. S. pay the sum to his executors at the day, yet he shall not have the term, but the survivor shall hold place; for it was in nature of a communication. Co. Lit. 184. 5. — That an agreement by one joint-tenant to alien will not be decreed in equity. 2 Vern. 63.

But if two joint-tenants are in fee, and one lets his moiety to J. S., for years, to begin after his death, this is good, and shall bind the other, if he survives, because this is a present disposition, and binds the land from the time of the lease made, so that he cannot after avoid it.

Co. Lit. 185. a. Bro. tit. Grants, 154.

But a devise for years in such manner by one joint-tenant will not bind the other surviving, because that is no present disposition, nor binding on the deviser himself, inasmuch as he may revoke or cancel his will, and so destroy that devise.

Lit. § 289. 2 Roll. Abr. 848.

Also, if there be two joint-tenants of lands, and one of them devise away that which belongs to him, and die, this is a void devise, and the devisee takes nothing, because the devise does not take effect

Lit. § 287. Perk. § 500. Cro. Jac. 106.

Moor, 776.
pl. 1074.

effect till after the death of the devisor, and then the surviving joint-tenant takes the whole by a prior title, *viz.* from the first feoffment; but in this case if the devisor survive the other joint-tenant, then the devise is good for the whole, because he being the surviving joint-tenant, has the whole by survivorship, and then the words of the will are sufficient to carry the whole estate; besides, at the time of making the will, though he was not sole tenant, yet he was seised *per mie & per tout*, and it is impossible to fix upon any particular part which he meant to devise, because he could not then call one part of the land more his own than another, and the most genuine construction seems to give the whole land, since he was seised *per tout* of it at the time of the devise.

Co. Lit. 59.
b Roll.
Abr. 501.

Also, if there are two joint-tenants, and one of them surrenders his moiety to the use of his last will, and dies before the surrender is presented, having made his will, this is a severance of the jointure; for when presented, it relates to the time of the first surrender.

Poph. 96.
Moor, pl.
514.
3 Bulf. 273.
Roll. Rep.
401. Dyer,
187. a.
Plow. 263.
Cro. Jac.
91. Co.
Lit. 184. b.
185. a.
186. a.
3 Bulf. 131.
2 And. 16.
2 Vern. 323.

If two joint-tenants for life are, and one of them makes a lease for years of his moiety, either to begin presently, or after his death, and dies, this lease is good and binding against the survivor; the reason whereof is, that notwithstanding the lease for years, the joint-tenancy in the freehold still continues, and in that they have a mutual interest in each other's life, so that the estate in the whole, or in any part, is not to determine or revert to the lessor till both are dead; for the life of the one, as well as of the other, was at first made the measure of the estate granted out by the lessor, and therefore so long as either of them lives, if the joint-tenancy continues, he is not to come into possession; now these joint-tenants having a reciprocal interest in each other's life, when one of them makes a lease for years of his moiety, this does not depend for its continuance on his life only, but on his life and the life of the other joint-tenant, whichever of them shall live longest, according to the nature and continuance of the estate whereout it was derived; and then so long as that continues, so long the lease holds good, and, by consequence, such lessee shall hold out the surviving joint-tenant and the reversioner till the estate, whereout his lease was derived, be fully determined.

Co. 96.
Moor, 139.
Co. Lit. 185
a. 318.
(a) But
guar., if
the execu-

But if a rent were reserved on such lease, this is determined and gone by the death of the lessor; for the survivor cannot have it, because he comes in by title paramount the lease, and the heirs of the lessor have no title to it, because they have no (a) reversion or interest in the land.

tors or administrators cannot maintain an action of debt or covenant, either upon the covenant in law or express covenant, for payment of the rent, if there be any.

Cro. Jac. 91.
Moor, pl.
1074
Whitlock v.
Horton.

A. and *B.*, joint-tenants for their lives, *A.*, by indenture leases the moiety which he holds in jointure with *B.*, to *C.* for sixty years from the death of *B.*, if he the said *A.* shall so long live, and devises the other moiety to *C.*, for sixty years from his own death, if *B.* shall so long live; then *A.* dies, and *B.* survives; and it was adjudged that this lease was void for both moieties; for by the first words it was a good lease from *A.*, of his part upon the con-

tingency

tingency of his surviving *B.*, but that never happened; and as to *B.*'s part, *A.* had not power to lease or contract for it during the life of *B.*, though he had happened after to survive him, for that was but a bare possibility, which could not be leased or contracted for, and therefore the lease was void in the whole.

A. and *B.* joint-tenants for their lives, *A.* leases his part for sixty years, if he and *B.* so long live; then *B.* surrenders his part, and takes back a new estate; then *A.* dies, living *B.*; and it was adjudged, that this lease made by *A.*, was determined by his death; for the joint-tenancy, which would have given them or their lessees an interest in each other's life, is by the surrender of *B.* determined and gone, and then the lease of *A.* stood single upon his own life, and, consequently by his death is determined. So, it would be, if after such lease for years by one joint-tenant they had made partition of the joint-estate, and then the lessor had died, his lease would be at an end, because the joint-tenancy, which should have supported it after his death, is by the partition defeated and gone.

Cro. Jac.
337. Roll.
Rep. 309.
3 Bulf. 130.
2 Roll.
Abr. 131.
Daniel and
Wadding-
ton.

4. What shall be a total Severance, or but for a limited Time.

It hath been holden in equity, that if three persons are jointly interested in the trust of a term for years, and one of them mortgages his third part, that hereby the joint-tenancy is wholly severed, and that it was not like the case where a person makes his will, and afterwards mortgages his estate, in which it was agreed to be no total revocation; for my Lord *Cowper* held, that a joint-tenancy was odious in equity, and not like the case of a will, which might have been for the benefit of the mortgagor, and not have been revoked; but that it was to the disadvantage of the mortgagor that the joint tenancy should continue; for thereby, if he happen to die first, all his estate and interest goes from his representatives to the survivor.

Salk. 158.
York v.
Stone.

If there be two joint-tenants of a rent, and one of them disseise the tenant of the land, this severs the joint-tenancy for a time, the moiety of the rent being suspended by unity of possession, and therefore cannot stand in jointure with the other moiety in possession.

Co. Lit.
188. a.

If two joint-tenants be of a term, and the one grant parcel of the term to a stranger, by this the jointure of all is severed.

Cro. Eliz.
33. Sym's
case.

5. How far the Charges or Incumbrances of one Joint-tenant shall affect the Survivor.

Regularly, all grants or charges by one joint-tenant out of the land fall off with his life, and cannot affect the survivor, because there being no immediate disposition of the land itself, that comes whole and entire to the survivor under the first title, and by consequence, over-reaches all intermediate charges or grants thereout by the other joint-tenant who is dead.

Lit. § 286.
Co. Lit.
184. b.
Bridgm. 43.

Therefore,

Co. Lit. 184. b. Therefore, if one joint-tenant acknowledge a recognizance, or a statute, or suffer judgment in an action of debt, &c. and die before execution had, it shall not be executed (a) afterwards; but if execution be sued in the life-time of the conusor, it shall bind the survivor: also in all these cases, if he that charges survive, it shall bind for ever.

(a) So, if one joint-tenant in fee-simple be indebted to the king, and die, after his decease no extent shall be made upon the land in the hands of the survivor. Co. Lit. 185. a.

Co. Lit. 186. b. But if one joint-tenant grant *vesturam*, or *herbagium terræ*, for years, and die, this shall bind the survivor. So, if two joint-tenants are of a water, and one grants a separate piscary for years, and dies, this shall bind the survivor; because in these cases, the grant of the one joint-tenant gives an immediate interest in the thing itself whereof they are joint-tenants.

Co. Lit. 184. b. Also, though a statute or recognizance acknowledged by one joint-tenant shall not bind his companion, unless execution was taken out in the life-time of him who acknowledged it; yet if after such acknowledgment, the joint-tenant who acknowledged it had released to his companion, the land would be chargeable with the statute, though he who acknowledged it had died before execution, because his acceptance of the release prevents his claiming by survivorship.

2 Sand. 28. So, if one joint-tenant in fee acknowledges a recognizance, and afterwards both joint-tenants bargain and sell the lands to a stranger, who reconveys it to them, and then he who acknowledged the recognizance dies, the moiety of the land shall be charged with the recognizance notwithstanding the survivorship.

6. Of Severance by Operation of Law.

2 And. 202. If a man hath issue three sons, and he devises to his two youngest sons lands to them jointly for their lives, and the eldest son, who hath the reversion in fee, dies, by which it descends to the second son, this, by operation of law, is a severance of the joint-tenancy.

2 Co. 60. b. So, if there be three joint-tenants for life, and the reversion be granted to one of them, the jointure is severed as to the third part of him to whom the reversion is so granted.

Wiscot's case. Co. Lit. 132. b. S. P. Cro. Eliz. 481. 570. S. P. 2 Sand. 386. S. P. cited. 2 Co. 58.

2 Co. 58. If two joint-tenants levy a fine and declare no uses, they are seised as before.

Hob. 25. If land be given to two jointly with warranty, and one of them make a feoffment of his part, the warranty is lost as to him, but the other may vouch for his moiety; but if they make partition, the warranty is lost as to both by the (b) common law.

(b) But if they make partition pursuant to the statute 31 H. 8. c. 1. & 32 H. 8. c. 32., the warranty remains, because they do it by compulsion. Co. Lit. 187. 6 Co. 12. b.

If one joint-tenant in fee take a lease for years of a stranger, by deed indented, and die, the survivor shall not be bound by the conclusion, because he claims above it, and not under it.

Co. Lit.
185. a.

7. Of Severance by Compulsion of Law; and therein of the Writ *de Partitione faciendâ*.

At common law joint-tenants and tenants in common were not compellable to make partition, except by the custom of some cities and boroughs.

Lit. § 290.
Co. Lit. 187.

But now by the 31 H. 8. cap. 1. reciting the inconveniencies which joint-tenants and tenants in common lay under, from one joint-tenant's or tenant's in common occupying the whole land, or receiving the whole profits, it is enacted, § 2. "That all joint-tenants and tenants in common that now be, or hereafter shall be of any estate or estates of (a) inheritance in their own rights, or in the right of their wives, of any manors, lands, tenements, or hereditaments within the realm of *England, Wales*, or the marches of the same, shall and may be coerced and compelled by virtue of this present act, to make partitions between them of all such manors, lands, tenements, and hereditaments, as they now hold, or hereafter shall hold as joint-tenants or tenants in common by writ *de partitione faciendâ*, in that case to be devised in the king our sovereign lord's court of Chancery, in like manner and form as coparceners by the common laws of this realm have been and are compelled to do, and the same writ to be pursued at the common law.

(a) The statute 32 H. 8. c. 32. gives the like remedy to joint-tenants and tenants in common for life or years.

"Provided that every of the said joint-tenants or tenants in common, and their heirs, after such partition made, shall and may have aid of the other, or of their heirs, to the intent to deraign the warranty paramount, and to recover for the rate as is used between coparceners after partition made by the order of the common law."

Before these statutes the writ of partition was confined to coparceners; also, it lay against the alienee of a coparcener, for a coparcener cannot by her alienation devert the right of her sister to divide the estate, nor can she destroy her writ of partition; but the alienee had no such writ of partition, because such alienee took an undivided moiety; nor was the alienee under the reasons on which the law had founded such right of division, which was, that the inheritance might be separated after marriage into distinct families; and for the same reasons the tenant by the curtesy, though he came in by the act of law, could not have this writ, though it lay against him by the surviving coparceners.

Co. Lit. 175. a. 167. a.
Dyer, 98. b.

But now by the force of these statutes, the alienee of one parcener may have a writ of partition against the other parcener, because they are tenants in common.

Co. Lit.
175. a.

So, tenant by curtesy shall have a writ of partition upon the statute 32 H. 8. cap. 32. for though he is neither joint-tenant nor tenant in common, yet being in equal mischief with those

Co. Lit.
175. b.

to whom the statute gives this remedy, he is within the equity thereof.

And. 30.
pl. 72.
Co. Lit.
175. b.
Keilw. 208.
Dyer, 128.
Bendl. 42.
pl. 76.

But if there be three coparceners, and a stranger purchase the part of one of them, he cannot join with either of the two coparceners in a writ of partition, either at common law or by force of the statute; for the words of the preamble of the statute are, *And none of them by the law doth or may know their several parts, &c. and cannot by the laws of this realm make partition without their mutual assents*: Now in this case one of them, viz. the parcener may have a writ of partition at common law, and therefore cannot come within the preamble and intent of the act, and so cannot join with the purchaser in a writ of partition brought upon it.

Cro. Eliz.
742, 743.
Et vide Cro.
Eliz. 759.
2 Lutw.
1018.
3 Leon. 231.

It hath been holden, that a general writ by joint-tenants or tenants in common grounded on this statute, and concluding *contra formam statut.* is sufficient, without reciting the case particularly, so as to bring it within the statute; for the framing of the writ is left to the clerks in Chancery, and must be according to the form which they have devised.

Cro. Eliz.
759.
Sir George
Moor and
Brown v.
Onslow.

In this writ partition may be demanded of the view of frankpledge, together with a manor; for though it be not severable of itself, nor partible, yet the profits thereof may be divided, or it may be divided thus, that the one shall have it at one time, and the other at another: also, being demanded with the manor, it may well be entirely allotted to one, and the land in recompence to another.

Booth, 245.
Lit. § 248.
Co. Lit. 167.
(a) The sheriff must go in person, otherwise upon information thereof the court will stay the filing of the return, and award a new writ, for

In this action there are two judgments; the first *quod partitio fiat inter partes predictas de tenementis predict. cum pertinen.* and upon this there goes out a judicial writ to the sheriff to make partition, which recites, first the writ of partition and judgment, and then commands the sheriff, together with twelve men of the vicinage, &c. to go in (a) person to the tenements to be divided, and there in presence of the parties, (if they appear on summons to be made) by the oaths of those twelve men, to make an equal and fair partition, and allot to each party their full and just share, and then return the inquisition of the partition annexed to the writ, under the seals of the sheriff, and the jurors, whose names are likewise to be returned.

the writ being his commission, he cannot deviate from it; but if the sheriff returns that he was there in person, and this return is received and filed, then any information to the contrary comes too late; because by the filing, it is become matter of record, against which no averment in *pais* lies; neither can the party have error upon the return. Cro. Eliz. 9, 10. Clay's case.

Co. Lit. 169.

When the inquisition is thus returned, upon motion made to the court, the second judgment is given in this manner: *Idco considerat. est per Cur. quod partitio firma & stabilis in perpetuum teneatur.*

Roll. Abr.
750. Lord
Berkley and
Countess of
Warwick,
Cro. Eliz.
635. Moor,

In a writ of partition, if the judgment be given *quod partitio fiat*, and thereupon a writ is directed to the sheriff to make partition, no writ of error lies hereupon, for the judgment is not complete till the sheriff's return, and the second judgment which the law requires hereupon, viz. *quod partitio*, &c. for before that,

the

the plaintiff may be nonsuit, or he may, upon the return of the sheriff, suggest to the court that the partition is not equal, and so have a new partition, and may also release before the last judgment. 324. 2 Bulf. 104. like case adjudged, & vide 2 Roll. Rep. 125. 2 Bulf. 119.

If the writ be brought by one joint-tenant against several, and there happen to be error in the execution of it, and one of the defendants release all errors to the plaintiff, this shall not bar the others; for each having a distinct interest shall not be prejudiced by the release of his companion. Cro. Eliz. 65.

A. and *B.* tenants in common of a manor, *A.* purchases several freeholds that lay so mixed with the demesne lands of the manor that they could hardly be distinguished from them; *B.* brings a writ of partition of the manor only: and it was adjudged that partition should be made, and a writ awarded accordingly; upon the execution of which writ *A.* comes to the sheriff and inquest, and informs them with the purchase of the freeholds, that are not parcel of the manor, and bids them take care how they make partition of all the lands within such a compass, lest they offer violence to their consciences; but does not shew them the freeholds distinctly, nor the limits of the manor, which obliged the sheriff to adjourn to a certain day, on which one of the inquest made default; and thereupon the sheriff returns a fine of 40 s. with an account of the difficulties they met with, & *ulterius propter brevitatem temporis breve illud exequi non potuit*: it was holden, that *A.* ought to shew the bounds of the several freeholds that he purchased, or the number of the acres; but if no light or evidence is given by either party to the inquest, and they make partition *de tanto quantum resumitur & dignoscitur per presumptiones*, it is good; for they are under an obligation to execute the commands of the court at their peril. Dyer, 265. pl. 5. Dalton's Sheriff, 265.

If after the awarding of the judicial writ, and before the return of it, the defendant dies, yet the partition is good, and the writ shall not abate, because before the death of the defendant judgment was given that partition should be made; and though upon the return of the judicial writ there is another judgment given, yet that is given in confirmation of the first judgment; it seems likewise, that upon the return of the judicial writ no exception can be taken to it; therefore, it is not material whether the defendant be dead or alive, since he can have no advantage by any plea on the return of the writ. Dalison, 57.

The process in this writ is summons, attachment, and distress infinite. F.N.B. 62. Booth, 245.

A. and *B.* were joint-tenants for years, *B.* suffers *C.* to occupy his moiety with him, and *A.* brings a writ of partition against *B.* and *C.* supposing that *B.* had granted a moiety of his part to *C.*, *C.* shews that he was but tenant at will to *B.* whereupon the writ abated; whether *A.* might have another writ of partition against *B.* by journeys accounts, was the question; and resolved, that he might; for the possession of *C.* was good colour for bringing the writ of partition, and *A.* could not take notice what estate *C.* had. Cro. Jac. 218. Beedle v. Clerk.

By

(a) And made perpetual by the 3 & 4 Annæ, c. 18. § 2. [Where a bill is brought in equity, to have a partition between two joint-tenants or tenants in common, the plaintiff must shew a title in himself to a moiety, and not allege generally that he is in possession of a moiety; and this is stricter than a partition at law, where seisin is sufficient, the statute of 3 & 9 W. 3. was made for that reason. *Per* Ld. Hardwicke, 2 Atk. 380.]

By the (a) 8 & 9 W. 3. cap. 31. entitled an act for the easier obtaining partitions of lands in coparcenary, joint-tenancy, and tenancy in common, reciting, That whereas the proceedings upon writs of partition between coparceners by the common law or custom, joint-tenants, and tenants in common are found by experience to be tedious, chargeable, and oftentimes ineffectual, by reason of the difficulty of discovering the persons and estates of the tenants of the manors, messuages, lands, tenements, and hereditaments to be divided, and the defective or dilatory executing and returning of the process of summons, attachment, and distress, and other impediments in making and establishing partitions, by reason of which divers persons having undivided parts or purparts, are greatly oppressed and prejudiced, and the premises are frequently wasted and destroyed, or lie uncultivated and unmanured, so that the profits of the same are totally or in a great measure lost; for remedy whereof it is enacted, “ That “ after process of *pone*, or attachment returned upon a writ of “ partition, affidavit being made by any credible person of due “ notice given of the said writ of partition to the tenant or tenants to the action, and a copy thereof left with the occupier, “ or tenant, or tenants, or, if they cannot be found, to the wife, “ son, or daughter, (being of the age of twenty-one years, or “ upwards,) of the tenant or tenants, or to the tenant in actual “ possession by virtue of any estate of freehold or for term for “ years, or uncertain interest, or at will, of the manors, lands, “ tenements, or hereditaments whereof the partition is demanded, “ (unless the said tenant in actual possession be demandant in the “ action,) at least forty days before the day of return of the said “ *pone* or attachment, if the tenant or tenants of such writ, or “ any of them, or the true tenant to the messuages, lands, tenements, and hereditaments as aforesaid, shall not in such case “ within fifteen days after return of such writ of *pone* or attachment cause an appearance to be entered in such court where “ such writ of *pone* or attachment shall be returnable, then in default of such appearance, the demandant having entered his “ declaration, the court may proceed to examine the defendant’s “ title, and quantity of his part and purpart, and accordingly as “ they shall find his right, part, and purpart to be, they shall “ for so much give judgment by default, and award a writ to “ make partition, whereby such proportion, part, and purpart “ may be set out severally; which writ being executed, after “ eight days notice given to the occupier, or tenant or tenants of “ the premises, and returned, and thereupon final judgment entered, the same shall be good, and conclude all persons whatsoever, after notice as aforesaid, whatever right or title they “ have, or may at any time claim to have, in any of the manors, “ messuages, lands, tenements, and hereditaments mentioned in “ the said judgment and writ of partition, although all persons “ concerned are not named in any of the proceedings, nor the “ title of the tenants truly set forth.

“ Provided

“ Provided always, That if such tenant or person concerned,
 “ or either of them, against whom or their right or title such
 “ judgment by default is given, shall within the space of one year
 “ after the first judgment entered, or in case of infancy, cover-
 “ ture, *non sana memoria*, or absence out of the kingdom, within
 “ one year after his, her, or their return, or the determination
 “ of such inability, apply themselves to the court by motion
 “ where such judgment is entered, and shew a good and pro-
 “ bable matter in bar of such partition, or that the demandant
 “ hath not title to so much as he hath recovered, then in such
 “ case the court may suspend or set aside such judgment, and ad-
 “ mit the tenant and tenants to appear and plead, and the cause
 “ shall proceed according to due course of law, as if no such
 “ judgment had been given; and if the court upon hearing there-
 “ of shall adjudge for the first demandant, then the said first
 “ judgment shall stand confirmed and be good against all persons
 “ whatsoever, except such other persons as shall be absent or dis-
 “ abled as aforesaid; and the person or persons so appealing shall
 “ be awarded thereupon to pay costs; or if within such time or
 “ times aforesaid the tenants or persons concerned, admitting the
 “ demandant’s title, parts, and purparts, shall shew to the court
 “ any inequality in the partition, the court may award a new par-
 “ tition to be made in presence of all parties concerned, (if they
 “ will appear,) notwithstanding the return and filing upon record
 “ of the former, which said second partition returned and filed
 “ shall be good and firm for ever against all persons whatsoever,
 “ except as before excepted.

“ And it is further enacted, That no plea in abatement shall
 “ be admitted or received in any suit for partition, nor shall the
 “ same be abated by reason of the death of any tenant.

“ And it is further enacted, That when the high sheriff by
 “ reason of distance, infirmity, or any other hindrance, cannot
 “ conveniently be present at the execution of any judgment in
 “ partition, in such case the under sheriff, in presence of two
 “ justices of the county where the lands, tenements, or heredita-
 “ ments to be divided do lie, shall and may proceed to execution
 “ of any writ of partition by inquisition in due form of law, as
 “ if the high sheriff were then personally present; and the high
 “ sheriff thereupon shall, and is hereby enabled and required to,
 “ make the same return as if he were personally present at such
 “ execution; and in case such partition be made, returned and
 “ filed, he or they, that were tenant or tenants of any of the
 “ said messuages, lands, tenements, and hereditaments, or any
 “ part or purpart thereof, before they were divided, shall be ten-
 “ ant or tenants for such part set out severally to the respective
 “ landlords or owners thereof, by and under the same conditions,
 “ rents, covenants, and reservations where they are or shall be so
 “ divided: and the landlords and owners of the several parts and
 “ purparts so divided and allotted as aforesaid, shall warrant and
 “ make good unto their respective tenants the said several parts
 “ severally after such partition, as they are or were bound to do
 “ by

“ by any copy, leases, or grants of their respective parts before
 “ any partition made : and in case any demandant be tenant in
 “ actual possession to the tenant to the action for his part and
 “ proportion, or any part thereof, in the messuages, lands, tene-
 “ ments, and hereditaments to be divided by virtue of a writ of
 “ partition as aforesaid, for any term of life, lives or years, or un-
 “ certain interest, the said tenant shall stand and be possessed of
 “ the said purparts and proportions for the like term, and under
 “ the same conditions and covenants, when it is set out severally
 “ in pursuance of this, or any other act, statute, or law, for that
 “ purpose.

“ And it is further enacted, That the respective sheriffs, their
 “ under-sheriffs and deputies, and, in case of sickness or disability
 “ in the high sheriff, all justices of the peace, within their respec-
 “ tive divisions, shall give due attendance to the executing such
 “ writ of partition, unless reasonable cause be shewn to the court
 “ upon oath, and there allowed of, or otherwise be liable every of
 “ them to pay unto the demandant such costs and damages as shall
 “ be awarded by the court, not exceeding five pounds, for which
 “ the demandant or plaintiff may bring his action in any of his
 “ majesty's courts of record at *Westminster*, wherein no essoin,
 “ protection, privilege, or wager of law shall be allowed, nor any
 “ more than one imparlance ; and in case the demandant doth not
 “ agree to pay to the sheriffs or under-sheriffs, justices, and jurors
 “ such fees as they shall respectively demand for their pains and
 “ attendance in the execution of the same, and returning thereof,
 “ then the court shall award what each person shall receive, having
 “ respect to the distance of the place from their respective habita-
 “ tions, and the time they must necessarily spend about the same,
 “ for which they may severally bring their actions.”

By the 7 *Annæ*, cap. 18. it is enacted, “ That if coparceners, or
 “ joint-tenants or tenants in common be seised of any estate of in-
 “ heritance in the advowson of any church or vicarage, or other
 “ ecclesiastical promotion, and a partition is or shall be made be-
 “ tween them to present by turns, that thereupon every one shall
 “ be taken and adjudged to be seised of his or her separate part of
 “ the advowson to present in his or her turn ; as if there be two,
 “ and they make such partition, each shall be said to be seised, the
 “ one of the one moiety to present in the first turn, the other of
 “ the other moiety to present in the second turn ; in like manner
 “ if there be three, four or more, every one shall be said to
 “ be seised of his or her part, and to present in his or her turn.”

(K) Joint-tenants and Tenants in common how to
 sue and be sued : And herein of Summons and
 Severance.

Co. Lit.
 18c. b.

Joint-tenants being seised *per mie & per tout*, and deriving by one
 and the same title, must jointly emplead and be jointly em-
 pleaded with others.

So,

So, though one joint-tenant may distrain for rent, yet he cannot bring an action of debt, nor (a) avow for rent-arrear without making himself bailiff to his companions, that they may be privy to the suit, and be entitled to their shares upon his recovery thereof in their right.

tenants must join in the avowry for damage-feasant. Thomps. Ent. 264.

Carth. 328.
Pullen and
Palmer,
5 Mod. 72.
150. S. C.
(a) That
joint-te-
5 Mod. 151.

If A. and B., joint-tenants and to the heirs of B., join in a lease for life, A. has a reversion, and shall join in action of waste; but the writ must be *ad exhereditationem* of B., because he only hath the inheritance.

Co. Lit.
42. a.

But if two joint-tenants acknowledge a statute, and their several lands are taken in execution, and after, upon the invalidity of the statute, they jointly bring an *audita querela*, the writ shall abate; for they ought to have several writs; for the wrong done to one by the execution of his land is no tort to the other.

Noy, 1.
Farmer and
Downs, ad-
judged.

And although regularly joint-tenants are to join and be joined in an action, yet it is otherwise with tenants in common; and therefore if in ejectment the plaintiff declares on a lease made by A. and B., and on the trial it appears that they are tenants in common, the plaintiff cannot recover; but if A. and B., had been joint-tenants, a joint-lease to the plaintiff had been good, and he might have declared *quod demiserunt*; and the reason of the difference is, that tenants in common are of several titles, and therefore the freehold is several; and if they are disseised, they shall be put to their several actions; as therefore the lands of tenants in common are to be considered as different estates depending on different titles, the plaintiff shall not recover, because that were to allow the plaintiff to try two several and different titles in one issue at the same time, and therefore the plaintiff to make out his title must shew and prove that each demised the whole to him, else he doth not prove the declaration; whereas the discovery of the tenancy in common proves the contrary; and as they have different titles to a moiety only, so they could not each of them demise the whole; but joint-tenants are seised *per mie & per tout*, and they derive by one and the same title, and therefore each may be said to demise the whole; and as they must join in an action for any violation of their possession, so for the same (b) reason too, their lessee on their joint demise.

Show. Rep.
342.
2 Vent. 214.
Comb. 150.
Carth. 224.
Mod. 102.
Co. Lit. 200.
2 Will. 233.

(b) But note,
That to
avoid any
difficulty in
these cases,
the best way
seems to be
for them to
join in a
lease to a
third per-
son, and
that lessee
to make a
lease to try
the title.
Noy, 13.
Lit. § 313.
Co. Lit.
197. a.
(c) Cannot
join, though
they come
in by one

But though tenants in common having (c) several and distinct rights cannot join in an action, yet where the thing is (d) entire, as a horse, hawk, they must join, these being in their nature not severable, and therefore from the necessity of the case the law admits them to join.

feoffment. Mod. 11. (d) And therefore tenants in common shall join in a *quare impedit*, because the presentation to the advowson is entire. Co. Lit. 197. b. — And for this reason tenants in common of a feignory shall join in a writ of right of ward, and ravishment of ward for the body, Co. Lit. 197. b. — Also tenants in common shall join in devinue of charters, and if the one be nonsuit, the other shall recover. Co. Lit. 197. b. — And shall join in a *warrantia chartæ*, but sever in voucher. Co. Lit. 197. b. [And wherever one entire injury is done to tenants in common, they shall have one entire remedy. 2 Bl. Rep. 1077.]

Co. Lit.
107. b.
Moor, 202.

So, if there be two tenants in common, and they make a lease for life, rendering rent, this reservation, though made by joint words, shall follow the nature of the reversion, which is several in the lessors; therefore they shall be put to their several assises if they be disseised, as if there had been distinct reservations.

Lit. § 315.
Co. Lit.
198. a.

Also, tenants in common shall join in actions personal, as trespasss in breaking into their house, breaking their inclosure or fences, feeding, wasting, or defouling their grass, cutting down their timber, fishing in their piscary, &c., and shall recover jointly their damages; because in those actions though their estates are several, yet the damages survive to all; and it would be unreasonable to bring several actions for one single trespass.

Co. Lit.
189. a.

So, if there be two tenants in common of a manor, and they make a bailiff thereof, and one of them die, the survivor shall have an action of account, for the action given unto them for the arrearages upon the account was joint.

Co. Lit.
189. a.

So, if two tenants in common sow their land, and a stranger eateth the corn with his cattle, though they have the corn in common, yet the action given to them for the trespass is joint, and shall survive.

Carth. 289.
Midgley and
Gilbert v.
Lord Love-
lace. (a) But
in an avowry

Tenants in common may join or sever in (a) debt or covenant for rent; but if they sever, the demand must be *de unâ medietate* of the whole rent, and not of a certain sum, which amounts to a moiety.

they ought to sever. Co. Lit. 188. b. 5 Term Rep. 249. [If a terre-tenant pay the whole rent to one tenant in common contrary to the express notice of the other, the latter may distrain for his share. Harrison v. Barney, 5 Term Rep. 246.]

Cro. Jac.
231. Some
and Barwith.
[(b) And
where the
injury is se-
parate, they
may have
several ac-
tions: and
therefore, one
tenant in com-
mon may sue
for the double
value of his
moiety of the
rent under the
statute of 4 Geo. 2. c. 28. Cutting v. Darby, 2 Bl. Rep. 1077.]

And as in trespasss tenants in common shall join, so they shall for a nuisance done to their land, for it is personal, and concerns the profits of the land; but for forging of false deeds they shall sever, for that concerns the inheritance of the land: (b) as to a nuisance, if it be continued after the death of one of the tenants in common, his devisee shall join in action with the survivor, for the continuance thereof is as the new erecting of such a nuisance.

Mich.
15 Car. 2.
Kitchen
and Knight
v. Buckley,
Sid. 157.
Lev. 109.
Keb. 565.
572
Raym. 80.
S. C. &
vide to this
purpose
Keilw. 14.
18 H. 6.

A. makes a lease, in which the lessee covenants with the lessor, &c., to repair; lessor grants his reversion by several moieties to several persons, and lessee assigns to J. S. In an action of covenant by the grantees of the reversion for not repairing, the question was, If two tenants in common of a reversion could join in bringing an action of covenant against the assignee? and it was holden, that they could and ought to join in this case, being a mere personal action, according to *Littleton's* rule, which was holden to be general, without relation to any privity of contract; and that the covenant being indivisible, the wrong and damages could not be distributed because uncertain.

6, 7. 28 E. 3. 90. Moor, 40. Godb. 90. 283. Bro. Joinder in Action, 104. Bendl. 87.

Joint-tenants and tenants in common are to join in a *quare impedit*; the first, because they are jointly seised, and claim by a joint title; the (a) latter out of necessity, because the thing is entire.

Incumb. 253. & vide sup. 7 Ann. c. 18. (a) If two tenants in common be of an advowson, and they bring a *quare impedit*, and the one release, yet the other shall sue for and recover the whole pre-
sentment. Co. Lit. 197. b.

Co. Lit.
197. b.
2 And. 23.
63. Comp.

If joint-tenants or tenants in common refuse to set out their tithes, the action must be brought against them both; but if one of them only occupy the land, the action is to be brought against him; or if one joint-tenant or tenant in common sets out the tithes, and the other takes them away, the action must be brought against the wrong-doer.

Hut. 121.
Cro. Jac.
86. 362.

If a lease for years be made to B. and C., rendering rent, and C. assign his moiety to D., and after the rent be in arrear, the lessor may bring an action of debt for the rent against B. and D., for the reversion remains entire.

Palm. 283.

If two joint-tenants bring trespass, and pending the action one of them dies, the writ shall abate; *secus*, if brought against them, for in the latter case the action is both joint and several*.

W. 3. c. 11. § 7., the death of one plaintiff, or defendant, where there is another surviving, shall not abate the suit.

Cro. Jac.
19. 4 Mod.
249. S. P.
* By 8 & 9

Also, where a *quare impedit* is brought by two joint-tenants, and pending the action, one of them dies, the writ shall not abate; and this out of necessity, lest the six months should elapse, and thereby the action be lost.

Cro. Jac.
19.

If one joint-tenant refuses to join in action, he may be summoned and severed; but herein it is to be observed, that if the person severed dies, the writ abates, because the survivor then goes for the whole, which he cannot do on that writ, where on the summons and severance he went only for a moiety before, for the writ cannot have a double effect, to wit, for a moiety in case of summons and severance, and for the whole in case of survivorship; and the law is the same if such joint-tenants proceed without summons and severance, for since both by the writ might by possibility recover their moieties, they shall not go on for the whole in case of survivorship, because the words and effect of the writ at the time of its first purchasing was that each might recover his moiety, and therefore a new writ must be purchased to enable one to proceed for the whole †.

Co. Lit. 188.

† See the
preceding
note, ante
217.

But in personal and mixed actions where there is summons and severance, and yet after such summons and severance the plaintiff goes on for the whole, there, if one of them dies, yet the writ shall not abate, because they go on for the whole after summons and severance; and if they were to have a new writ, it would only give the court authority to go on for the whole.

Co. Lit. 197.

So, if two joint-tenants bring a writ of ward, and they are summoned and severed, and the severed person dies, the writ shall not abate, because after such severance he went on for the whole; and so he does in this case, after the death of his companion.

Co. Lit. 197.

So, in a *quare impedit* by two joint-tenants, and one is summoned and severed, and the severed person dies, the writ shall not abate,

Co. Lit.
197. b.
Dyer, 279.

abate, because the advowson is an entire thing; and he proceeded for the whole after the severance, and so he may after the death, &c.

11 H. 4. 17.
Roll. Abr.
571.

If two joint-tenants bring an assise, and the one is severed, if it be found that the other had goods taken upon the land, he shall recover sole damage for them.

Moor, 466.
Cro. Eliz.

554.
Skin. 12.
pl. 12.
Salk. 4. pl.
10. 32.
Mod. 102.
2 Lev. 113.
Carth. 63.

Wherever tenants in common ought to join in an action, and one alone brings the action, the defendant ought to plead the tenancy in common in abatement, which is a defence the law allows him, that he may not be twice charged; but if he plead in chief, and it be found against him, the plaintiff shall have judgment, because he loses the opportunity of pleading in abatement by pleading to the right of the action.

Bull. N. P. 35. [But it is said, that in *assumpsit*, advantage may be taken of this at the trial, for then it would not be the same contract. *Leglise v. Champante*, 2 Str. 820.]

2 Inst. 523,
524.

If joint-tenancy be pleaded by fine or deed in abatement of the demandant's action, he cannot take a general averment that the tenant is sole seised, for that were directly to contradict them, and set them aside by a matter of less force and solemnity than they are; but he may confess the joint-tenancy which the tenant pleads after the fine levied, but that the joint-tenant not named released to the tenant before the writ brought, or that both the conuzees enfeoffed one who enfeoffed the tenant; but at this day, if the tenant had been enfeoffed by deed, and had pleaded joint-tenancy, to abate the demandant's writ, the demandant might have averred generally, that the tenant is sole seised, for the statute of 34 E. 1. *de conjunctim feoffatis* extends to joint-tenancy by deed though not by fine, but by the common law the demandant was not allowed that plea, where the tenant claimed under a deed any more than when he claimed under a fine; but if the tenant claim by feoffment in *pais*, and plead that in abatement of the demandant's action, the demandant may aver sole tenancy, because the feoffment is to be proved *viva voce per pares*, whose credit is not more regarded by the court than the demandant's.

(L) Of the Remedies which Joint-tenants and Tenants in common have against each other.

Co. Lit. 172.
a. 186. a.
2co. b.
3 Leon. 228.
So, if two
had a ward
in common,
and one took
all the pro-
fits. F. N. B.
118.

BY the common law joint-tenants and tenants in common had no remedy against each other, where one alone received the whole profits of the estate, for he could not be charged as bailiff or receiver to his companion, unless he actually made him so; but now by the 4 & 5 Ann. cap. 16. it is provided, that they and their executors and administrators may have an account against the others as bailiffs, for receiving more than their proportion, and against their executors and administrators.

Co. Lit.
1: 9. b.
(a) But tho'

But if one joint-tenant or tenant in common had ejected or (a) withheld the possession from his companion, such joint-tenant or tenant

tenant in common so ejected might have mained an *ejectione firme* one tenant in common may dis-
against such ejector, &c. *

seise the other, yet it must be by actual disseisin, as turning him out, hindering him to enter, &c.; but a bare perception of profits is not enough. Salk. 392. pl. 4. 7 Mod. 39. — * Confession of lease, entry, and ouster, is sufficient on an ejection, in the case of a tenant in common, without proof of actual ouster. 3 Burr. 1895. [And one tenant in common may maintain an action for mesne profits against his companion. Goodtitle v. Tombs, 3 Will. 1118.]

Also, one joint-tenant or tenant in common may offend against the statutes against forcible entries, either by forcibly ejecting, or forcibly holding out his companions; for though the entry of such a tenant be lawful *per mie & per tout*, so that he cannot in any case be punished in an action of trespass at the common law; yet the lawfulness of his entry no way excuses the violence, or lessens the injury done to his companion, and consequently an indictment of forcible entry into a moiety of a manor, &c. is good. Latch. 227. Palm. 419.

But though joint-tenants and tenants in common being actually ejected, had these remedies at common law, yet such remedies were only extended to things real; and there was no remedy where a horse, hawk, &c. were seised by one joint-tenant or tenant in common, but by reseising it again when a proper opportunity served. Lit. § 323.

If there be two tenants in common of a manor to which waif and stray belong, a stray doth happen, they are tenants in common of the same; and if the one doth take the stray, the other hath no remedy by action but to take him again; but if by prescription the one is to have the first beast happening as a stray, and the other the second, there an action lieth, if the one take that which pertains to the other. Co. Lit. 200. a.

So, if there be two tenants in common of a park or dove-house, and one of them destroy all the deer, or take all the old doves, and destroy the flight; or if two have land and mere-stones in common, and one of them carry them away; or if they have a folding in common, and one disturb the other to erect hurdles, in all these cases trespass *quare vi & armis* lies. Co. Lit. 200. a. b.

If two several owners of houses have a river in common, and one of them corrupt it, the other shall have an action on the case. Co. Lit. 200. b.

If one be willing to repair a house or mill which he holds in common, or jointly with another, he may have a writ *de domo reparanda* against him. Co. Lit. 200. b.

If land be given to two for life, and to the heirs of one of them, and tenant for life do waste, he that hath the fee cannot have an action of waste on the statute of *Glocester*, but he may have one on *Westm. 2. cap. 22.* which enacts, that if there be two tenants in common of a wood, turbary, piscary, &c. and one do waste, the other shall have a writ of waste, and the waster shall have election before judgment, either to have his part in certain assigned to him by the oath of twelve men, (and then the place waited shall be assigned for part thereof,) or to grant that he will take no more for the future than his companion shall approve of; Co. Lit. 200. b. 2 Inst. 403.

and this act by construction has been held to extend to joint-tenants, but not to parceners, because they might have the writ *de partitione faciendâ* at common law.

*Vide tit. Tro-
ver and Con-
version.*

One tenant in common cannot bring trover against his companion, because they are both equally entitled to the possession.

Jointure.

Co. Lit.
36. b.
4 Co. 2. b.

A JOINTURE is a competent livelihood of freehold for the wife, of lands, &c. to take effect presently in possession or profit after the death of the husband, for the life of the wife at least, if she herself be not the cause of the determination or forfeiture thereof.

Under this definition we shall consider,

- (A) The Original and first Introduction of this Provision.
- (B) Of its being a Bar of Dower: And herein of the 27 H. 8. c. 10., and the Rules to be observed in making a good Jointure, and such a one as will be an effectual Bar of Dower: And herein,
 1. That the Estate must take Effect immediately after the death of the Husband.
 2. That it must be for the Term of the Wife's Life or greater Estate.
 3. That it must be made to herself, and not to others, in Trust for her.
 4. That it must be in Satisfaction of her whole Dower.
 5. That it must be expressed to be in Satisfaction of her Dower; and therein how far a collateral Recompence shall be a Bar of Dower or Jointure.
 6. That it must not be made during Coverture.
- (C) How far her own or her Husband's Acts may defeat her of this Provision.
- (D) How far a Jointress is entitled to the Aid and Assistance of a Court of Equity.

Of Discontinuances by Women of their Husbands Estates,
vide Tit. Discontinuance.

(A) Of the Original and first Introduction of this Provision.

IT having been determined that at common law a woman could not be endowed of an use; and most lands before the 27 H. 8. *cap.* 10. being put in use, so that there was no confidence to be had in the dower at the common law; this obliged the wife, or her friends, either before or after the marriage, to procure the husband to take the legal estate from the feoffees, and settle it to the use of him and his wife for life, or in tail, with what remainders over he pleased; and this seems to have been the original of jointures.

Vide tit. Dower, and tit. Curtesy of England.

But though this method was an effectual security to the wife, yet was it of no service to the husband, or his heirs, in barring her of her dower before the 27 H. 8. *cap.* 10. for by the common law a woman could not be barred of her dower by any assignment or assurance to her, of other lands whereof she was not dowable, (except in the case of dower *ad ositum ecclesiæ*, or *ex assensu patris*, which were allowed to be dowers or jointures of themselves, and were a good bar of any other dower) were such assignment or assurance made by the husband before marriage or after, or by the heir after his death; and though they were expressly said to be in full bar and recompence of her dower, yet might she recover her dower notwithstanding; for she having a right to be endowed of the third part of all her husband's lands, vested and fixed in her immediately upon the marriage and the husband's seisin thereof; this right, like all others, could not be transferred or extinguished but by a release thereof; and if no such release was made, it continued still in being, for want of the proper means to destroy it; and if it still existed, her remedy was open to recover and reduce it into possession; and of this there can be no doubt as to any estate or purchase procured by the husband to be made to his wife after marriage, in lieu and satisfaction of dower, for she is not at this day bound in such case; and if it were made before marriage, it was at common law no bar, for two reasons; 1. Because at the time of making thereof she had no title to dower, and therefore an estate made to her then could be no bar to a right which accrued to her after. 2. Because immediately upon the marriage the right first vested in her, and could not be extinguished or barred but by a release thereof: so, if such assignment or assurance were by the heir *in pais*, this was no bar neither; but (a) if it were by indenture or fine, then it should seem an estoppel to her to demand any other dower, because her title to dower was then complete and certain; and she has by this acceptance concluded herself to demand any thing more.

4 Co. 1.
Vernon's
case, Dyer,
91. Co.
Lit. 34. b.
36. b.
Bro. tit.
Dower, 97.
2 Brown,
132.

(a) 4 Co. 5.

(B) Of its becoming a Bar of Dower : And herein of the 27 *H. 8. cap. 10.*, and the Rules to be observed in making a good Jointure, and such a one as will be an effectual Bar of Dower.

Co. Lit.
36. b.
4 Co. 1.

THE maxims of the common law, that no right could be barred before it accrued ; that a right or title to a freehold could not be barred by acceptance of a collateral satisfaction ; and the reasons aforesaid allowing the wife to claim her dower, and also the benefit of such settlement as was made on her, all these being contrary to justice,

By the 27 *H. 8. cap. 10. § 6.* it is enacted, “ That where divers
“ persons have purchased, or have estates made and conveyed of
“ and in divers lands, tenements, and hereditaments, unto them
“ and their wives, and to the heirs of the husband, or to the
“ husband and the wife, and to the heirs of their two bodies begotten, or to the heirs of one of their bodies begotten, or to the husband and the wife for term of their lives, or for term
“ of the life of the said wife ; or where any such estate or purchase of any lands, tenements, or hereditaments, hath been
“ or hereafter shall be made to any husband and to his wife in
“ manner and form above expressed, or to any other person or
“ persons, and to their heirs and assigns, to the use and behoof
“ of the said husband and wife, or to the use of the wife, as is
“ before rehearsed, for the jointure of the wife, that then in
“ every such case every woman married having such jointure
“ made, or hereafter to be made, shall not claim nor have title
“ to have any dower of the residue of the (a) lands, tenements,
“ or hereditaments, that at any time were her said husband’s, by
“ whom she had any such jointure, nor shall demand or claim
“ her dower of and against them that have the lands and inheritances of her said husband ; but if she have no such jointure,
“ then she shall be admitted and enabled to pursue, have and
“ demand her dower by writ of dower, after the due course
“ and order of the common law of this realm ; this act or
“ any law or provision made to the contrary thereof notwithstanding.”

(a) A jointure made of copyhold lands is no bar of dower within this statute. Cro. Car. 44.
4 Mod. 85.

§ 7. Provided, “ That if any such woman be lawfully expelled or evicted from her said jointure, or from any part thereof, without any fraud or covin, by lawful entry, action, or by discontinuance of her husband, then every such woman shall be
“ endowed of as much of the residue of her husband’s tenements
“ or hereditaments whereof she was before dowable, as the same
“ lands and tenements so evicted and expelled shall amount or
“ extend unto.”

§ 9. Provided also, “ That if any wife have, or hereafter shall
“ have, any manors, lands, tenements, or hereditaments unto
“ her given or assured after marriage for term of her life or other-
“ wife,

“ wife, in jointure, except the same assurance be to her made by
 “ act of parliament, and the said wife after that fortune to over-
 “ live the same her husband in whose time the said jointure was
 “ made or assured unto her, that then the same wife so overliving
 “ shall and may be at liberty after the death of her said husband
 “ to refuse to have and take the lands and tenements so to her
 “ given, appointed, or assured during the coverture, for term of
 “ her life or otherwise, in jointure, except the same assurance be
 “ to her made by act of parliament as is aforesaid, and thereupon
 “ to have, ask, demand, and take her dower by writ of dower or
 “ otherwise, according to the common law, of and in all such
 “ lands, tenements, and hereditaments, as her husband was and
 “ stood seised of any estate of inheritance any time during the
 “ coverture ; any thing,” &c.

To make a good jointure within this statute, the six following things are to be regarded,

1. That the Estate must take Effect immediately from the Death of the Husband.

Therefore if an estate be made to the husband for life, the remainder to *J. S.* for life, remainder to the wife for her jointure, this is no good jointure, for it is not within the words or intent of the statute ; for the statute designed nothing as a satisfaction for dower, but that which came in the same place, and is of the same use to the wife ; and though *J. S.* dies during the life of the husband, yet this is not good ; for every interest not equivalent to dower, being not within the statute, is a void limitation to deprive the wife of her dower.

4 Co. 3.
Hutton, 54.

So, if an estate be made to the use of *A.* for life, the remainder to the wife for life, this is not good, though *A.* dies, living the husband.

4 Co. 2.
Hob. 151.

So, if an estate be made to the husband for life, the remainder to *J. S.* for years, the remainder to the wife for her jointure, this is not good, though the years are expired in the life-time of the husband.

Hut. 51.
Winch. 33.

But if an estate be made to the husband for life, the remainder to *J. S.* for the life of the husband, to support contingent remainders, remainder to the wife for life, this is a good jointure, though not within the express words of the statute, for it is within the equity and design of it.

4 Co. 3.

If a man makes a feoffment to the use of himself for life, remainder to the son and his wife, and the heirs of the body of the son, this is no good jointure, though the wife hath an immediate freehold ; for to be within the cases of the statute whereby dower is barred, the wife must have (a) a sole property after the death of her husband.

Winch. 33.
(a) That a jointure within this act by the first limitation must take effect

for life in possession or profit presently after the death of the husband, laid down in Co. Lit. 36. b.

A feoffment in fee to the use of the feoffee for life, the remainder to the use of his second son for life, remainder to the use

Sid. 3. 4.
per Bridgman,

use of such wife as the son shall take, remainder to the heirs of the son; the father dies, the son marries, and dies: the wife is not by this settlement barred of her dower; for this at the time of the creation was no certain provision for the wife's life, for the son might have married and died in the life of the father.

Co. Lit. 133. Moor, 851. 3 Bulf. 188. Roll. Rep. 400. 2 Vern. 104. A jointure limited to take effect immediately on the death of the husband shall take effect as well on a civil as a natural death; therefore, if the husband enters into religion, is banished, or abjures the realm, the wife shall have her jointure.

2. That it must be for Term of the Wife's Life or greater Estate.

Co. Lit. 36. b. 4 Co. 2. b. Therefore, if an estate be made to the wife for the life or lives of many others, this is no good jointure; for if she survives such lives, as she may, then it would be no competent provision during her life, as every jointure within the statute ought to be.

Co. Lit. 36. So, if a term for 100 years be limited to the wife, if she so long live, or absolutely, this is no good jointure; for the statute provides, that when the wife hath an estate for life by settlement, she shall be barred of her dower at common law; if she hath any greater estate, she hath an estate for her own life included in it; but if she hath any less estate, it is out of the statute.

4 Co. 3. a. (a) So, says my Lord Coke, if limited to her upon condition that she shall perform the will of her husband, &c. this is a good jointure within the words and intention of the act, for that her estate cannot determine without her default. 4 Co. 2. b. 3. a. But for this *vide* Moor, 31. pl. 103. Leon. 311. N. Bendl. pl. 247. If an estate be limited to the wife upon condition, her acceptance of such a conditional jointure makes it good; for this estate supports the wife well enough, and it is in her power to continue it during her life; therefore, an estate limited to the wife (a) *durante viduitate* is a good jointure; for it cannot determine but by her act.

3. That it must be made to herself, and not to others, in Trust for her.

Co. Lit. 36. b. This rule, my Lord Coke says, is so necessary to be observed, that though the wife should assent to a jointure made in trust for her, yet it would not be good; for the statute only bars the dower when by it the possession (which was formerly a use) is executed in her.

* A conveyance must be to the wife herself, and not to trustees, in order to make the provision a jointure in point of law. *Hervy v. Hervy*, 1 Atk. 561. But as the intention of the statute was to secure the wife a competent provision, and also to exclude her from claiming dower, and likewise her settlement, it seems that a provision or settlement on the wife, though by way of trust, if in other respects it answers the intention of the statute, will be enforced in a court of equity *.

4. That

4. That it must be in Satisfaction of her whole Dower.

The reason hereof is, that if it be in satisfaction of part only, it is uncertain for what part it is in satisfaction of her dower, and therefore void in the whole. Co. Lit. 36. b.

If an estate be made to the wife in satisfaction of part of her dower before marriage, and after marriage other lands are conveyed, wherein it is said to be in full satisfaction of all her dower, if she waives the lands conveyed to her after marriage, she shall have dower of all the lands of her husband, notwithstanding the settlement is in satisfaction of part. 4 Co. 5.

5. That it must be expressed to be in Satisfaction of her Dower; therein how far a collateral Recompence shall be a Bar of Dower or Jointure.

My Lord *Coke* says, that it must be expressed or averred to be in satisfaction of her dower; but *quære*; for this does not seem requisite, either within the words or intention of the statute. Co. Lit. 36. b.

Therefore where an assurance was made to a woman to the intent it should be for her jointure, but it was not so expressed in the deed, the opinion of the court was, that it might be averred that it was for a jointure, and that such averment was not traversable. Owen, 33. and there said, that it had been so likewise ruled between the Queen and Dame Beaumont.

But a devise of an estate to a wife for life cannot be averred to be in satisfaction of dower or jointure, unless it be expressed to be so in the will; for there can be no averment contrary to the will, and consequently there can be no averment contrary to the consideration implied in every devise, which is the kindness of the testator. Co. Lit. 36. 4 Co. 4.

So, where one devised lands to his wife during her widowhood, and died, and she married again and brought dower, and this devise being pleaded in bar, it was holden no bar: 1st, Because a will imports a consideration in itself, and cannot be averred to be in bar of dower, unless it be so expressed. 2^{dly}, Dower cannot be of less estate than for life of the wife. And a *third* reason may be, that her right to dower cannot be barred by a collateral recompence, since such collateral recompence is no proper conveyance of such right. Moor, 31. pl. 103. [This case, as here reported, is not warranted by the report in Moor. For by that it appears, that such a de-

wife was holden to be a bar of dower by two judges, Weston and Benlows, against Dyer.]

A man devised his lands to his wife till his daughter *M.* should arrive at the age of nineteen years, and after to *M.* in tail, remainder over in fee; and devised further, that *M.* should pay after her age of nineteen years to his wife 12*l.* per annum in recompence of her dower, and if she failed in payment, that then his wife should have the land for her life: the wife before her daughter came to nineteen brought her writ of dower, and recovered a third part; and after the daughter came to nineteen, and for non-payment of the 12*l.* the mother entered: and the question was, Cro. Eliz. 128. Gosling and Warberton.

if her entry were lawful? and argued that it was, and that by bringing her writ of dower she had not waved the benefit to have the lands by the devise, because then she had no title to it, but her title accrued after, for non-payment of the 12^l. But it was adjudged, that she, having recovered a third part in dower, should not have the rent by the will; for it is against the intention of the will that she should have both, and the acceptance of one is a waiver of the other.

Dyer, 220.
4 Co. 4.

One seised in fee of lands holden in socage, and of other lands in tail holden *in capite*, devises by will in writing the third part of all his lands to his wife in recompence of her dower, and dies; she enters into the third part of the fee-simple lands without bringing her writ of dower, and therefore she was barred to have any more by 27 H. 8. cap. 10. of jointures; which shews that she took this by the devise, as a jointure within that statute, and that taking by the devise she could not have more than the devisor had power to dispose of which was only his fee-simple lands; and she by entering into a third part thereof shews her intention to have it as a jointure, (for otherwise she could not enter till assignment by the heir or sheriff;) but in this case, she being barred only by reason of the statute, as the book says, it appears that, before that statute, she would not have been barred of her dower by such devise.

2 Vent. 340.
and 1 Chan.
Cases, 181.
Pheasant's
case;

A man marries an orphan of London, who had a great portion in the chamber of London, the husband dies before taking it out, but makes his will, and devises this money to his wife, provided that she should not claim her dower; and yet after his death she brought her writ of dower; and thereupon a bill was brought in Chancery to have her release her dower, or renounce the devise, and for an injunction in the mean time, but could not prevail, the money belonging to her in her own right by the custom, for want of the husband's altering the property thereof; and though he had, yet it was admitted it would have been no bar of dower, being totally collateral thereto; though it should seem, she would in such case have forfeited the money by suing for dower.

2 Chan.

Ca. 24.

2 Vern. 365.

[Lawrence

v. Lawrence,

infra. Le-

mon v. Le-

mon, Vin.

Abr. tit.

Devise, T. c.

pl. 45.

Hitchin v. Hitchin, Pr. Ch. 133.

Galton v. Hancock, 2 Atk. 427.

Tinney v. Tinney,

3 Atk. 8.

Incedon v. Northcote, *id.* 436.

Ayres v. Willis, 1 Vez. 230.

Charles v. Andrews,

9 Mod. 152.

Broughton v. Errington, 7 Br P. C. 12.

Pitt v. Snowden, 1 Br. Ch. Rep. 292.

Pearson v. Pearson, *id. ibid.*

But it is not absolutely necessary that a testator should expressly declare that the devise should be a satisfaction of dower; it is sufficient that it appears from circumstances, as where allowing the double provision would disappoint or materially affect the will. Arnold v. Kempstead, Ambl. 466., and 1 Br. Ch. Rep. 292.

Villa Real v. Lord Galway, Ambl. 682., and 1 Br. Ch. Rep. *ubi supra*.

Jones v. Collier, Ambl. 730.

Wake v. Wake, 3 Br. Ch. Rep. 255.

In such case the widow must make her election. The accepting of an annuity for three years under a will, the widow during that time claiming both, is not conclusive upon her, but she may still make her election. Wake v. Wake, *ubi supra*.] (a) But if A. charges land in D. with a portion for a daughter by a first

On this distinction it hath been often ruled in Chancery, that if lands, money, goods, &c. are devised to a woman, without saying in lieu or satisfaction of dower, &c. yet the wife shall have both; because a devise is said to be considered as a bounty, and implies a consideration in itself; but if it be in lieu or recompence of dower, there the wife cannot have both, but may (a) wave which she pleases.

Devise, T. c. pl. 45. Hitchin v. Hitchin, Pr. Ch. 133. Galton v. Hancock, 2 Atk. 427. Tinney v. Tinney, 3 Atk. 8. Incedon v. Northcote, *id.* 436. Ayres v. Willis, 1 Vez. 230. Charles v. Andrews, 9 Mod. 152. Broughton v. Errington, 7 Br P. C. 12. Pitt v. Snowden, 1 Br. Ch. Rep. 292. Pearson v. Pearson, *id. ibid.* But it is not absolutely necessary that a testator should expressly declare that the devise should be a satisfaction of dower; it is sufficient that it appears from circumstances, as where allowing the double provision would disappoint or materially affect the will. Arnold v. Kempstead, Ambl. 466., and 1 Br. Ch. Rep. 292. Villa Real v. Lord Galway, Ambl. 682., and 1 Br. Ch. Rep. *ubi supra*. Jones v. Collier, Ambl. 730. Wake v. Wake, 3 Br. Ch. Rep. 255. In such case the widow must make her election. The accepting of an annuity for three years under a will, the widow during that time claiming both, is not conclusive upon her, but she may still make her election. Wake v. Wake, *ubi supra*.] (a) But if A. charges land in D. with a portion for a daughter by a first

center

venter, and then marries, and settles part of those lands as a jointure on a second wife, who has no notice of the charge, and *A.* believing that the portion would take place of the jointure, by will gives other lands to the wife in lieu thereof, and the wife by combination with the heir refuses to accept of the devise; the daughter shall hold the other lands which descended to the heir till satisfied her portion. Vern. 219. Reeve and Reeve.

J. S. devised legacies to his wife out of his personal estate, and devised to her part of his real estate during her widowhood, and devised the residue of his estate to trustees, for twenty-one years, for payment of debts and legacies, and the remainder of the whole estate he devised to the plaintiff, (who was his godson, and of his name, but a remote relation,) for life, and to his first and other sons in tail; and my Lord Chancellor *Somers* decreed, that though it was not declared in the will to be in lieu and satisfaction of dower, yet as it may be plainly collected to be so intended, (he having made a disposition of his whole estate,) and as a collateral satisfaction may be a good bar to dower in equity, though not at law, that she must either take her dower and wave the devise, or accept the devise and wave the dower; but this decree was reversed by *Wright*, Lord Keeper, and the decree of reversal affirmed in parliament.

J. S. seised of copyhold lands belonging to the manor of *Whitchurch*, in which manor there is the following custom, viz. that the first wife of every tenant shall have her free bench in all the lands whereof her husband was ever seised during the coverture; the second wife a moiety, and the third a third part so long as she kept her husband above ground; *J. S.* in consideration of a marriage and marriage portion covenants with trustees, that within two months after the marriage he would settle all his lands to the following uses, viz. as to part of the lands, to the uses of himself and his wife for their lives, remainder to the first son, &c. in tail male; and as to the other moiety, to the use of himself for life, remainder to his first son, &c. with a proviso that the lands so settled on the wife should be in lieu of her customary estate; and one of the points in this case was, whether this jointure not being made expressly in lieu of her dower, but only said so in the proviso, and she being an infant at the time of making the articles (*a*), and not a party to them, she should be excluded from claiming her free bench; and it was holden, that she should be obliged to abide by her jointure, and the case of *Vizet* and *Longdon* was cited, where a sum of money was settled upon a woman before marriage for her provision and maintenance; and the Master of the *Rolls* was of opinion she should have both that and her dower; but the Chancellor reversed the decree, and confined her to her settlement.

[*A.* in consideration of a portion, articulated to settle a jointure, but died before the portion was paid, or the settlement was made. The widow took out administration, and so entitled herself to the portion: she then filed a bill against the heir of the husband to have her jointure settled. But the court said, the plaintiff shall not have the money as administratrix, and the jointure too, which was agreed to be made in consideration of the money, and in expectation

2 Vern. 365.
Lawrence
and Lawrence.
Abr.
Eq. 218-9.
S. C.

Mich.
6 Geo. 2.
Jordan v.
Savage.

[(a) *Vide*
Supr. 603.
3 Atk. 8.
S. C. by the
name of
Viyard v.
Longdale.]

Meredith
v. Jones,
1 Vern. 463.

petition that the husband should have received it ; and therefore dismissed the bill with costs. But the reporter adds a *quare de hoc* ; for she is entitled to these two demands in distinct capacities ; and the debts may appear hereafter to exhaust the assets ; and in case the husband had actually received the portion, and it had been in his possession, she would have had it as his administratrix.]

6. That it must not be made during the Coverture.

Co. Lit. 36.

4 Co. 3.

(a) What shall be said an agreement or refusal, 3 Co. 26. a.

3 Leon. 272.

And. 352.

This the very words of the act of parliament require ; and therefore if a jointure be made to a woman during coverture in satisfaction of dower, she may waive it after her husband's death ; but if she enters and agrees thereto, she is concluded ; for though a woman is not bound by any act when she is not at her own disposal, yet if she (a) agrees to it after she is at liberty, it is her own act, and she cannot avoid it.

Poph. 88. Gould 4. 84, 85.

Co. Lit.

36. b

Bulf. 163.

If a jointure be made to the wife before coverture, and the husband and wife alien by fine, the wife shall not afterwards be endowed of any lands of her husband's ; for since she quitted her dower when she was at her own disposal, she can claim nothing but the jointure, and that she has passed away by the fine levied : but if the jointure was made during the coverture, and then she relinquished it by fine, yet she shall have her dower of the other lands ; for the acceptance of a jointure during the coverture is no bar of her dower, and her passing it by fine cannot be construed an acceptance of property in them, since that is capable of another construction, *viz.* to bar her of her dower in those lands.

Moore, 717.

pl 1002.

(b) But whether the part settled in recompence should be in tail, or for life only, *quare* ; & vide 4 Co. 3. b.

The husband after marriage settled lands to the use of himself and wife in (b) tail, for her jointure, and during the coverture part of the lands were evicted, and the husband died, and the wife entered into the residue ; and upon a reference out of the court of wards to the two chief justices, it was resolved, that she should have a recompence for the part evicted.

3 Leon. 272.

3 Co. 27.

A feignory was granted to the husband and wife, and their heirs, the tenant attorns, the husband dies, and the feignory survives to the wife, and she brought her writ of dower, in bar of which the heir pleads acceptance of homage from the tenant ; and this was holden a good bar ; for though she might have disagreed to such estate made during the coverture, yet by the acceptance of homage she hath concluded herself ; and this case differs from the assignment by the heir *in pais* and her acceptance ; because if he gives her a wrong estate, and she accepts thereof, this is no bar of her rightful estate ; but here she having two titles, either as a purchaser to have the whole, or as a wife to have the third part, her acceptance of the one is a waiver of the other, because she cannot have both out of the same land.

Perk 352-3.

3 Co. 27.

If lands are given to the husband and wife, and the heirs of the husband, who dies, the wife may disagree to this estate made during

during the coverture, and then it will be an estate to the husband and his heirs *ab initio*, and so she shall have her dower thereof; but if an estate be made to the husband and wife for the life of the husband, remainder to the right heirs of the husband, it hath been said, that she cannot in this case disagree, because the estate upon the husband's death is determined and gone. [Yet it seemeth, saith *Perkins*, that she may disagree by bringing a writ of dower, notwithstanding that the estate were determined; for otherwise by such means, the wife may be ousted of her dower in every purchase made by her husband; and yet during the marriage she is always by law under the government of the husband in such manner and form, as that she cannot give away any manner of profit arising out of the lands, without the leave of her husband; and she cannot disagree to the same estate during the marriage.]

If an estate be made to the wife for her jointure during the coverture, the remainder to *J. S.* in fee, and the wife wave this jointure, *J. S.* shall have the remainder; for here was a particular estate at the time of creating the remainder, so that it had the circumstances of a remainder, being the residue of a particular estate then in being; and since the particular estate was defeasible by an act that could not hurt the remainder, the remainder upon such destruction of the particular estate comes in being. Co. Lit. 29. b.

A man covenants to stand seised to the use of himself in tail, the remainder to his wife for life, the remainder to *B.* in tail, and then he makes a feoffment in fee to the use of himself and his wife for their lives, as a jointure, the remainder to *C.* and dies without issue; the wife is remitted; for where a later and defeasible, and a former and indefeasible title concur in the same person, there must be a remitter. Co. Lit. 348. a.

But in this case the wife hath two titles, both waveable by her; the first indefeasible by any third person, the latter defeasible by a third person; for upon her claiming by the second title she waves the first, and consequently the remainder in *B.* commences, and he shall have his action, and therefore she must be in of her former title, to save the contention and trouble of the action. Co. Lit. 348. a.

But if an estate is made to the husband in tail, the remainder to the wife for life, the remainder to the right heirs of the husband, the husband afterwards makes a feoffment in fee to the use of the husband and wife for their lives, the remainder to the right heirs of the husband; the husband dies without issue; the wife may claim by which she pleases, and is not remitted *nolens volens*, because here are not two titles the one indefeasible, and the other defeasible by a third person, but both equally firm; for the right heir of the husband upon the waver of the first estate by the wife can claim nothing in the land contrary to the feoffment of his ancestor; and therefore that estate which the wife claims is indefeasible, and no stranger is prejudiced by being put to his action. Co. Lit. 357. Dyer, 351.

But

2 Roll. Abr.
422.

But if she makes no election, she shall be supposed to be in of her elder estate, because every one is presumed to choose what is most for his benefit.

Cro. Jac.
490.

If the wife has an old right before the coverture, and afterwards takes a jointure of the same lands, she shall be remitted.

Hob. 72.

An estate settled to the husband for life, remainder to the wife for a jointure, except such of the lands as the husband should devise; this exception is repugnant to the grant, because the settlement might be avoided by the husband devising the whole.

(C) How far her own or her Husband's Acts may defeat her of this Provision.

Co. Lit. 26.

Dyer 358.

(a) So, a re-

covery as

well as a

fine by a

feme covert

is sufficient

to bar her,

because the *pro. ipe* in the recovery answers the writ of covenant in the fine to bring her into court, where the examination of the judges destroys the presumption of law, that this is done by the coercion of the husband, for then it is to be presumed they would have refused her. 10 Co. 43.

2 Roll. Abr. 395.

IT has been already observed, that if a man make a jointure on his wife either before or after marriage, and they both join in a (a) fine, that she is so far bound thereby, that if the jointure was made before marriage she is barred to claim dower in any other lands of the husband's; but if the jointure was made during coverture, she may claim dower in the other lands.

2 Inst. 673.

Hob. 225.

But if a wife joins with her husband in a bargain and sale of the lands by deed indented and enrolled, yet it shall not bind her; for a wife cannot be examined by any court without writ, and there is no writ allowed in this case.

2 Chan. Ca.

162.

(b) And the

money shall

be paid out

of the per-

sonal estate

of the husband. Vern. 41. 213. 2 Vern. 436.—So, if a jointure be made of lands which are in mortgage, the wife may redeem, and her executor shall hold over till repaid with interest. Chan. Ca. 271. 2 Vent. 343. S. P. decreed.

But if a feme covert joins with her husband in levying a fine to raise a sum of money by way of mortgage, this shall bind her; yet in this case she doth not absolutely depart with her estate for life, but there results a trust to the wife to (b) redeem, and to re-instate herself in her jointure.

Chan. Ca.

119, 120.

If tenant in tail of a trust makes a mortgage, or acknowledges a judgment or statute, and then levies a fine, and settles a jointure, the jointress shall hold it subject to the mortgage or judgment, in the same manner as if the mortgagor or consignor had been tenant in tail of the legal estate, and, after the mortgage or judgment, had levied a fine, and made a jointure, because the subsequent declaration of the use of the fine is merely the act of the tenant in tail, and he cannot by any act of his own make a subsequent conveyance take place of a precedent, and the rather, because the feme claims under that fee which tenant in tail got by the fine, and that fee was subject to all the charges he had laid upon it.

(D) How far a Jointress is entitled to the Aid and Assistance of a Court of Equity.

IF a man before marriage articles to settle a jointure on his intended wife, and the marriage is consummated, and the husband dies before any settlement made, an execution of the articles will be decreed in (a) equity.

2 Vent. 343.
(a) That a jointress in equity is considered as a purchaser

for valuable consideration, who may set aside a prior voluntary conveyance as fraudulent against her. Chan. Ca. 100.—But where by a marriage agreement the son's intended wife was to have more than would have been left for the father, (though indebted) his wife and two daughters unpreferred, the court of Chancery would not decree it, principally, by reason of the extremity of it, but left the party to her remedy by law. 2 Chan. Ca. 17.

So, where A. gave a voluntary bond after marriage to make a jointure to his wife, and he made a jointure accordingly, and then the wife delivered up the bond, and the jointure was evicted; the court held, that it should be made good out of the personal estate, especially as there were no creditors affected by it; for the delivery of the bond by a feme covert could no way bind her.

Vern. 427.
Beard and Nuthal.

So, if a jointress brings her bill to have an account of the real and personal estate of her late husband, and to have satisfaction thereout, for a defect of value of her jointure lands, which he had covenanted to be and to (b) continue of such value, and the defendant insists that this is a covenant which (c) sounds only in damages, and properly determinable at law; though it be admitted that a court of equity cannot regularly assess damages, yet in this case a master in Chancery may properly inquire into the value of the defect of the lands, and report it to the court, which may decree such defect to be made good, or send it to be tried at law upon a *quantum damnificat*.

Abr. Equ. 18.
(b) If a man covenants to settle lands of such a value as a jointure, and this covenant is omitted in the settlement, yet it subsists in equity; but

the value of the land is not to be estimated according to the present value, but as they were at the time of the jointure settled, unless the covenant be so. Vern. 217. Speake v. Speake. (c) An action on the case brought at law for not making a jointure: 2 Roll. Rep. 488.

If there be a jointress, and a covenant that her jointure shall be of such a yearly value, and it fall short, though her estate be not without impeachment of waste, yet she may commit waste so far as to make up the defect of the jointure, and equity will not (d) prohibit.

Abr. Equ. 221-2.
Carew and Carew.
(d) But on a motion to stay a jointress

tenant in tail after possibility, &c. the court held, that she being a jointress within the 12 H. 7. c. 20., ought to be restrained, being part of the inheritance which by the statute she is restrained from aliening, and therefore granted an injunction against wilful waste. Abr. Equ. 221. Cook and Winfold.

J. S. made a settlement on his eldest son for life, with remainder to his first and other sons in tail, remainder over, with power to his son to appoint any of the lands not exceeding 100 l. *per annum* to any wife he should afterwards marry, for a jointure, (the father being under an apprehension that he was then married to a woman whom the father disliked, and had no intention his son

Abr. Equ. 221. Hills 1701. Fothergill and Fothergill.

should provide for;) the father died, and the son married that very woman, (though there was strong presumptive proof that he was married to her before,) and after marriage appointed certain lands to trustees in trust for her, for a jointure, and covenanted, that if they were not of 100*l.* *per annum* value, that upon request made to him any time during his life, he would make them up so much out of other lands in his power. He lived several years, and no complaint was made that the lands were not of that value, nor request to make it up, and died; upon issue on a bill brought by the widow to have the jointure made up 100*l.* my Lord Keeper said, that a provision for the wife or children was not to be considered as a voluntary covenant, and therefore decreed the deficiency to be made up, notwithstanding the circumstances of the case, and her neglect in not requesting it during coverture; for the laches of a feme covert cannot be imputed to her.

2 Vern. 701.
Vern. 479.
S.P. though
the jointure
was made
after mar-
riage.

If a bill is brought by an heir at law, or any other person against a jointress, whereby the party would avoid the jointure, under pretence that his ancestor was only tenant for life, &c. and he seeks for a discovery of deeds and writings, whereby he would avoid the title of the jointress, he shall never have such a discovery, unless he by his bill submits to confirm her title, and then he shall.

So, if a jointress prays a discovery against an heir at law of deeds and writings, if the heir submits by answer to confirm the jointress's title, she shall have no such discovery.

Juries.

Fortesc. de
Laud. Leg.
Ang. c. 25.
Co. Lit. 155.
Co. Preface
to 3d and
2d report.

THE trial *per pais*, or by a jury of one's country, is justly esteemed one of the principal excellencies of our constitution; for what greater security can any person have in his life, liberty, or estate, than to be sure of not being dejected of, or injured in any of these, without the sense and verdict of twelve honest and impartial men of his neighbourhood? and hence we find the common law herein confirmed by *Magna Charta*, cap. 29. *Nullus liber homo capiatur, vel imprisonetur, aut disseisetur de libero tenemento suo, vel libertatibus, vel liberis consuetudinibus suis, aut utlagetur, aut exuletur, aut aliquo modo destruat, nec super eum ibimus, nec super eum mittemus nisi per legale iudicium parium suorum, vel per legem terræ.*

2

Likewise

Likewise the antiquity of this trial, and its being peculiar to us, have been taken notice of, as matters which reflect honour on our constitution; for though there were anciently several other methods of trial, such as by battle, ordeal, &c. yet have they, from the inconveniencies attending them, been laid aside, and this alone cultivated and improved, as the best method of investigating truth.

*Spelm. Gloss.
verbo Jura-
ta. Glan.
lib. 2. c. 7.*

We shall consider this Head under the following Divisions.

(A) Of the several Kinds of Juries and Inquests:
And herein of the Number such Juries must consist of.

(B) Of the Jury Process, and Manner of convening the Jury: And herein,

1. Of the Necessity of such Process, and where a Panel may be returned by a bare Award without any Precept.
2. Of the several Kinds of Jury Process, and Manner of compelling a Jury to appear.
3. By whom such Processes are to be executed, and the Jury convened.
4. In what Time such Processes are returnable.
5. Where the Jury must appear.
6. What Number are to be returned.
7. Of awarding Process by *Proviso*.
8. Necessity of returning a Panel into Court, and where a Prisoner may demand a Copy of it.
9. Of the Trials going off *pro Defectu Juratorum*; and therein of drawing a Juror.

(C) In what Cases, and in what Manner a *Tales* is grantable.

(D) In what Cases, and in what Manner Special Juries are appointed.

(E) Who are to be returned: And herein of the Qualifications and several Causes for which they may be challenged; and,

1. Of Challenges to the Array or to the Polls; and herein where the Insufficiency or Partiality of the Sheriff or Returning Officer is a principal Cause of Challenge, or to the Favour.
2. Where Insufficiency and not being *Liber Homo* is a good Cause of Challenge to the Polls.

3. Where the Want of Freehold, or a competent Estate, is a good Cause of Challenge.
4. Where the Jury's not being convened from a right Place is a good Cause of Challenge.
5. Where Partiality in the Juror is a good Cause of Challenge; and therein where it shall be said a principal Cause of Challenge, or to the Favour.
6. Where the Quality of the Juror is a good Cause of Challenge; and herein who are exempt from serving on Juries.
7. Where from the Quality of either Party it is a good Cause of Challenge, that a Knight is not returned.
8. Of Trials *per Medietatem Linguz*, where an Alien is Party.
9. Of peremptory Challenges.
10. Of Challenges by the Crown.
11. At what Time a Challenge is to be taken.
12. How such a Challenge is to be tried.

(F) How Jurors are to be impanelled and sworn.

(G) How to be kept and discharged.

(H) In what Cases, and in what Manner to have a View.

(I) What Irregularities and Defects in convening, or in the Qualifications of the Jurors, are amendable, and aided after Verdict.

(K) What Irregularities or Defects in convening, or in the Qualifications of the Jurors, are aided by Consent.

(L) When, and by whom to be paid.

(M) For what Misdemeanours punishable: And herein,

1. Where punishable by Attaint.
2. How otherwise punishable.
3. Where Abuses by others in relation to them are punishable; and therein of the Offence of Embracery.

(A) Of the several Kinds of Juries and Inquests :
And herein of the Number such Jury must
consist of.

JURIES are distinguished into grand and petit juries ; the grand jury may (a) consist of thirteen, or any greater number [not exceeding twenty-three] ; for these being the grand inquisitors of the county, every indictment and presentment by them must be found by twelve at least ; but it is not necessary that all above that number should concur in such presentment or indictment.

Cro. Eliz.
654.
3 Inst. 30.
2 Inst. 387.
2 Hal. Hist.
P. C. 154.
[2 Burr.
1088]

(a) That in *Middlesex* three grand juries are returned every term to serve in B. R., every jury consisting of sixteen, seventeen, or more, to inquire of offences criminal committed in the several parts of the county of *Middlesex* through the whole county ; the reason hereof is, that in *Middlesex* there are three hundreds, and for every several hundred there is a particular jury returned to serve for that hundred only. 2 Lil. Reg. 156.—That in some counties which consist of guildable, and such franchise, where anciently several justices of gaol-delivery sat, as in *Suffolk*, there are two grand juries, one for the guildable, another for the franchise, because there are two several commissions of gaol-delivery. 2 Hal. Hist. P. C. 26. 154.

Upon the summons of any session of the peace, and in cases of commissions of oyer and terminer and gaol-delivery, there goes out a precept either in the name of the king, or of two or more justices, directed to the sheriff, upon which he is to return twenty-four, or more, out of the whole county, namely, a considerable number out of every hundred, out of which the grand inquest at the sessions of the peace, oyer and terminer or gaol-delivery, are taken, and sworn *ad inquirendum pro domino rege & corpore comitatûs*.

2 Hal. Hist.
P. C. 154.

Those returned to serve on the grand jury must be (b) *probi & legales homines*, and ought to be of the same county where the crime was committed ; and therefore it is a good exception at common law to one returned on a grand jury, that he is an alien or villein, or that he is (c) outlawed for a crime, or that he was not returned by the proper officer, or that he was returned at the instance of the prosecutor ; but these exceptions must be taken before the indictment found.

Cro. Eliz.
654.
3 Inst. 30.
12 Co. 99.
2 Roll. Rep.
82. 2 Hal.
Hist. P. C.
154-5.
(b) Where
indictments
found in

inferior courts have been quashed for want of the words *proborum & legalium hominum* in the caption. Cro. Eliz. 751. Cro. Jac. 635. Palm. 282. 2 Roll. Rep. 400. 2 Koll. Abr. 82. Poph. 202. Keb. 629. 2 Keb. 471. 3 Mod. 122. Lev. 208.—But this exception has been often over-ruled, because *prima facie* all men shall be intended honest and lawful. Keb. 50. 2 Keb. 135. 284. Cro. Jac. 41. Sid. 106. 367. (c) Though in a personal action. 2 Hal. Hist. P. C. 155. But for this *vide* 3 Inst. 32. 21 H. 6. 30. pl. 17. Fitz. tit. *Process*, 208. Cro. Car. 154. 147. Jones, 198. 12 Co. 99.

It is laid down by my Lord Chief Justice *Hale*, that at common law every person returned on the grand jury ought to be a freeholder at least, and that the statute of 2 H. 5. cap. 3. that requires jurors that pass upon the trial of a man's life to have 40s. *per annum* freehold, hath been the measure by which the freehold of grand jurymen hath been measured in precepts of summons of sessions.

2 Hal. Hist.
P. C. 155.
But for this
vide 2 Hawk.
P. C. c. 25.
§ 19. [To
what a-
mount the
qualification
should be, is
Cont. 302.]

uncertain, and seems to be *casus omissus*, and proper to be supplied by the legislature. 4 Bl.

(*a* *Viz.*
Westm. 2.
 c. 28. that
 old men
 above the
 age of seven-
 ty shall not
 be put on
 juries.—By
Westm. 2.
 c. 38. shall
 not have less
 than 20 s.
 yearly.—By
 31 E. 1. com-
 monly called
 the statute
*de his qui po-
 nend. sunt in
 assis.* shall
 have tene-
 ments to the
 value of 40 s.
 yearly.—By
 28 E. 1. com-
 monly called
 the statute of
*articuli super
 chartas*,
 none are to
 be put on
 inquests and
 juries but
 such as be
 next neigh-
 bours, most
 sufficient,
 and least
 suspicious;
 and the like is enacted by 42 E. 3. c. 11. And to the same purpose are the 23 E. 3. c. 6. and 34 E. 3. c. 4. * Leaseholders, where the improved rents amount to 50 l. *per annum*, liable to serve as jurors, *per* 4 Geo. 2. c. 7. § 3. *

Also, by several (*a*) acts of parliament it is provided, that those who serve on the grand jury be such as are duly qualified, the principal ones of which are the 11 H. 4. cap. 9. and 3 H. 8. cap. 12. the first whereof is as followeth: "Because that now of
 " the late enquests were taken at *Westminster* of persons named to
 " the justices, without due return of the sheriff, of which persons
 " some were outlawed before the said justices of record, and some
 " fled to sanctuary for treason, and some for felony, there to have
 " refuge, by whom as well many offenders were indicted, as other
 " lawful liege people of our lord the king, not guilty, by conspi-
 " racy, abettment, and false imagination of other persons, for
 " their special advantage and singular lucre, against the course of
 " the common law used and accustomed before this time; our
 " said lord the king, for the greater ease and quietness of his peo-
 " ple, wills and granteth, that the same indictment so made, with
 " all the dependance thereof, be revoked, annulled, void, and
 " holden for none for ever, and that from henceforth no indict-
 " ment be made by any such persons, but by inquests of the king's
 " lawful liege people, in the manner it was used in the time of
 " his noble progenitors, returned by the sheriffs or bailiffs of fran-
 " chises, without any denomination to the sheriffs or bailiffs of
 " franchises before made by any person of the names which by
 " him should be impanelled, except it be by the officers of the said
 " sheriffs or bailiffs of franchises sworn and known to make the
 " same, and other officers to whom it pertaineth to make the
 " same, according to the law of *England*; and if any indictment
 " be made hereafter in any point to the contrary, that the same
 " indictment be also void, revoked, and for ever holden for
 " none."

And to the same purpose are the 23 E. 3. c. 6. and 34 E. 3. c. 4. * Leaseholders, where the improved rents amount to 50 l. *per annum*, liable to serve as jurors, *per* 4 Geo. 2. c. 7. § 3. *

In the Construction of this Statute the following Points have been resolved;

12 Co. 99. That if a person not returned on a grand jury procure his name
 3 Inst. 33. to be read among those that are returned, whereupon he is sworn,
 &c., he may be indicted for a contempt of this statute.

12 Co. 99. That indictments before (*b*) justices of the peace are clearly
 3 Inst. 33. within this statute.
 Cro. Car.

134. (*b*) It seems, that a coroner's inquest is within it. Jones, 198.

3 Inst. 34. That a person, arraigned on an indictment taken contrary to the
 Cro. Car. statute may plead such matter in avoidance of the indictment, and
 134. Jones also plead over to the felony.
 198.

3 Inst. 34. That he, who is outlawed on an indictment without any trial,
 Cro. Car. may clearly shew in avoidance of such outlawry, that the indict-
 147. ment was taken contrary to the statute; but the court need not ad-
 mit of the plea of the outlawry of an indictor in avoidance of any
 such indictment unless he who pleads it have the record ready,
 unless it be an outlawry of the same court wherein the indictment
 is depending; in which case it is said, that any one as *amicus curie*
 may

may inform the court of it; also it seems the better opinion, that no exception against an indictor is allowable, unless the party takes it before trial.

That if one of the grand jury, who find an indictment, be within any of the exceptions in the statute, he vitiates the whole, though never so many unexceptionable persons joined with him in finding it.

11 H. 4. 41.
pl. 8. S. P.
C. 88.

That if a prisoner indicted of felony offer to take any such exception, he shall, upon his prayer, have counsel assigned him for his assistance.

3 Inst. 33.
Cro. Car.
134. 147.
Jones 198.

By the 3 H. 8. cap. 12. it is enacted, “ That all panels to be returned, which be not at the suit of any party, that shall be made, and put in by every sheriff and their ministers, before any justice of gaol-delivery, or justices of peace, whereof one to be of the *quorum*, in their open sessions, to inquire for the king, shall be reformed by putting to and taking out of the names of the persons which so be impanelled by every sheriff, and their ministers, by the discretion of the same justices before whom such panels shall be returned, and that the same justice and justices shall command every sheriff, and their ministers in his absence, to put other persons in the same panel by their discretions, and that the same panels so reformed by the said justices be good and lawful; and that if any sheriff, or any other minister, at any time do not return the same panels so reformed, that then every such sheriff and minister so offending shall forfeit for every such offence twenty pounds, &c.”

This act extends not only to panels of grand inquests returned, but also to panels of the petty jury, commonly called the petty jury of life and death, which may be reformed by the justice according to this act, and the sheriff is bound to return the panel so reformed.

2 Hal. Hist.
P. C. 156.
265.

It hath been holden, that this statute doth not take away the force of 11 H. 4. cap. 9. as to any point wherein both may consist together; and therefore if any indictor be outlawed, or returned at the nomination of any person, contrary to 11 H. 4. cap. 9. except of the justices authorised as abovementioned to reform the panel, the indictment may be avoided in the same manner as before.

3 Inst. 33.
2 Hawk.
P. C. 313.

The grand jury, as has been already observed, must consist of twelve at (a) least, the petty jury of twelve, and can be neither more nor less; but it is said, that particular (b) inquests may consist of a more or less * number than twelve.

Trials per Pais, 93.
F. N. B. 107.
Finch of Law 400.
484.—

A writ of inquiry of waste by thirteen was holden good. Cro. Car. 414. (a) That to make a jury in a writ of right, which is called the grand assize, there must be sixteen, viz. four knights, and twelve others. *Trials per Pais*, 95. Or it may consist of a greater number. 2 Roll. Abr. 674.— The jury in attain, called the grand jury, must be twenty-four; but if the issue be upon a matter out of the point of the attain, as upon a plea of non-tenure, the trial shall be by twelve. *Trials per pais*, 95. (b) That a juror can be excepted against on an inquest of office. 6 Mod. 43.— That a jury cannot be tainted on an inquest of office. Carth. 562. * See *infra*.

But on a writ of error a judgment out of an inferior court was reversed, because being by default the inquiry of damages was

Vent. 113.

only by two jurors; and though a custom was alleged to warrant it, yet it was resolved that there could not be less than twelve, though the writ of inquiry saith only *per sacramentum proborum & legalium hominum*, and not *duodecim* as in a *venire*.

Cro. Car.
259. Sid.
233.
3 Keb. 326.
[(a) See Cro.
Car. 259.
1 Sid. 233.
and 3 Geo. 2. c. 25. § 9.]

Also, it hath been frequently holden, that a custom in an inferior court to try by six jurors is void; and that though such custom is used in *Wales*, yet that that is by force of the statute 34 & 35 H. 8. cap. 26. § 74. which appoints that such trials may be by six only where the custom hath been so (a).

(B) Of the Jury Process, and Manner of convening the Jury: And herein,

1. Of the Necessity of such Process, and where a Panel may be returned by a bare Award without any Precept.

March, 81.

IT seems agreed, that a person not duly summoned and returned is not obliged to serve on a jury; as it hath been holden, that if a stranger cause himself to be sworn in the name of one who was of the jury, it is such a misdemeanour for which he may be indicted, and for which also an action on the case lies at the suit of the party injured.

2 Inst. 568.
4 Inst. 168.
2 Hawk.
P. C. c. 41.
§ 1.

But justices of gaol-delivery may have a panel returned by the sheriff without any precept or writ; and the reason given for it is, that before their coming they may make a general precept to the sheriff in parchment, under their seals, to bring before them at the day of their sessions twenty-four out of every hundred, &c., to do those things which shall be enjoined them on the part of the king, &c., and therefore it is said, that they need not make any other precept for the return of a jury for the trial of any issue joined before them, but that their bare award that the jury shall come is sufficient, because there are enough for that purpose, supposed to be present in court, whom the sheriff may return immediately, whenever the court shall demand their service.

2 Inst. 568.
Sid. 364.

(a) 2 Hawk.
P. C. c. 41.
§ 1.

Also it is said, that a jury may be so returned before justices of peace at their sessions, because the precept for the summons of the sessions hath a clause to the same effect, for the summons of twenty-four out of every hundred: but it is (a) doubted whether this matter does not rather depend on practice, and the constant course of precedents, than any argument from the reason of the thing; and even in the case of justices of gaol-delivery, the law is otherwise, if they have a special commission.

2 Hal. Hist.
P. C. 260-1.
2 Hawk.
P. C. 571.

Also, the precept to the sheriff from justices of oyer and terminer, in order for the holding of their sessions, hath in effect the very same clause for the bringing of twenty-four before them out of each hundred at the day of their sessions, &c. and yet it seems agreed, that they cannot have a jury returned for the trial of an issue joined before them by force of a bare award, but ought to make a particular precept to the sheriff for that purpose under their seals,

By the course of the King's Bench no jury can be returned into it from a foreign county, without process under the seal of the chief-justice; but *quere* if it may not be returned for a trial in the county where it sits by a bare *præceptum est*? Dyer 118.
2 Hal. Hist.
260.
2 Hawk.
P. C. c. 41. § 2.

2. Of the several Kinds of Jury Process, and Manner of compelling a Jury to appear,

The first process for convening the jury is the *venire facias*, which must be awarded on the roll, and thereupon in the *Common Pleas*, there issues the *habeas corpora* and *disfringas juratores*; but in the *King's Bench* and *Exchequer* after the *venire* they proceed on the *disfringas*; for the *venire* being in the nature of a summons, if the jury do not appear thereon in those courts in which the king has a more immediate concern, they proceed on the strongest process, viz. the *disfringas*. Trial per
Pais. 62.

If all the jury did not attend on the *habeas corpora* or *disfringas*, which was to bring them into court, there was an *undecim*, *decem*, or *octo tales*, according as the number was deficient, to force others to the King's Court to try the issue; this was without (a) a new summons or *venire*, because it was supposed that the first *habeas corpora* and *disfringas* had given notice to the vicinity that they ought to appear; and therefore the supplement of a jury were forced in without a particular summons to them. (a) But if
the whole
jury be chal-
lenged off,
then a new
venire facias,
and if none
of the jury
appear, then
a *disfringas*
juratores
P. C. 265.

shall issue, and no *tales*. 2 Hal. Hist. P. C. 265.

There must be an award on the roll to warrant the issuing of the *venire* or *disfringas*, and such process must be continued from time to time against the jurors, returnable on the same days to which the suit is continued on the roll against the parties.

And therefore where a *venire facias* was made returnable on the 23d of January, and the *disfringas* tested on the 24th, this was holden a discontinuance, and being in a criminal case, not aided by any of the statutes of *jeofails*.

So, where the *venire* omits part of the issue or issues to be tried, or where a *venire* omits any of the parties, these are discontinuances.

3 Bult. 311.

So, where a juror is named in the *habeas corpora* by a name different from that in the panel returned on the *venire*, or where a juror returned on such a panel is wholly omitted in the *habeas corpora*; but in these cases, if the juror so misnamed or omitted be not sworn at the trial of the cause, it is questionable whether there be any discontinuance at all.

586. Vide *Poſtea*, letter (1).

Where there are several defendants who plead several pleas, the plaintiff may choose either to have one *venire facias* for all, or several for (b) every one of the defendants; so, where several persons are arraigned upon the same indictment or appeal, and severally plead not guilty, it in the election of the prosecutor either to take out a joint *venire* against them all, or several against each of them; but

2 Hawk.
P. C. c. 27.
§ 95.

6 Mod. 281.
Saik. 51.
pl. 14.
2 Ld. Raym.
1001.

Cio. Eliz.
622. Roll.
Rep. 22.
Winch. 73.

Sid. 66.
Keb. 182.
191. 398.
215
6 Mod. 285.
5 Co. 36. b.
Cro. Eliz.

Jones, 425.
2 Hawk.
P. C. c. 41.
§ 8.

(b) It is
said, that
where there
are three
but

defendants the plaintiff may join two of them in one *venire*, and take out another against the third. Cro. Eliz. 541. But for this *vide* 2 Roll. Abr. 556. 620. 667. Hob. 36. Cro. Eliz. 366. Cro. Jac. 550.

2 Hawk. P. C. c. 27. § 96. But where a joint *venire* is first awarded for the trial of all the defendants together, and afterwards several *venires* for the trial of each of them, this is a discontinuance.

2 Hawk. P. C. c. 41. § 9. And where the same jury is returned on joint process against several defendants, if a juror be challenged by any one of them, and thereupon drawn, he is by necessary consequence drawn as to all, because there being but one panel, the same person cannot at the same time be taken from it, and continue in it; and to prevent this inconvenience, where one jury is jointly returned before justices of gaol-delivery, they may sever the panel; but after an appellant has taken out a joint *venire* against all the appellees, he cannot afterwards take out several ones, though the first be never returned, because it would cause a discontinuance.

2 Hawk. P. C. c. 22. § 14. Jurors being duly served with process are compellable to appear; and therefore, where more than one appear, but not enough to take the inquest, but some of the others come within view, or into the town where the court is holden, but refuse to come into court; in these cases the court may order those who appear to enquire of the yearly value of such defaulters lands; which being done, the court may either summon them to appear, on pain of the sum found, or some less sum, or may fine them in like sum without more ado; but such juror shall only lose his issues, and not the yearly value of his lands, unless the party pray it: but one who makes default after appearance is liable to such forfeiture without any prayer; yet the court in discretion will sometimes only impose a small fine: also, a juror, who comes not to town where the court is holden, shall only lose his issues, or be amerced, but not fined; and it is said, that a juror is not amerceable at all at the return of the first *venire*, except before justices of *oyer* and *terminer*.

Also, by the 27 Eliz. cap. 6. § 2. it is enacted, "That upon every first writ of *habeas corpora* or *disfringas* with a *nisi prius* delivered of record by the sheriff, or other minister or ministers to whom the making of the return shall appertain, shall return in issues, upon every person impannelled and returned upon any such writ, at least ten shillings; and at the second writ of *habeas corpus* or *disfringas* with a *nisi prius* upon every person impannelled and returned upon any writ twenty shillings at the least; and at the third writ of *habeas corpora* or *disfringas* with a *nisi prius*, that shall be further awarded, upon every person impannelled and returned upon such writ thirty shillings; and upon every writ that shall be further awarded to try any issues, to double the issues last before specified, until a full jury be sworn, or the process otherwise ceased or determined, upon pain to forfeit for every return of issues contrary to the form aforesaid five pounds."

And

And now by 3 Geo. 2. cap. 25. § 13. it is enacted, "That every person or persons whose name or names shall be drawn, (as by the act is directed) and who shall not appear after being openly called three times, upon oath made by some credible person, that such person for making default had been lawfully summoned, shall forfeit and pay for every default in not appearing upon call as aforesaid, (unless some reasonable cause of his absence be proved by oath or affidavit, to the satisfaction of the judge who sits to try the said cause) such fine or fines not exceeding the sum of five pounds, and not less than forty shillings, as the said judge shall think reasonable to inflict or assess for such default *."

* Persons summoned on juries in courts of record, in cities, corporations, and franchises, and not attending, may be fined.
29 Geo. 2. c. 19.

3. By whom such Processes are to be executed, and the Jury convened.

The sheriff is the proper officer by whom the jury process is to be executed, unless he be partial, that is, such a one, as from his consanguinity or affinity, his being under the power of either party, &c., cannot be presumed to be an indifferent person, as every officer who hath any way to do with the administration of justice ought to be; and in every such case the process shall be directed to the coroners, if they are impartial, or to those of them who are so, in case some of them lie under the afore-mentioned prejudices; and in case all the coroners are partial, or not indifferent, then the *venire* shall be directed to two elizors named by the court, and against whom, for that reason, no challenge can be taken.

Co. Lit. 158. a.
Bro. Chal-
lenge, 153.
vide infra,
letter (E).

When process is once awarded to the coroners, &c., for the sheriff's actual partiality, the entry is *vicecomes se non intronittat*, and in such case process shall not afterwards be awarded to any new sheriff: but where it was awarded to the coroners, for that the sheriff is tenant, &c., it may be awarded to a new sheriff.

Co. Lit. 158.
2 Roll.
Abr. 670.

So, if a *venire facias* is awarded to the coroner for partiality in the sheriff, and afterwards a *tales* is awarded, which is returned by the sheriff, this has been holden error.

Cro. Eliz.
574.
Morgan v.
Cro. Eliz. 586.
Wye; & vide

But if the *venire* be awarded to the coroners for default in the sheriff, and they do nothing upon the writ, upon a default discovered in the coroner *de puisne temps* the party may shew this to the court, and have a *venire* awarded to the sheriff, if there be an indifferent one, made in the mean time, else to elizors; & sic e converso.

Trials per
Pais, 53.

And therefore in error of a judgment in *Chester*, the parties being at issue, a *venire* was awarded to the sheriff, and at the day of the return it was entered, *quod vicecomes non misit breve*, and then the plaintiff prayed a *venire facias* to the coroners for cosinage betwixt him and the sheriff, which was awarded accordingly; and at the day of trial the defendant made default, and there being judgment thereon, it was assigned for error, that after the plaintiff had admitted the sheriff to execute the writ, he could not pray a *venire facias* to the coroners without some cause *de puisne temps*;

Cro. Eliz.
853.

sed

sed non allocatur, because there was nothing done upon the first writ, and the defendant having made default, it was not material.

Co. Lit. 157.
b. 158. a.
Trials per Pais, 55.
Jenk. 115.
[(a) But such a surmise with respect to the under-sheriff will not authorise the awarding of the *venire* to the coroners. Cro. Ja. 547. *Symonds v. Walsb.* But see 2 Lill. Pr. Reg. 155.]

Upon the surmise of the plaintiff that the sheriff is his cousin (a), and upon prayer that the *venire* be directed to the coroners for avoidance of his own delay, that might happen by the challenge of the array, the defendant shall be examined whether it be true or not; and if he confesses it, then the *venire* shall be awarded to the coroners; for then it appears to the court by the defendant's confession, that the sheriff is not indifferent; but if the defendant denies it, then the process shall be awarded to the sheriff, and the defendant, shall not afterwards challenge the array for this cause: but if the defendant will allege any such matter, and pray a *venire facias* to the coroners, there the plaintiff shall not be examined, neither shall such allegations be allowed, because delays are for the defendant's advantage, and the defendant may challenge the jury for this cause, and so is at no prejudice.

Carth. 214.
The King v. Warrington, one of the sheriffs of Chester, 2 Salk. 152.

If there be two sheriffs of a county, and one of them be partial, the *venire* may be directed to the other, and not to the coroners; for the coroner is not the proper person to execute the process of the court, but in such cases where the proper officer is wanting; which cannot be said where there is one impartial sheriff.

S. C. 1 Show, 352. 4 Mod. 65. S. C. Comb. 191. S. C. 12. Mod. 22. S. C. Skin. 104. pl. 3. S. P. adjudged between Rich, Sheriff of London, and Sir Thomas Player.

Trials per Pais, 51.

So, if the under sheriff be a party, yet the *venire* may be directed to the high sheriff, with this proviso, *quod sub-vic. tuus in nulla se intromittat cum executione istius brevis*.

Fitz. tit. Challenge, 121.

After a challenge to the array, and allowed for the partiality of the sheriff, the coroner may return the very same jury.

Dyer, 177. b. pl. 34.

If the sheriff return on the *venire facias*, *quod breve istud sic executum & indorsatum per A. B. nuper vicecomitem predecessorem suum cum panello, ubi in facto panellum illud factum & arraiatum fuit per ipsum nunc vicecomitem*, the party may challenge the array afterwards for consanguinity or affinity of the sheriff; and this shall be tried by two triers, notwithstanding this false return.

Elieb. 70.

Upon a surmise the *venire facias* was awarded to the coroners, and the *venire* was returned by two coroners only, and the *disstringas* by three coroners; and there being at the time of the award and return of the *venire facias* and *disstringas* four coroners, it was agreed that this was at common law plain error; for that coroners as ministers must all join, but as judges they may divide; but that it was aided by the statute of *jeofails*, which cures the imperfect and insufficient returns of process by sheriffs or other officers.

Raym. 284.
Dominus Rex v. Higgin,

If upon a suggestion on the roll the *venire* is directed to the coroners, who are two in number, and both the coroners are mentioned on the record to have returned the panel, and in reality one only returned it; yet this cannot be excepted against, because an objection contrary to what appears on the face of the record.

Error

Error of a judgment in *Northampton*, because in *Northampton* the court being holden before the mayor and two bailiffs, the *venire fac.* upon the issue was awarded to the two bailiffs to return a jury before the mayor and bailiffs *secundum consuetudinem*, which being returned, and judgment given, the error assigned was, because the bailiffs being judges of the court, could not also be officers, to whom process should be directed, there being no custom that can maintain any to be both officer and judge; but all the court (*absente Hide*) conceived it might be good by custom, and that it is not any error; for the judges be not the bailiffs only, but the mayor and bailiffs; and it is a common course in many of the ancient corporations where the bailiffs are judges, or the mayor and they be judges, yet in respect of executing process they be the officers only, and one may be judge and officer *diversis respectibus*; as in re-disseisin, the sheriff is judge and officer; whereupon the judgment was affirmed.

Cro. Car.
138. Crane
v. Holland.

If the array of a panel is returned by a bailiff of a franchise, and the sheriff return it as of himself, this shall be quashed; but if the sheriff return a jury within a liberty, this is good, and the lord of the franchise is driven to his remedy against him.

Co. Lit.
156. a.

If the sheriff returns a panel of jurors, struck by two strangers, that favour neither of the parties, this is a good array, and shall not be quashed; and, therefore, it is common for the officers of the court, by the direction of the judges, to give a panel to the sheriff, which he returns; but the court seems not to have power to compel the sheriff to make his return, but they can fine him, if a sufficient jury does not appear according to the precept of the writ.

Co. Lit.
157. a.
Keb. 357.
687.

By the 3 Geo. 2. cap. 25. for the better regulation of juries, it is enacted, "That the person or persons required by the 7th and 8th of King *William*, and the 3d and 4th of Queen *Ann*, to give in, or who are, by virtue of this act, to make up true lists in writing of the names of persons qualified to serve on juries, in order to assist them to complete such lists, shall (upon request to any parish officer, who shall have in his custody any of the rates for the poor, or land-tax) have free liberty to inspect such rates, and take from thence the names of such freeholders, copyholders, or other persons qualified to serve on juries, dwelling within their respective parishes, &c. for which such list is to be given in and returned, and shall yearly, twenty days at least before the feast of St. *Michael* the archangel, upon two or more *Sundays*, fix upon the door of the church, &c. within their respective precincts, a true and exact list of all such persons intended to be returned to the quarter sessions, as qualified to serve on juries, and leave at the same time a duplicate of such list with a church-warden, chapel-warden, or overseer of the poor, to be perused by the parishioners without fee or reward, to the end that notice may be given of persons so qualified who are omitted, or of persons inserted by mistake, who ought to be omitted out of such lists; and if any person not being qualified to serve on juries, shall find his name mentioned in such list, and the person required to make such list

Made perpetual by
6 Geo. 2.
c. 37.

“ shall refuse to omit him, or think it doubtful whether he ought
 “ to be omitted, it shall be lawful for the justices of the peace,
 “ at their respective general quarter sessions, to which the said
 “ lists shall be so returned, upon satisfaction from the oath of
 “ the party complaining, or other proof, that he is not qualified
 “ to serve, to order his name to be struck out, when the same
 “ shall be entered in the book, to be kept by the clerk of the
 “ peace for that purpose.”

§ 2. It is further enacted, “ That if any person required to return
 “ or give in, or to make up any such list, or concerned therein,
 “ shall wilfully omit any person whose name ought to be inserted,
 “ or shall wilfully insert any person who ought to be omitted, or
 “ shall take any money, or other reward, for omitting or insert-
 “ ing any person, he shall, for every person so omitted or insert-
 “ ed, forfeit twenty shillings for every offence, and upon con-
 “ viction before one or more justice, &c. where such offender
 “ shall dwell, upon the confession of the offender, or proof upon
 “ oath; one half to the informer, and the other half to the poor
 “ of such parish; and in case such penalty shall not be paid with-
 “ in five days after conviction, the same shall be levied by dis-
 “ tress and sale of the offender’s goods, by warrant, returning
 “ the overplus, if any; and the justice or justices, before whom
 “ such person shall be convicted, shall, in writing, certify the
 “ same to the justices at their next general quarter sessions;
 “ which justices shall direct the clerk of the peace, to insert or
 “ strike out the name of such person as shall by such certificate
 “ appear to have been omitted or inserted in such lists; and du-
 “ plicates of the lists, when delivered in at the quarter sessions,
 “ and entered in such book, shall during the continuance of
 “ such quarter sessions, or within ten days after, be delivered or
 “ transmitted by the clerk of the peace to the sheriff of each re-
 “ spective county, or his under-sheriff, in order for his returning
 “ juries out of the said lists; and such sheriff, or under-sheriff,
 “ shall immediately take care that the names of the persons con-
 “ tained in such duplicates shall be faithfully entered alphabeti-
 “ cally, with their additions and places of abode, in some book
 “ or books to be kept by him or them for that purpose; and that
 “ every clerk of the peace, neglecting his duty therein, shall
 “ forfeit 20 *l.* to such person as shall inform or prosecute, until
 “ the party be thereof convicted upon an indictment before the
 “ justices at any general quarter sessions of the peace to be holden
 “ for the same county, &c.”

And § 3. it is further enacted, “ That in case any sheriff, un-
 “ der-sheriff, bailiff, or other officer, to whom the return of
 “ juries shall belong, shall summon and return any person to
 “ serve on any jury in any cause to be tried before the justices
 “ of assize or *nisi prius*, or judges of the great sessions, or the
 “ judge or judges of the sessions for the counties palatine, whose
 “ name is not inserted in the duplicates so delivered or transmit-
 “ ted, if any such duplicate shall be delivered or transmitted; or
 “ if any clerk of assize, judge’s associate, or other officer, shall
 “ record

“ record the appearance of any person so summoned and returned
 “ as aforesaid, who did not really and truly appear, then, and in
 “ such case, any such judge, &c. shall, upon examination in a
 “ summary way, set such fine or fines upon such sheriff, or un-
 “ der-sheriff, clerk of the assise, judge’s associate, or other officer,
 “ for every such person so summoned or returned as aforesaid;
 “ and for every person whose appearance shall be so falsely re-
 “ corded, as the said judge, &c. shall think meet, not exceeding
 “ 10 *l.* and not less than 40 *s.*

§ 4. “ And for preventing abuses by *sheriffs, under-sheriffs,*
 “ *bailiffs, or other officers concerned in the summoning or returning*
 “ *of jurors*, it is further enacted, That no persons shall be re-
 “ turned as jurors to serve on trials at any assises or *nisi prius*, or
 “ at any the said great sessions, or at the sessions for the said
 “ counties palatine, who have served within the space of one year
 “ before in the county of *Rutland*, or for four years in the coun-
 “ ty of *York*, or for two years before in any other county, not
 “ being a county of a city or town; and if any such sheriff shall
 “ wilfully transgress therein, any such judge, &c. is required,
 “ on examination and proof of such offence in a summary way,
 “ to set a fine or fines upon every such offender, as he shall think
 “ meet, not exceeding 5 *l.* for any one offence.

Note: by the 4 Geo. 2. c. 7. this clause is repealed as to the county of *Middlesex*, and no person to serve who has served within the two terms before, when he is liable to serve again.

§ 5. “ It is further enacted, That the sheriff, under-sheriff, or
 “ other officer, to whom the return of juries shall belong, shall
 “ from time to time enter, or register, in a book, the names of
 “ such persons as shall be summoned, and shall serve as jurors on
 “ trials at any assises or *nisi prius*, or in the said courts of great
 “ sessions, or sessions for the said counties palatine, together with
 “ their additions and places of abode alphabetically, and also the
 “ times of their services; and every person so summoned and at-
 “ tending or serving as aforesaid, shall (upon application by him
 “ made to such sheriff, under-sheriff, or other officer,) have a
 “ certificate, testifying such his attendance or service done, which
 “ certificate the said sheriff, under-sheriff, or other officer, is
 “ hereby directed and required to give without fee or reward;
 “ and the said book shall be transmitted by such sheriff, under-
 “ sheriff, or other officer, to his or their successor or successors
 “ from time to time.

§ 6. “ It is further enacted, That no sheriff, under-sheriff,
 “ bailiff, or other officer, or person whatsoever, shall directly or
 “ indirectly take or receive any money, or other reward, to ex-
 “ cuse any person from serving or being summoned to serve on
 “ juries, or under that colour or pretence; and that no bailiff,
 “ or other officer, appointed by any sheriff, or under-sheriff, to
 “ summon juries, shall summon any person to serve thereon,
 “ other than such whose name is specified in a mandate signed
 “ by such sheriff, or under-sheriff, and directed to such bailiff,
 “ or other officer; and if any sheriff, under-sheriff, bailiff, or
 “ other officer, shall wilfully transgress in any of the cases aforesaid,
 “ any such judge, &c. is required, on examination and
 “ proof of such offence in a summary way, to set a fine or
 “ fines

“ fines upon any person or persons so offending, as he shall
 “ think meet, not exceeding 10*l.* according to the nature of the
 “ offence.

§ 7. “ *And whereas by the said act of 7 & 8 W. 3. and by the*
 “ *3 & 4 Ann. all constables, tythingmen, and headboroughs, are*
 “ *obliged to give in true lists at the respective quarter sessions of the*
 “ *peace holden for each county, riding, or division, of the name and*
 “ *places of all persons within their respective precincts or places, qua-*
 “ *lified to serve on juries, to the justices of the peace in open court,*
 “ *which hath by experience been found inconvenient and expensive to*
 “ *several constables, tythingmen, and headboroughs, such quarter ses-*
 “ *sions being often held at a great distance from their abode; for re-*
 “ *medy whereof it is enacted,* That it shall be lawful and sufficient
 “ for all or any constables, &c. after they shall have made and
 “ completed such lists of persons qualified to serve on juries, for
 “ their respective parishes or precincts, to subscribe the same in
 “ the presence of one or more justice or justices of the peace;
 “ for each respective county or place, and also at the same time
 “ to attest the truth of such lists upon oath, to the best of their
 “ knowledge or belief, which oath such justice or justices respec-
 “ tively are required to administer; and the said lists shall (being
 “ first signed by the said justices respectively, before whom the
 “ same shall be attested on oath, and subscribed as aforesaid) be
 “ delivered by the said constables, &c. to the chief or high con-
 “ stables of the hundreds or divisions whereunto the same shall
 “ respectively belong, who are required to deliver in such lists to
 “ the justices of the peace for the county, &c. at their respective
 “ general quarter sessions in open court, attesting at the same
 “ time, upon oath, their receipt of such lists from the constables,
 “ &c. respectively, and that no alteration hath been therein
 “ made since their receipt thereof; and the said lists so delivered
 “ in and attested, shall be deemed as effectual as if they had
 “ been delivered in by the constables, &c. for their respective
 “ parishes and precincts *.”

* The
 24 Geo. 2.
 c. 28. al-
 lows fees to
 jurymen,
 and specifies
 what costs
 shall be paid,
 for praying
 a special
 jury.

4. In what Time such Proceesses are returnable.

2 Roll.

Abr. 626.

9 Co. 118. b.

2 Init 568.

2 Hawk.

P. C. c. 41.

§ 3.

(a) Whether

such indictment were originally taken in the King's Bench, or taken before justices of the peace of the same county, and removed into the King's Bench by *certiorari*. 2 Hal. Hist. P. C. 260.

2 Hawk.

P. C. c. 41.

§ 4., and

several au-

thorities

there cited.

(b) That as

Process against jurors may be returnable immediately into the King's Bench for the trial of an indictment found in the (a) county where it sits, whether for a crime in such county, or for a treason beyond sea; but for the trial of an indictment removed by *certiorari* from a different county, there must be fifteen days between the teste and return of every process.

Justices in *eyre*, or of gaol-delivery, may order a jury to be returned immediately for the trial of a prisoner; also it hath been adjudged, that justices of (b) *oyer and terminer* may for the trial of an issue joined before them award a *venire* returnable the same day on which the party is arraigned: and it hath been adjudged, that

that justices of the peace may do the like; but it is said, that there are strong authorities to the contrary, unless the prisoner consent, or the crime amount to felony.

to the com-
mission of
oyer and
terminer,

though there goes out a general precept in the names of three or more of the commissioners, and under their seals, fifteen days before the sessions, directed to the sheriff to return twenty-four jurors to try the issue between the king and the prisoners to be arraigned; yet this is but preparatory, and to have a jury in readiness; for after the prisoners are arraigned, and have pleaded to the country, a precept ought to issue to the sheriff in nature of a *venire fac.* which may bear teste the same day that the prisoners plead, commanding the sheriff to return twenty-four, &c. to try the issue upon such a day. 2 Hal. Hist. P. C. 261. — Or they may make the precept returnable the same day that the prisoners plead, viz. *ad horam primam post meridiem*, &c. for justices of oyer and terminer may take their indictment and arraign the prisoners, and try the same day. *Ibid.* — And it is there also said, that the justices of the peace; as to the point of their precepts of *venire fac.* agree with justices of oyer and terminer; for they are, as to this purpose, commissioners of oyer and terminer, and may indict, arraign, and try the same day, in cases of felony.

A *venire* before justices of oyer and terminer, returnable at a day certain, is erroneous, unless the sessions appear to be adjourned to the same day, because otherwise it shall not be intended that their commission continued so long; but such *venire* may be returnable at the next assizes, and then tried by virtue of 1 E. 6. cap. 7.

2 Hal. Hist.
P. C. 261.
2 Hawk.
P. C. c. 41.
§ 6.

Here it may be proper to take notice, that the statutes of 4 & 5 W. & M. cap. 24. and 7 & 8 W. cap. 32. require that jurors shall be summoned six days before they appear, which seems to make it necessary that whenever a *venire fac.* or particular precept is required, there should be six days between its teste and return; and to this purpose it is enacted by the last mentioned statute, "That every summons of any person qualified, &c. shall be made by the sheriff, his officer, or lawful deputy, six days before, at the least, shewing to every person so summoned the warrant under the seal of the office, wherein they are nominated and appointed to serve; and in case any juror, so to be summoned, be absent from the usual place of his habitation at the time of such summons, in such case notice of such summons shall be given, by leaving a note in writing, under the hand of such officer, containing the contents thereof, at the dwelling-house of such juror, with some person there inhabiting in the same.

"Provided that those acts shall not extend to give or require any longer time for the summoning of any juries, that are to try any issues joined in any of the said courts that are triable by jurors of the city of London or county of Middlesex, than was by law required before the making of the act, nor shall extend or be construed to give any longer time, or other day, for the return of any writ, precept, or process of *venire facias*, *habeas corpora*, or *distingas*, for the summoning, attaching, or distraining of any jury to appear, than was by law required before the making of the act; but that where there shall not be six days between the awarding of such writ, precept, or process, and return thereof, every juror may be summoned, attached, or distrained to appear at the day and time therein mentioned or appointed, as he might have been before the making of the act."

5. Where the Jury must appear.

2 Inst. 421.
2., &c.
4 Inst. 159.
Cro. Car.
349.
(a) The
award of
a *venire* re-
turnable at
a certain day
before jus-
tices of *oyer*, &c. needs not express before what justices it shall be returnable, for it cannot but be in-
tended that it ought to be returned before the court that awards it. 29 E. 3. 30. b. 29 Aff. p. 33.
S. C. Br. tit. *Error*, p. 124. S. C. Dyer, 315. pl. 99. S. C. 2 Keb. 855.

2 Inst. 423.
Trials per
Pais, 76.
The manner of contriving it was to direct the *venire* to return the jury at some day the next term, unless the justices *prius tali die, & loco venerint*; and thus the *nisi prius* was at first on the *venire*, and continued in that manner from *Ed. 1.* to *Ed. 3.* for though there were no issues returned on the *venire* to make them appear at *nisi prius*; yet it was so much a greater difficulty on them to appear afterwards at *Westminster*, which if they did not, the *distringas* issued, that it had its effect to bring them in their proper counties; the writ was contrived to command them to come into court, because it would have been improper for the court to have commanded them to come into any other place; so that their appearance before the justices of assize is an excuse for their non-appearance in bank; but if they did not appear at the assize, nor at *Westminster*, then issued a *habeas corpus* and *distringas* to bring them up.

Trials per
Pais, 76.
The ancient practice of the defendant's being essoignable on the *venire* was a great mischief in this process, because, if he did not appear, the jury were afterwards obliged to appear in bank; and there was another mischief in this process as it then stood, that the parties not seeing the panel beforehand, they could not be prepared to make their challenge; and the first of these mischiefs was pretty well remedied by laying the costs on the defendant when the plaintiff prevailed; but the second mischief had no remedy till 42 E. 3. cap. 11. whereby it is ordained, that no inquests but assizes and delivery of gaols be taken by writ of *nisi prius*, or other manner, at the suit of great or small, before that the names of all of them that shall pass in the inquest be returned into the court; and this set the process on the same foot it now stands.

Trials per
Pais, 76.
From henceforward they could not place the *nisi prius* in the *venire*, as was directed by the statute of *Westminster 2.* because it is directed that no inquest be taken at *nisi prius* until the inquest be returned in court, and therefore the clause of *nisi prius* was taken out of the *venire* and placed to the *habeas corpus* and *distringas*, which was so awarded on the roll in the *jurat.*; this had many good effects; 1st. For that the plaintiff and defendant knew the names of the jury, in order to their challenges. 2^{dly}, The *venire* being

being returned, the defendant had no *essoign* on the *habeas corpus* and *distringas*, but was obliged to appear, else by *Westminster* 2. cap. 27. the inquest was taken by default as if he had appeared. Another advantage was, that the jury on the *nisi prius* were fined if they did not appear; and therefore the clause in the *distringas* is *quod habeas corpora eorum coram nobis apud Westm. die Luna prox. post assign., si prius die, &c.* and since they could fine them on this process according to their offence, they granted *nisi prius* in the ensuing *distringas*, and did not compel them to try it at bar; which was more convenient than the ancient way, where the appearing juror was obliged by his companions default to come up to *Westminster*; but now every one has issues returned on him for his own default.

The day at *nisi prius* and in bank are in consideration of law the same, because the writ of *nisi prius*, which gives authority to the judge to try the cause in the country, is instead of the court, and therefore the *posse* certified by him on the day in bank is the same as if the jury had come up to the court, and the trial had been had in open court; and this, as has been said, is for the ease of the subject, that the jury and witnesses may not come out of the proper county. 6 Mod. 94

It seems agreed, that an issue joined in the King's Bench upon an indictment or appeal, whether for treason or felony, or a crime of an inferior nature, committed in a different county from that wherein the court sits, may be tried in the proper county by writ of *nisi prius*, by virtue of the statute of *Westm.* 2. cap. 30. Cro. Car. 348. 2 Inst. 424. 4 Inst. 73, 74. Raym. 367.

Yet inasmuch as the king is not expressly named in the statute, and it is a general rule that he shall not be bound by a statute which doth not expressly name him, it seems to have been generally holden, that wherever the king is a party, it is irregular to grant a trial by *nisi prius* without his special warrant, or the (a) assent of his attorney; but it seems the court may grant it in an (b) appeal in the same manner as in any other action. 2 Lec. 110. 6 Mod. 123. (a) In an indictment of barretry, which seemed to require great examination, the court

refused to grant a trial by *nisi prius* at the motion of the attorney-general, till the king by his letters had signified his pleasure that it should be so tried. Cro. Car. 348. (b) But not where the jury is to be from two counties. Dyer, 46. pl. 8. See 2 & 3 E. 6. c. 24. § 2.

6. What Number are to be returned.

Although by the words of the writ of *venire facias* the sheriff is only to return twelve, yet by ancient course he was obliged to return twenty-four; and this, says my Lord Coke, is for expedition of justice; for if twelve should only be returned, no man should have a full jury appear or be sworn in respect of challenges without a *tales*, which would be a great delay of trials. Co. Lit. 155. a.

But though the sheriff return a less number, as where the sheriff returned only twenty-three, and a sufficient number appear, and try the issue, this will be aided by the statutes of *jezfail* as a misreturn. Cro. Car. 223.

2 Hal. Hist.
P. C. 263.

The precept that issues before a sessions of gaol-delivery, oyer and terminer, and of the peace, is to return twenty-four, and commonly the sheriff returns upon that precept forty-eight.

2 Hal. Hist.
P. C. 263.
(a) But it
has been

But the award or precept to try the prisoner after he hath pleaded, is only *venire facias* twelve, and (a) twenty-four are returned by the sheriff on that panel.

holden, that in trials on the crown side for criminals the sheriff may be commanded to return any number the court please, and accordingly, in Sir H. Vane's trial, the sheriff returned sixty. Kel. 16.

Godb 370.

Kel. 310.

(b) This statute extends not to jurors returned for trial of criminal persons. Kel. 16.

At common law in civil causes, it seems the sheriff might have returned above twenty-four if he pleased; and therefore by the statute of (b) *Westminster* 2. cap. 38. it is recited, That whereas the sheriffs were used to summon an unreasonable multitude of jurors, to the grievance of the people, it is ordained, that from thenceforth in one assise no more shall be returned than twenty-four.

Before this statute the sheriff used to return a separate jury in every cause. By the 9th § of this statute, the number in *Wales* for the grand sessions not to be less than ten, nor more than fifteen out of every hundred, and to be summoned eight days before.—By the 10th § the number in the counties palatine the same as in other parts of *England*, and to be summoned fourteen days before.

And now by the 3 *Geo.* 2. cap. 25. § 8. it is enacted, “ That every sheriff or other officer, to whom the return of the *venire facias juratores*, or other process, for the trial of causes before justices of assise or *nisi prius*, in any county in *England*, doth or shall belong, shall upon his return of every such writ of *venire facias*, (unless in causes intended to be tried at bar, or in cases where a special jury shall be struck by order or rule of court) annex a panel to the said writ, containing the christian and surnames, additions, and places of abode of a competent number of jurors named in such lists as are qualified to serve on juries, the names of the persons to be inserted in the panel annexed to every *venire facias* for the trial of all issues at the same assises in each respective county, which number of jurors shall not be less than forty-eight in any county, nor more than seventy-two, without direction of the judges appointed to go the circuit and sit as judges of assise or *nisi prius* in such county or one of them, who are respectively hereby impowered and required, if he or they see cause, by order under his or their respective hand or hands, to direct a greater or less number; and then such number, as shall be so directed, shall be the number to serve on such jury, and that the writs of *habeas corpus juratorum* or *disfringas*, subsequent to such writ of *venire facias*, need not have inserted in the bodies of such respective writs the names of all the persons contained in such panel; but it shall be sufficient to insert in the mandatory part of such writs, respectively, *corpora separatum personarum in panello huic brevi annexo nominatarum*, or words of the like import, and to annex to such writs respectively panels containing the same names as were returned in the panel to such *venire facias*, with their additions and places of abode, that the parties concerned in any such trials may have timely notice of the jurors who are to serve at the next assises, in order to make their challenges to them, if there be cause; and that for making the returns and panels aforesaid, and annexing the same to the respective writs, no other fee or fees shall be taken than what are now
“ allowed

“ allowed by law to be taken for the return of the like writs and
 “ panels annexed to the same, and that the persons named in such
 “ panels shall be summoned to serve on juries at the then next
 “ assizes or sessions of *nisi prius* for the respective counties to be
 “ named in such writs, and no other.”

7. Of awarding Procefs by *Proviso*.

If the plaintiff after issue joined neglects to try his cause the first assizes in the country, or the first term in *Middlesex* or *London*, the defendant is at liberty to bring down the cause by *proviso*, so called by the clause in the *venire facias*, which says, *proviso semper quod si duo breviam inde tibi pervenerint, unum eorundem tantum retorn. & exequaris*; for both plaintiff and defendant having put themselves upon their country, the plaintiff's laches shall not prevent the defendant's discharging himself from the action, and therefore the process is as well open for him as for the plaintiff.

This process by *proviso*, (*i. e.* with a clause that if two writs come to the sheriff, he shall execute one of them only) may be taken out not only when the plaintiff neglects to take out the *venire* the same term, but also upon his neglect to get it returned; and in like manner if the plaintiff makes the like default in suing out an *habeas corpora*, or other subsequent process, the defendant may sue out the like process by *proviso*.

But where the defendant hath sued out any process by *proviso*, there are authorities that the plaintiff is to sue out the proper subsequent process upon it in the same manner as if he had sued out the first, and that it is irregular for a defendant to take out any such subsequent process till the plaintiff has made a default in respect of the same kind of process, except only in such actions wherein the defendant is an actor as well as the plaintiff, as in replevin or error, or *quare impedit* against a patron only, or prohibition, &c., in which actions the defendant may either take out process by *proviso*, without any default in the plaintiff, or may, if he think fit, take it out in the same manner, as the plaintiff, without any clause of *proviso*.

It seems agreed, that neither in actions wherein the king is sole party, nor in indictments, there can be any process taken out by *proviso*, because no laches are imputable to the king: also, it hath been questioned whether there can be any such process in informations *qui tam*, because the king is in some sort a party.

But it seems agreed, that it may be so awarded in any appeal, whether capital or not capital, in the same manner as in other actions, after the appellant hath made default in relation to the very same kind of process.

By the 7 & 8 *W. 3. cap. 32.* which gives a *venire facias de novo* where the cause is not tried the first assizes, it is enacted, “ That
 “ if any defendant or tenant in any action depending in any of
 “ the courts of *Westminster* shall be minded to bring to trial any
 “ issue joined against him, when by the course in any of the said
 “ courts he may lawfully do the same by *proviso*, such defendant

Tria's per Pais, 71, 72.

*Dyer, 215.
 pl. 51. 284.
 pl. 34. Cro.
 Car. 484.
 Keilw. 176.
 pl. 11.*

*Dyer, 193.
 pl. 28. 284.
 pl. 34.
 2 Lev. 5, 6.
 2 Sand. 336.
 6 Mod. 246.*

*2 Leon. 110.
 Keb. 195.
 6 Mod. 246.
 but Sid.
 316. contr.*

*Keilw. 176.
 pl. 70.*

“ or tenant shall or may, of the issuable term next preceding such
 “ intended trial to be had at the next assises, sue out a new *venire*
 “ *facias* to the sheriff by *proviso*, and prosecute the same by writ of
 “ *habeas corpora* or *disfringas*, with a *nisi prius*, as though there had
 “ not been any former *venire facias* sued out or returned in that
 “ cause ; and so *toties quoties* as the matter shall require.”

8. Of the Necessity of returning a Panel into Court, and where a Prisoner may demand a Copy of it.

By the 42 *E. 3. cap. 11.* it is recited, that divers mischiefs had happened, because that the panels of inquests, which had been taken before justices by writ of *seire facias* and other writs, had not been returned before the sessions of the justices at the *nisi prius*, and otherwise, so that the parties could not have knowledge of the names of the persons which should pass in the inquest ; whereby divers of the people had been disinherited and oppressed ; and thereupon it is ordained, “ That no inquest but (a) assises and
 “ deliverances of gaols be taken by writ of *nisi prius*, nor in any
 “ other manner, at the suit of the great or small, before the
 “ names of all of them that shall pass in the inquest be returned
 “ in the court.”

(a) The statute of 6 H. 6. c. 2. provides also for assises. 3 Inst. 175.

2 Hawk.

P. C. c. 41. § 21.

This statute extends as well to writs of *nisi prius* in criminal cases as in civil, and to jurors returned upon a *tales* as well as to those returned upon a principal panel.

Id. § 22.

But it seems that in trials before the justices of gaol-delivery the prisoner has no right to a copy of the panel before the time of his trial, except only in cases within the purview of 7 & 8 *W. 3. cap. 3.* which enacts, “ That every person indicted and tried for
 “ high treason, or misprision thereof, (except it be for counter-
 “ feiting the coin, &c.) shall have a copy of the panel of the
 “ jurors who are to try them duly returned by the sheriff, and
 “ delivered unto him two days at least before he shall be tried.”

Id. § 23.

It hath been adjudged to be sufficient, within the intent of this act, to deliver to the prisoner a copy of a panel arrayed by the sheriff before it is returned to the court, if the very same panel be afterwards returned.

9. Of the Trials going off *pro Defectu Juratorum* ; and therein of drawing a Juror.

Vide the statute 7 & 8 *W. 3. c. 32.* which gives a *venire facias de novo*, in case the cause be not tried the first assises.

[But, notwithstanding the statute, if after a special jury has been struck, the cause goes off for defect of jurors, no new jury can be struck ; but the cause must be tried by the jury first appointed. *Rex v. Perry*, 5 Term

If a *venire* is awarded, and the parties do not go to trial the next assises, but it lies for several terms, the continuance may be made by a *vic. non nisi breve* ; but if a *nisi prius* be awarded, and some of the jury appear, and the panel be not full, so that the trial is not carried on, they enter those of the jury that appeared, and *alii non venerunt, ideo respectuentur* to the next term *pro defectu jurat.*, and at the day in the next term they award an *alias disfringas* to the next assises, with a *nisi prius* until the next term.

3 Term Rep. 453. And the same jury shall serve for the trial of the cause, notwithstanding an intermediate change of sheriffs. Rex v. Hart, Cowp. 412.]

It is holden by the opinion of some, that in a criminal case not capital, after a jury sworn and impanelled, and all the evidence given, the king's counsel may, without the party's consent, withdraw a juror, and have the cause tried over again. Vent. 28. Raym. 84.

But herein the better opinion seems to be; 1st, That in capital cases a juror cannot be withdrawn, though all parties consent to it. 2^{dly}, That in criminal cases not capital a juror may be withdrawn, if both parties consent, but not otherwise. 3^{dly}, That in all (a) civil causes, a juror cannot be withdrawn, but by consent of all parties. Carth. 465. (a) Where the jurors lying all night, could not agree, a juror by consent was drawn. Cro. Car. 484.

It hath been holden, that a juror withdrawn from the panel by consent of both parties, to the intent the trial might for that time go off *pro defectu juratorum*, it being necessary for the jury to have a view, may be of the jury, when the cause comes to be tried at a subsequent time, and that this being neither a principal cause of challenge, nor to the favour, cannot be error. Ca. Law and Eq. 390. Hart and Bainard,

(C) In what Cases, and in what Manner a *Tales* is grantable.

SINCE the (b) 3 Geo. 2. for the regulation of juries, by which the sheriff cannot return less than forty-eight jurors, the use of a *tales* seems to be taken away; but as the statute herein extends only to civil causes, it will still be necessary to consider the manner of awarding a *tales*, especially in criminal cases. (b) It hath been holden, since this statute, that a *tales de circumstantibus* was allowable upon special juries, by Raymond, C. J. in the case of the King v. Franklin, Trin. 5 Geo. 2. 2 Kel. 77. pl. 39. 21 Vin. Abr. 313. pl. 12.*——* In special jury causes, and in common, a *tales* is allowable.—It is the constant practice.

allowable upon special juries, by Raymond, C. J. in the case of the King v. Franklin, Trin. 5 Geo. 2. 2 Kel. 77. pl. 39. 21 Vin. Abr. 313. pl. 12.*——* In special jury causes, and in common, a *tales* is allowable.—It is the constant practice.

If all the jury did not attend on the *habeas corpus* or *disfringas*, whether by reason of the death of some of the persons returned, or for any other cause; or if so many be challenged and drawn, that there do not remain a sufficient number to make a jury; or if after the jury is charged one or more of them die, there are at common law the writs of *undecim*, *decem*, or *octo tales*, (c) according as the number was deficient, to force others into court to try the issue, or by (d) statute, the plaintiff may pray a *tales de circumstantibus* to prevent the delay of the *decem tales*. 10 Co. 104. Dyer, 359. pl. 2. 2 Roll. Abr. 671. Plow. 100. 2 Hal. Hist. P. C. 266. [(c) This is still necessary on trials at bar.

5 Term Rep. 456, 7. 462.] (d) For this purpose, *vide* the statutes 35 H. 8. c. 6. made perpetual by 2 & 3 E. 6. c. 32., 4 & 5 Ph. & Mar. c. 7., 5 Eliz. c. 25., 14 Eliz. c. 9., 7 & 8 W. 3. c. 32. —[The plaintiff may avoid a nonsuit by refusing to pray a *tales*. Jenkins v. Purcell, 2 Str. 707.]

A *tales* may be granted as well on the application of the defendant as plaintiff; but it seems that a defendant cannot regularly pray it till there has been a default in the plaintiff. Cro. Car. 484. 10 Co. 104. 2 Roll. Abr.

671., and in Dyer, 359. pl. 2., it is said, that if a full jury do not appear, and the plaintiff prays a *disfringas* without praying any *tales*, the court ought to grant it at the prayer of the defendant.

Pulf. 121. In capital cases the *tales* may be granted for a larger number than the first process; as for sixty, or forty, or any other even number, in order to prevent delays from peremptory challenges; and in this respect a *tales* in capital cases is different from what it is in any other case; it being an allowed rule, that in all (a) other cases the *tales* must be for a less number than the first process.

10 Co. 105. a.

10 Co. 105. Every subsequent *tales* in capital, as well as in all other cases, must be for a less number than the former, except the former were quashed, in which case the next may be for the same number.

10 Co. 104. The quashing of the array of the principal panel doth not quash that of the *tales*, but the inquest shall be taken by those returned on the *tales*, if there be a sufficient number, otherwise more shall be added to them by a new *tales*; but if all the persons returned on a *habeas corpora* be challenged and drawn, there shall not be a *tales* awarded but a new *venire*; for the word *tales* plainly refers to some others, to whom the persons returned are to be like: also, if the first *habeas corpora* be quashed, the second with a *tales* cannot be quashed with it, and the party must go on as if the *venire* had only been returned, and nothing done upon it; for where a process is quashed, all that follows and depends upon it falls with it.

Cro. Eliz. 502. 2 Roll. Abr. 671. It seems, that a *tales* is not grantable on the return of a *venire*, but only on the return of a *habeas corpora* or *distringas*, because it appears not before such return, but that a full jury may appear.

Roll. Abr. 793. A *distringas* or *habeas corpora*, with a command to add so many more to those summoned on the *venire*, is the first process against the *tales*.

Cro. Jac. 677. If a juror be withdrawn after a trial commenced, whereon a *tales de circumstantibus* was awarded, and afterwards a new *habeas corpora* be taken out with a *tales*, it shall appoint the *tales* to be added to the jurors first returned, and also to those returned on the *tales de circumstantibus*.

Raym. 367. The statutes, which authorize justices of *nisi prius* to award a *tales circumstantibus*, extend as well to all capital cases as to others; but it seems that such a *tales* cannot be prayed for the king upon an indictment, or criminal information, without a warrant from the attorney general, or an express assignment from the court, before which the inquest is taken.

Keilw. 176. It seems not to be clear, that a *tales* is grantable by justices of *oyer, &c.*, or of (b) gaol-delivery; but if a trial be put off before justices of gaol-delivery for want of a full jury, they may, without doubt, order a larger panel, whereon the former jurors should be returned in the same order as before, and called to be sworn as they stand, without any more regard to those who were sworn before, than to the others; and the like method is to be observed as to a jury returned with a *tales*.

of much use, because there is no particular precept to the sheriff to return either jury or *tales*, but the general precept before the sessions, and the award or command of the court upon the plea of the prisoner. 2 Hal. Hist. P. C. 266.

On a writ of error of a judgment given in the court of *Bristol*, it was solemnly adjudged, that a custom in an inferior court to try by a *tales de circumstantibus* was void, as it breaks down that important rule, that trials must be *per pares*, and admits an unlimited latitude of gleaning together any set of men for jurors, however profligate and unfit for the office, and entirely deprives the parties of their challenges.

Mich.
6 Geo. 2.
in B. R.
Bell v.
Knight,
vide Styl.
16.

It was agreed to be common practice in the circuits, that if but one juror appears and he is challenged, there may be twelve talesmen sworn, who may try the cause.

Sel. Caf.
Evid. 110.

[A juror who has been challenged on the principal panel, ought not to be sworn as a *talesman*.]

Parker v.
Thoroton,
1 Str. 640. 2 Ld. Raym. 1410.

(D) In what Cases, and in what Manner Special Juries are appointed.

SPECIAL juries are appointed on motion and application to the court for that purpose, on which, if the court think it reasonable, the sheriff is to attend the secondary or master with his book of freeholders, who, in the presence of the attornies on both sides, names forty-eight freeholders, and then each party strikes out twelve, by one at a time, the plaintiff or his attorney beginning first, and the remaining twenty-four are returned by the secondary, as the jury, to try the cause.

2 Lil. Re-
gist. 155.
The court
may order a
jury of mer-
chants if
they think
it conve-
nient. *Ibid*.

If the rule was entered into by consent, it is said to be a contempt in the attorney not to be present; but to remedy any inconveniency from hence, a rule was made, that when a master is to strike a jury, *viz.* forty-eight out of the freeholders book, he shall give notice to the attornies of both sides to be present; and if the one comes, and the other does not, he that appears shall, according to the ancient course, strike out twelve, and the master shall strike out other twelve for him that is absent.

Salk. 405.
pl. 1.

And it is said, that if by rule of court the master is ordered to strike a jury, in case it be not expressed in such rule that the master shall strike forty-eight, and each of the parties shall strike out twelve, the master shall strike twenty-four, and the parties have no liberty to strike out any.

Salk. 405.
pl. 1.

It is said, that a special jury may be granted to try a cause at bar without the consent of the parties, but never at *nisi prius*, unless for good cause shewn, such as partiality of the sheriff, &c.

Mod. Ca.
Law and
Eq. 248.

Also, it is said to be contrary to the course of the court of B. R. in capital cases, to order the clerk of the crown to strike a special jury as is done by the secondary in civil causes upon trials at bar*.

2 Jon. 222.
* See the
next clause.

By the 3 Geo. 2. cap. 25. § 15. reciting, that whereas some doubt had been conceived touching the power of his majesty's courts of law at *Westminster*, to appoint juries to be struck before the clerk of the crown, master of the office of prothonotaries, or other

There can
be no special
jury in trea-
son or fe-
lony.

21 Vin. Abr. 301. pl. 5. From the penning of this act, it appears to extend only to the trial of any issue joined, therefore the court will not grant a special jury upon a writ of inquiry. Mich. 25 Geo. 2. Symonds v. Parminter. [But in such case, the plaintiff may move the court for a rule to have a good jury, which is a better sort of com-

mon jury. Imp. K. B. 407. 5 Term Rep. 460. And before the introduction of special juries, this rule appears to have been frequently granted for the trial of causes at *nisi prius*. Rex v. Smith, 1 Str. 265.] No special jury after common jury process returned. [But in common causes between assizes and assizes, the practice is different. Crofs v. Skipwith, Barnes, 449. Dobson v. Stevens, *id.* 461. Special jury struck and returned by elizors of the court. Holland v. Heron, Barnes, 465. Motion for special jury too late after *ven. fa.* and return filed. Clark v. Sheppard, Barnes, 488.]

[*(a)* Soon after the passing of this act, it was determined that all the costs

of a special jury, except those of striking, must be paid by the party losing. Wilks v. Eames, Andr. 5. 2 Str. 1080. S. C. Eyles v. Smarr, Suppl. to Lill. Pr. Reg. 7. But this giving occasion to applications for special juries in trivial causes, the legislature interposed, and by stat. 24 Geo. 2. c. 18. enacts, that the party applying shall, besides the costs of striking, pay all the expences occasioned by such special jury, and be allowed only what he would be entitled to, if the trial had been by a common jury; unless the judge shall immediately after the trial certify in open court, under his hand upon the back of the record, that it was a cause proper to be tried by a special jury.]

other proper officer of such respective courts, for the trials of issues depending in the said courts, without the consent of the prosecutor or parties concerned in the prosecution or suit then depending, unless such issues are to be tried at the bar of the same courts, it is enacted, "That it shall and may be lawful to and for his majesty's courts of King's Bench, Common Pleas, and Exchequer, at *Westminster*, respectively, upon motion made on behalf of his majesty, or on the motion of any prosecutor or defendant in any indictment or information for any misdemeanour or information in nature of a *quo warranto*, depending or to be brought or prosecuted in the said court of Exchequer, or on the motion of any plaintiff or plaintiffs, defendant or defendants, in any action, cause or suit whatsoever depending, or to be brought and carried on in the said courts of King's Bench, &c. or in any of them; and the said courts are hereby respectively authorized and required upon motion aforesaid, in any of the cases afore-mentioned, to order and appoint a jury to be struck before the proper officer of each respective court, for the trial of any issue joined in any of the said cases, and triable by a jury of twelve men, in such manner as special juries have been and are usually struck in such courts respectively, upon trials at bar had in the said courts, which said jury, so struck as aforesaid, shall be the jury returned for the trial of the said issue."

And by § 16. of the said statute it is further enacted, "That the person or party, who shall apply for such jury to be struck as aforesaid, shall bear and pay the fees for the striking such jury, and shall not have any allowance for the same upon taxation of costs (*a*)."

§ 17. *Provided*, "That where any special jury shall be ordered, by rule of any of the said courts, to be struck by the proper officer of such court, in the manner aforesaid, in any case arising in any city or county of a city or town, the sheriff or sheriffs, or under-sheriff of such city, or county of a city or town, shall be ordered by such rule to bring, or cause to be brought before the said officer, the books or lists of persons qualified to serve on juries within the same, out of which juries ought to be returned by such sheriff or sheriffs, in like manner as the freholders book hath been usually ordered to be brought,

"brought, in order to the striking of juries for trials at the bar in the causes arising in counties at large; and in every such case the jury shall be taken and struck out of such books or lifts respectively."

A rule was made for a special jury, which was entered into by consent; and afterwards, when the parties attended the master, the defendant struck out some hundredors, and at the trial challenged the array for want of hundredors, which the judge of assize allowed a good challenge; and this was held such a breach and contempt of the rule, that an attachment was granted for it.

Mod. Ca.
Law and
Eq. 245.

But where in the trial of a *quo warranto*, the defendant challenged the array of a special jury, that had been struck at his request, for partiality in the sheriff, an attachment being moved for, the case next above was relied on, but was denied; and it was said *per curiam*, that the attachment in the case *supra* was granted by reason of the abuse of the rule; but here the only foundation is the jury's being so struck at his request, which is not alone sufficient; for he had a right to challenge the array on the process's being directed to a wrong officer; and the rule might have been fulfilled another way, *viz.* as the sheriff was partial, a proper entry might have been made, and process directed to the coroner.

The King
v. Johnson,
Mich.
8 Geo. 2.
in B. R.
2 Stra. 1000.
2 Kel. 110.

(E) Who are to be returned: And herein of the Qualifications and several Causes for which they may be challenged: And,

1. Of Challenges to the Array or to the Polls; and herein where the Insufficiency or Partiality of the Sheriff or Returning Officer is a principal Cause of Challenge, or to the Favour.

A Challenge (*a*) to jurors is twofold; either to the array, or to the polls, *i. e.* to the particular jurors; to the array of the principal panel, and to the array of the tales; and herein my Lord Coke observes, that the jurors names are ranked in the panel one under another, which order or ranking the jury is called the array; as in common speech we say *battail array* for the order of battle; so as to challenge the array of the panel, is at once to challenge or except against all the persons so arrayed or impanelled, in respect of the partiality or default of the sheriff, coroner, or other officer who made the return.

Co. Lit.
156. a.
(a) For the
several sig-
nifications
of the word
challenge,
vide Co.
Lit. 155. b.

This kind of challenge is twofold, either a principal cause of challenge, or to the favour, like that to the polls or particular jurors; for it was thought there could be no better rule to ascertain what should be a proper challenge to the officer, than what was a proper challenge to each juror's partiality; for it was not supposed that there was a jury *per quos rei veritas melius sciri poterit*, unless they were settled by a person absolutely indifferent.

Co. Lit. 156.

A principal

Co.Lit.156. A principal is grounded on such a manifest presumption of partiality, that if it be found true it unquestionably sets aside the array or the juror, but a challenge to the favour leaves it to the discretion of the triers.

Co.Lit.156. There are many principal causes of challenge to the array; as if the officer return any juror at the party's denomination, or that he may be more favourable to one party than the other; or if the array be returned by a bailiff of a franchise, and the sheriff return it as of himself; in which case the party should lose his challenges in a default in the bailiff, because the return on record is in the sheriff's name; but if the sheriff return one within a liberty, this is good, and the lord of the franchise is put to his action against him.

Co.Lit.156. If the sheriff be liable to the distress of either of the parties immediately or immediately, or if he be his servant or officer in fee, or of robes, or his (a) counsellor or attorney, or have part of the land depending on the same title; or if he has been godfather to a child of either of the parties, or either of them to his; or if either of them have an action of debt against him; or if an action of battery, or such like, which imply malice, are depending between them, these are principal challenges to the array (b).

recover the penalty of a bye-law calculated to exclude strangers from trafficking in the city of Chester. The bye law limited the cause to be tried before the local jurisdiction there; one third of the penalty was allotted to poor prisoners; one other third to the informer; and the remaining third was not subject to any particular disposition. The array was challenged because the local sheriffs who impanelled it, were citizens and freemen of Chester; and the polls were challenged, because the jurors were also freemen. Both these objections were over-ruled by the portmote court of that city, but that judgment was reversed in the court Great Sessions, and the reversal affirmed in the King's Bench. *Helketh v. Braddock*, 3 Burr. 1847. See the form of the challenge. 3 Wooddes. 340.]

Co.Lit.156. But if either of the parties be subject to the distress of the sheriff, &c. or if the sheriff, &c. have an action of debt against either of the parties, these are causes of challenge to the favour only; for the sheriff, &c. thereby is not under the party's influence, but the party under his.

Co.Lit.156. Confanguinity, how remote soever, between the sheriff or juror and either of the parties, or affinity by marriage of either party himself with the cousin of the sheriff or the juror, or *e consorsors*, are principal causes of challenge to the array, or to the polls; but if the marriage be between the son of the one and the daughter of the other, it is a cause of challenge to the favour only; and he, that challenges the array or a juror for a consanguinity, must shew how the party is cousin; but if it be found that he is cousin it is (c) sufficient, whether it be found in the manner alleged or not; and here my Lord Coke notes, that a bastard can have no-kindred.

after time taken to consider the point, it was adjudged to be a principal challenge by three judges, the fourth (Perjam J.) hesitating. From this case these two positions may be inferred: that having issue living by the wife, though she is dead, is sufficient to continue the husband's affinity: that it is not necessary that the issue should be inheritable to the land, where land is the subject of the action. Co. Lit. 156. a. n. 2. 13th edit.] (c) That being cousin, though in 8th or 9th degree, is sufficient. Dyer 319. a. pl. 23. Owen, 44.

That the sheriff and one of the parties are fellow servants, not a principal cause of challenge, but only to the favour.

It has been doubted whether the (a) lessor in ejectment, being of kin to the sheriff in such a manner as to make it a principal cause of challenge, in case he had been plaintiff or defendant, has been a principal cause of challenge, and by some it hath been holden a principal cause, for though this is but a fictitious action, yet the lessor only being concerned in interest, and the plaintiff a fictitious person, the courts take notice of the lessor as the real plaintiff, by ordering him in certain cases to pay costs, &c. but the better opinion is, that it is no principal cause of challenge; that he not being party to the record, the judges *ex officio* are not obliged to take notice of him, and that to do it in this case would tend to delay, which the courts always avoid.

freehold of *J. S.*, it is a principal challenge, that a juror is within the distress of *J. S.*, for that the title is to be tried. Hutt. 25. — But in this case of an ejectment it has been held, in the House of Lords, in the case of Holborn v. Banington 1719, that the lessor of the plaintiff, being a peer, and no knight returned, was no cause of challenge, because he did not appear to be party to the record. [2 Br. P. C. 114. tit. Trial, (H. c.) p. 8.] — And the S. P. was resolved Mich. 9. Geo. 2. between Grimston, lessee of Lord Gower and Gardner; & *vide* Skin. 229. pl. 8. S. P. See now 24 Geo. 2. c. 18. § 4.

The array of a panel was challenged *ore tenus*, because it was returned by the sheriff two days after he had received a writ of discharge; and it was said *per cur.* that it could not be challenged for that cause, because it would be a direct averment against the record, for it is returned by him as sheriff, and the return accepted: but by the advice of the court the party made his challenge to the array, because it was favourably made, and returned in favour of the party, &c. and issue being joined thereupon, and all this matter given in evidence, the court directed the triers, that it was not duly made and returned, for it was without warrant; whereupon the array was quashed.

But where a challenge to the array was taken, because the sheriff who made the return had continued in his office for more than three months, and not taken the oaths, and subscribed the declaration required by the act 25 *Car. 2. cap. 2.* made for preventing the dangers by popish recusants; and so his office, by that act, was void to all intents and purposes before he made his return of the jury; this challenge was disallowed by the court, for he must be taken here as sheriff *de facto*; and if such a challenge should be allowed, no trial could be had, but should be put off, unless the party were ready to shew that the sheriff had taken the test.

The plaintiff for his expedition surmised that he was servant to the sheriff of the county where the action was brought and triable, and prayed a *venire fac.* to the coroners, and the defendant *non dedixit*; whereupon process was awarded to the coroners; and after trial, and verdict for the plaintiff, it was moved, that this process was misawarded, and a mis-trial, for process ought not to be awarded to the coroners but where the challenge is principal; and here to say that he was servant to the sheriff, is no principal challenge, but only to the favour, wherefore, &c. but the court held,

Dyer, 367. pl. 40.

Roll. Rep. 328. Hutt. 25. Cro. Jac. 21.

Moor, 894. Eyre v. Banister.

(a) It is said, that where the defendant justifies as servant to *J. S.*, and that the land is the

for that the title is to be tried. Hutt. 25. — But in this case of an ejectment it has been held, in the House of Lords, in the case of Holborn v. Banington 1719, that the lessor of the plaintiff, being a peer, and no knight returned, was no cause of challenge, because he did not appear to be party to the record. [2 Br. P. C. 114. tit. Trial, (H. c.) p. 8.] — And the S. P. was resolved Mich. 9. Geo. 2. between Grimston, lessee of Lord Gower and Gardner; & *vide* Skin. 229. pl. 8. S. P. See now 24 Geo. 2. c. 18. § 4.

Cro. Eliz. 369. Hore v. Broom.

2 Vent. 58. in the case of the Sheriff of Bucks.

Cro. Eliz. 581. Cham. v. Matthew.

(a) But Cro.
Jac. 547.
S. P. cited,
and seems
adjudged
contra.
(b) *Vide*
Plow. 74.
Co. Lit. 156.
b. 157. b.

held, forasmuch as if the sheriff had returned this panel, it had been a good cause to quash the array for favour, (a) that the plaintiff to avoid that delay might well shew it, and have process to the coroners; and the rather, this being a (b) judicial and not an original writ; and the clerks said, there were many precedents accordingly.

If the challenge to the array be found against the party he shall have his challenge to the polls; but neither party shall take a challenge to the polls, which they might have had to the array.

2. Where Insufficiency and not being *Liber Hemo* is a good Cause of Challenge to the Polls.

Fortesc.
Laud. Leg.
Ang. c. 25.
2 Inst. 27.
Vide post.

A challenge to the polls is, as has been observed, a challenge to the particular jurors, who, it seems, of old could not be challenged; for these by the feudal law, as the *pares curtis*, were the judges; and therein the rule was *pares qui ordinariam jurisdictionem habent recusari non possunt*; but though those suitors, as judges of the court, could not be challenged, yet the *pares*, when brought up by writ, were subject to be challenged; and the reason is, that there are several qualifications required by the writ, viz. that they be *liberi & legales homines de vicineto* (of the place laid in the declaration) *quorum quilibet habeat decem libras terrar. tenementor. vel reddit. per ann. ad minus, per quos rei veritas melius sciri poterit, & qui nec* (of the plaintiff nor defendant) *aliquâ affinitate attingunt, ad faciend. quand. jurat. patrie inter partes predict.* These qualifications were inserted, because this manner of trial was different from that below; for, there, the trial being by all the *pares*, if there was a majority amounting to twelve, the cause was decided by such a number as were necessary; but here, because they brought up but twelve, and they were all to be of one mind, in order to make the verdict, therefore, it was necessary there should be several qualifications mentioned in such persons who are to give in the verdict in that cause; and if any of the qualifications were wanting in any one, it was a sufficient reason to reject such person.

Co. Lit. 156.
b. 155. b.
158. a.
7 Co. 18.
in Calvin's case.

The first qualification is, that they should be *liberi & legales homines*; hence it has been always clearly holden, that aliens, minors or villeins, cannot be jurors.

Co. Lit. 6. b.
155. b.
158. a.
2 Roll.
Abr. 649.
1 Lev. 263.
Raym. 380.
Hal. Hist.
P. C. 303.
2 Hawk.
P. C. c. 43.
§ 25.

Also, infamy is a good cause of challenge to a juror; as that he is outlawed (c), or that he hath been adjudged to any corporal punishment whereby he becomes infamous (d), or that he hath been convicted of treason or felony, or perjury or conspiracy, or of forgery on 5 *Eliz. cap. 14.* or attainted in an attainder for giving a false verdict; and it hath been holden, that such exceptions are not solved by a pardon; and it was anciently holden, that excommunication was also a good challenge; yet it seems that none of the above cited challenges are principal ones, but only to the favour, unless

unless the record of the outlawry, judgment or conviction, be produced, if it be a record of another court; or the term, &c. be shewn, if it be a record of the same court.

a personal action be sufficient to disqualify. Cro. Car. 134. W. Jon. 198. S. C. (d) According to modern cases it is not the infamy of the punishment, but of the crime, which incapacitates.

The *venire facias* was *probos & legales homines*; and it was objected, that it ought to have been (a) *liberos legales homines*, there being a difference between *probus*, *liber & legalis*; for that *legalis* is he who is not outlawed, and against whom no exception can be taken in this behalf; that *probus* is not taken notice of in law; and *liber homo* is not only one that hath freehold land, but that hath freedom of mind, and stands indifferent, no more inclining to the one than to the other; but it was adjudged that *probos & liberos* are of one sense, and that the statute of *Westminster* 2. which gives the *venire*, does not tie the writ to the very words.

2 Bulstr.
154. [(c) But
29. whether
outlawry in
2 Will. 18.

Raym. 417.
Attorney-
General v.
Blood & al.
Keb. 563.
S. C.
(a) *Libros*
for *liberos* in
the *venire*
amended
after verdict.
Cro. Eliz.
618.

3. Where the Want of a Freehold, or competent Estate, is a good Cause of Challenge.

It seems to be admitted by the statute of 21 E. 1. *de his qui ponendi sunt in assis*, and also by the register, that at common law there was no necessity that jurors should have any freehold as to inquests before justices in *eyre*, or in cities or burghs; for it seems, that in corporations the freedom, and not the freehold, made them *liberos homines*.

Raym. 485.
Vent. 366.

Also, it seems agreed, that the common law doth not require that a juror should in any case have a freehold of any certain value; and upon this ground it hath been adjudged, that a freehold worth but 20s. or 5s. or even 1d. is still a sufficient qualification for a juror in such cases as are not within the statutes, which require a freehold of greater value.

Keilw. 46.
Cro. Eliz.
413.
2 Hawk.
P. C. c. 43.
§ 12.
2 Hal. Hist.
P. C. 272.
2 Hawk.
P. C. c. 43.
§ 12., and
the autho-
rithorities
there cited.
State Trials,
vol. 6. 58.
Francis's
case. fol.
245. Lay-
er's case.

Also, by some opinions it is holden, that the common law did not require that a juror should in any case have a freehold; but this is not only contrary to what seems implied by the books, which, in saying that the common law did not require a freehold of any certain value, plainly suppose that it required some freehold, but hath been also contradicted by many express authorities; agreeably to which it seems to be settled at this day, that the want of a freehold is a good challenge of a juror in all cases not otherwise provided for by statute, and consequently in a trial for high treason in *London* as well as in any other county.

Keilw. 46.
P. 2. 92.
Pl. 5. Dyer
9. pl. 26.
Co. Lit.
156 b.
157 a. 272.
Plow. 58. a.
2 Roll.
Abr. 648.

But it seems agreed, that wherever the letter of the common or statute law require that a juror should have a freehold, the meaning is fully satisfied by his having the use of a freehold, and that it is not material whether he have it in his own or his wife's right, or whether it be absolute or upon condition, or an estate of inheritance, or only for term of one's own or another's life, so that it be in the same county wherein the suit is brought, and actually continue in the juror till the time when he is sworn.

But this matter, as to the freehold and value of jurors, has been regulated and settled by divers statutes; to which purpose, by the statutes

(a) In the statutes of *Westm.* 2. *cap.* 38. and 21 *E.* 1. *de his qui ponendi sunt in assisis*, it is enacted, "That none shall be (a) put in assises or juries, except in cities, burghs, or trading towns, who have not tene-
 " ments to the yearly value of 40 s."
 can neither be challenged by the parties for being returned contrary to these acts, nor allege such matter himself for his discharge, but must take his remedy by action against the sheriff, or by writ of privilege, for his discharge. 2 Inst. 448.

[This seems extended to 4 l. by 27 El. c. 6.]
 (b) Keilw. 92. (c) Cro. Eliz. 413.

2 Roll. Abr. 647.
 Keilw. 92.
 3 Mod. 149.

By the 2 *H.* 5. *cap.* 3. it is enacted, "That no person shall be
 " admitted to pass in any inquest upon trial of the death of a
 " man, nor in any inquest betwixt party or party, in plea real or
 " plea personal, whereof the debt or the damage declared amount
 " to forty marks, if the same person have not lands or tene-
 " ments of the yearly value of 40 s. above all charges of the same,
 " so that it be challenged by the party, &c."

It hath been (b) holden, that this statute extends as well to colla-
 teral issues as to the general one, but (c) that it doth not extend to
 an indictment or information for a crime not capital.

It has been holden, that a feoffee to the use of another, or one
 who has only a dry remainder, are not qualified to be jurors within
 the meaning of those statutes, because, whatsoever the value of the
 lands may be, they have no income from them.

By the 23 *H.* 8. *cap.* 13. "Every natural-born subject, who doth
 " enjoy and use the liberties and privileges of any city, borough,
 " or town corporate, where he dwells and makes his abode, being
 " worth in moveable goods and substance to the clear value of
 " 40 l., shall be admitted in trial of felonies in every sessions and
 " gaol-delivery to be holden in and for the liberty of such city,
 " &c., albeit he have no freehold; but this act shall not extend to
 " any knight or esquire in such city, &c."

By the 1 R.
 3. c. 4. a
 juror in the
 born was to
 have 20 s. freehold, and 1 l. 6 s. 8 d. copyhold.

Special provision is made by 11 *H.* 7. *cap.* 21. and 4 *H.* 8. *cap.* 3.
 for jurors in *London* in real and personal actions above the value of
 forty marks.

(d) But by
 the common
 law, a free-
 hold in an-
 cient de-
 mesne was
 not suffi-
 cient. Co.
 Lit. 156. b.

By the 4 & 5 *W. & M.* *cap.* 24. it is enacted, "That all jurors
 " (other than strangers upon trials *per medietatem linguæ*) who are
 " to be returned for trials of issues joined in any of the courts of
 " King's Bench, Common Pleas or Exchequer, or before justices
 " of assise or *nisi prius*, *oyer* and *terminer*, gaol-delivery, or general
 " quarter-sessions of the peace in any county of this realm of
 " *England*, shall every of them have in their own name, or in trust
 " for them within the same county, ten pounds by the year, at
 " least, above reprises, of freehold or copyhold lands or tenements,
 " or of lands or tenements of (d) ancient demesne, or in rents, or
 " in all or any of the said lands, tenements or rents in fee-simple,
 " fee-tail, or for the life of themselves, or some other person; and
 " that in every county in *Wales*, every such juror shall have in the
 " same county six pounds by the year, at least, in manner afore-
 " said, above reprises."

Provided,

Provided that it shall be lawful to return any person on a *tales* in *England* who shall have 5*l.* by the year, or in *Wales* who shall have 3*l.* by the year, in manner aforesaid.

In this statute, as also in the statutes 27 *Eliz. cap. 6.* and 16 & 17 *Car. 2. cap. 3. § 2.* there is a saving to all cities, boroughs and towns corporate, of their ancient usages; from whence it hath been settled, that trials in those places continue as before, or as prescribed by the 23 *H. 8. cap. 13.* which requires jurors to be worth 40*l.* in goods, &c., lest there should be a failure of justice, it being generally impracticable to get a sufficient number of such freeholders as the statutes require in towns; but it has been agreed, that for trials in *London* for (a) high treason, every juror ought to have such freehold or copyhold as is required by 4 & 5 *W. & M. cap. 24.*

Vent. 366.
Skin. 91.
pl. 8.

(a) State
Trials, vol.
6. fo. 58.
Francia's
trial.

By the 3 *Geo. 2. cap. 25. § 18.* it is enacted, "That any person or persons having an estate in possession in land, in their own right, of the yearly value of 20*l.* or upwards, over and above the reserved rent payable thereout, such lands being held by lease or leases for the absolute term of 500 years, or more, or for 99 years, or any other term, determinable on one or more life or lives; the names of every such person or persons shall and may, and are hereby directed and required to be inserted in the respective lists, in order to their being inserted in the freeholders book; and the persons appointed to make such lists are hereby directed to insert them accordingly; and such leaseholder, or leaseholders, shall and may be summoned or impanelled to serve on juries, in like manner as freeholders may be summoned and impanelled, by virtue of this or any other act or acts of parliament for that purpose, and be subject to the like penalties for non-appearance; any law, &c."

And by § 19. it is further enacted, "That the sheriffs of the city of *London* for the time being, shall not impanel or return any person or persons to try any issue joined in any of his majesty's courts of King's Bench, Common Pleas, and Exchequer, or to be or serve on any jury at the sessions of *oyer and terminer*, gaol-delivery, or sessions of the peace, to be had or held for the said city of *London*, who shall not be a householder within the said city, and have lands, tenements, or personal estate, to the value of 100*l.* and the same matter and cause alleged by way of challenge, and so found, shall be taken and admitted as a principal challenge; and the person or persons so challenged shall and may be examined, on oath, of the truth of the said matter."

And by § 20. it is further enacted, "That the sheriffs, or other officers, to whom the returning of juries doth or shall belong, for any county, city, or place respectively, shall not impanel or return any person or persons to serve on any jury, for the trial of any capital offence, who at the time of such return would not be qualified in such respective county, city, or place, to serve as jurors in civil causes for that purpose; and the same matter and cause alleged by way of challenge, and so found, shall be admitted and taken as a principal challenge; and the person or

" persons

" persons so challenged shall and may be examined, on oath, of the truth of the said matter."

By the 4 *Geo. 2. cap. 7.* reciting, "That whereas by the very frequent occasions there are for juries in the county of *Middlesex*, and by the small number of freeholders that are in the said county, the sheriffs of the said county may be under difficulties in procuring juries; for remedy thereof it is enacted, That all leaseholders upon leases, where the improved rents or value shall amount to fifty pounds or upwards *per annum*, over and above all ground-rents, or other reservations, payable by virtue of the said leases, shall be liable and obliged to serve upon juries, when they shall be legally summoned for that purpose; any thing in this or any former act to the contrary, &c."

4. Where the Jury's not being convened from a right Place is a good Cause of Challenge.

*I*de 2.
Hawk.
P. C. c. 23.
§ 92. c. 40.
§ 1. *I*de
tit. *Actions*
Local and
Transitory.
5 Mod. 405.
2 Roll. Abr.
601. 603.

The jury is regularly to come from that county in which the matter is alleged to arise, and antiently from the vicinity or very hundred, pursuant to that maxim, *vicini vicinorum facta presumuntur scire*, persons living in the neighbourhood being esteemed the most proper judges of the facts done within its limits, as being most likely to be proved by witnesses, and charged upon persons with whose integrity and reputation they are best acquainted.

But if a declaration contains matters lying in two counties that join, the jury may come out of both counties, because the sheriffs may be supposed to meet on the bounds of each county, and impanel the *pares* there; but if the counties cannot join, and consequently, the sheriffs cannot meet each other in order to impanel, as if the issue were, whether a road from *London to York*, and from *York to London*, &c. this may be tried in either county.

6 Mod. 223.
* He may
be tried in
the one for
forging, or
in the other for uttering, knowing it to be forged.

So, it is said, that if a man forge a deed in one county, and publish it in another, the trial shall be by a jury of both counties; for that the writing, as well as the publication of that writing, is material*.

Hob. 330.
2 Brownl.
272.
(a) If the
issue be to
be tried by
two coun-
ties, and one
full inquest
appear of
one county,

A party jury of the counties of *Bedford* and *Hertford* came to the bar, and first was sworn one of one county, and another of the other county, and so on in order, till one of the county of *Bedford* was challenged, and then the court proceeded to the next of that county till one was sworn, and so of the other county, until six of each county were sworn; for if there should be six sworn of the county first, and six of the other afterwards, it were disorderly and (a) erroneous.

but the inquest remain for default of jurors of the other county, a *tales* shall be awarded to the county where the default is, not to the other, *Trials per Pais*, 69.

Co. Lit.
157. a.
Hard. 228.
Tri. per
Pais, 185.
2 Vin.

If the jury did not come from the hundred, it was a good cause of challenge to the array, and it seems that originally they were (b) all obliged to be of the hundred; this was changed by statute, and they were settled first at (c) six, afterwards at (d) two,

two, from the difficulty of getting hundredors, and the partiality they found amongst them, neighbours having generally a particular attachment to one party more than the other.

ments of treason or felonies, the prisoner pleading not guilty, there ought at common law to be four hundredors returned, the statutes requiring six, and two hundredors, not extending to treason or felony. —But my Lord Hale says, that he never knew any challenge for default of hundredors upon a trial of an indictment for felony or treason. 2 Hal. Hist. P. C. 272. (c) By 35 H. 3. c. 6. (d) By 27 Eliz. c. 6.

Abr. 217.
(b) It is said, that upon indict-
ments of treason or felonies, there ought at common law to be four hundredors returned, the statutes requiring six, and two hundredors, not extending to treason or felony.
(c) By 35 H. 3. c. 6.
(d) By 27 Eliz. c. 6.

And as the jury was to come from the hundred, it was necessary to lay the *venue* from some known place where the fact was supposed to be done; as in a vill, castle, manor, forest; because if it was not a known place, there could be no proper direction to the sheriff who were the *pares* that were to try the fact there: It has been holden, that a street or lane is no proper place for a *venue*, because it is not supposed to be sufficiently known to the sheriff in what hundred it is; but a street in a parish is a proper *venue*, because it is sufficiently known in what hundred the parish is.

For this vid:
2 Hawk.
P. C. c. 23.
§ 92.

If the lord of the hundred be a party, then it is sufficient they should come from the next hundred.

So, if an action be brought on the statute of *Winton*, there, from the apparent partiality, the jury must come from the next hundred where the robbery was committed; for the proper *pares* for the trial of every fact are the nearest (a) impartial men to the place where the fact was done.

Co. Lit.
157. a.
2 Roll.
Abr. 596.
(a) It is said,
that no inhabitant of
a county
ought to be
6 Mod. 307.

juror for the trial of an issue, whether the county be bound to repair a bridge or not. [In such case, the trial shall be in the next county. 2 Burr. 859, 60.]

He that takes such a challenge must shew in what hundred the *visne* lies, and he must take it before so many are sworn as will serve for the hundred, and he that is challenged for the hundred shall not be drawn absolutely, but shall remain *propter hundredum*.

Co. Lit.
158. a.
Dyer, 234.
pl. 3.

If a person dwell in the hundred, whether he have any freehold there or not, or if he had a freehold there when he was returned, and sell it before he appear, he is a good hundredor; but if he sell all his freehold, he may be challenged absolutely*.

Co. Lit.
157. a.
* Ld. Coke
says, 157. a.
if, after his
return, he

selles away his land, he may be challenged. —But as the stat. 4 Ann. c. 16. directs the *venue* to be *de corpore comitatús*, this law is now obsolete, and only stands here to shew what the law formerly was; in civil suits, &c. *aliter*, as to prosecutions criminal, &c. *vide infra*.

the *venue* to be
formerly was;

If divers hundreds are in a leet, or if the cause of action arose in divers hundreds, the hundredors may come from any of them.

Co. Lit.
157. a.

And now by the 4 & 5 *Anna*, cap. 16. no hundredors are required, except in prosecutions criminal, and on penal statutes, because in other cases the *venue* shall be *de corpore comitatús*, and that too in trials of issues on penal statutes by 24 *Geo*. 2. cap. 18. § 2.

5. Where Partiality in the Juror is a good Cause of Challenge ; and therein where it shall be said a principal Cause of Challenge, or to the Favour.

Co. Lit. 158.

a. Stat.

3 Geo. 2.

c. 5. § 8.

perpetuated

by 6 Geo. 2.

c. 37.

whereby one

panel is to

be returned

for the whole

county, and

not less than

48 in each

panel, causes

of challenges

to the polls,

are not so

minutely

entered into as formerly.

Jurors ought to be *omni exceptione majores*, and by the words of the writ such *per quos rei veritas melius sciri poterit, & qui nec the plaintiff, nec the defendant, aliquâ affinitate attingunt*; which words contain all causes of objection from partiality or incapacity, consanguinity, and affinity; therefore, if the juror be under the power of either party, as if counsel, servant of the robes, or tenant, he is expressly within the intent of the writ; so, if he has declared his opinion touching the matter, or has been chosen arbitrator by one side, or is a parishioner of the parish whereof the other party is parson, and the right of the church comes in question, or has done any act by which it appears that he cannot be impartial, as if he has eaten or drunk at the expence of either party, or taken money to give his verdict, these are principal causes of challenge.

Co. Lit.

158. a.

But though a juror is not under the distress of either side, or has not given apparent marks of partiality, yet there may be sufficient reason to suspect he may be more favourable to one side than the other; and this is a challenge to the favour; as if the juror's son has married the plaintiff's daughter; because this is not contained within the words of the writ, and therefore no principal cause of challenge, but only to the favour, because such juror is not within the power of the party; and in these inducements to suspicion of favour the question is, whether the jurymen is indifferent as he stands unsworn; for a jurymen ought to be perfectly impartial to either side; for otherwise his affection will give weight to the evidence of one party, and an honest but weak man may be so much biased, as to think he goes by his evidence, when his affections add weight to the evidence. Now since the writ expects those by whom the truth may be best known, it excludes all those who are apparently partial without any trial, because they are not under the qualifications in the writ, since the truth cannot be unknown to them; but where the partiality is not apparent, but only suspicious, then the juror is to be tried whether favourable or not, that is, whether he comes within the description of the writ: and if the triers think he does, then he is to be set aside.

Co. Lit. 157.

b. (a) Challenges are

allowed where the issue concerns a city or corporation, and they are to make the panel, or where any of their body be to go on the jury, or any of kin unto them, though the body corporate be not directly party to the suit. Hob. 87. Sand 344.—So, where a dean and chapter brought an assise, a juror was challenged, because he was brother to one of the prebendaries. Hob. 87.

If an action be brought (a) by a corporation, and the juror be of kin to any member, it is a principal challenge.

Co. Lit. 157.

If a juror be challenged for being of kin to one party, it is no counter-plea that he is of kin also to the other; for the *venire* commands the sheriff to return those who are of kin to neither.

An arbitrator chosen by both parties, whether he have treated of the matter or not, or chosen by one party, if he has never treated thereof, or a commissioner chosen by one party for examination of witnesses, and appointed under the great seal, cannot be challenged principally; but for such cause one may be challenged for favour.

Co. Lit. 158
9 Co. 71. a.

If a juror be cousin to him in reversion, it is only a challenge to the favour, because he in reversion is not party to the record; but it is a principal challenge if he be party by voucher, aid, or receipt.

Co. Lit. 158.

It is a principal cause of challenge, that the juror is a witness named in the deed, or hath formerly given a verdict on the same cause, whether between the same parties, or others; but this is only a challenge to the favour if the record be of another court, and not shewn forth; but if it be of the same court, it is sufficient to shew the day and the term.

Co. Lit. 157.
Cro. Eliz.
33. pl. 23.

By the 25 E. 3. cap. 3. it is enacted, "That no indictor shall be put on inquests upon deliverance of the indictments of felony or trespass, if he be challenged for the same cause by him who is so indicted." And this hath been adjudged a good exception not only on the trial of the same indictment, but also on the trial of another indictment or action, wherein the matter found in such former indictment is either directly in issue, or happens to be material.

Sid. 244.

It is a good cause of challenge, that a juror hath a claim to the forfeiture to be caused by the conviction, or that he hath declared his opinion beforehand; yet this has been adjudged to be no cause of challenge where it hath appeared to proceed not from any ill will, but from a knowledge of the cause.

2 Hawk.
P. C. c. 43.
§ 28.

But it is no good cause of challenge, that the juror has found others guilty on the same indictment; for the indictment in judgment of law is several against each defendant, and every one must be convicted by particular evidence against himself.

2 Hawk.
P. C. c. 43.
§ 29.

It hath been ruled to be a good challenge on the part of the king, that the juror hath given his dogs the names of the king's witnesses.

2 Hawk.
P. C. c. 43.
§ 30.

Though the king may take either a principal challenge, or to the favour, yet it is said that the subject cannot take a challenge to the favour against the king, because every one is bound by his allegiance to favour the king: it is said to be a principal challenge against the king, that the jury is of his livery, or his immediate tenant.

2 Hawk.
P. C. c. 43.
§ 31, 32,
33.

In an information of forgery the defendant challenged one of the jury, for that the prosecutor had been lately entertained at his house; and this was admitted to the favour, though against the king.

Vent. 309.
which seems
cont. to Cro.
Eliz. 663.

A juror was challenged because he was tenant of a manor to which there was a court-leet, of which the plaintiff was steward; and it was holden, that this was no principal challenge, but only to the favour.

Allen, 29.

Salk. 152.
pl. 1.

Upon a trial at bar the question was, whether the fair called *Waybill Fair* should be kept at *Waybill*, or at *Anderry*, and one of the jury was challenged because he lived at *Waybill*; and the objection was, that the fair occasioned manure to improve the ground; on the other side it was considered, that the fair occasioned trampling of the grass; and this being a challenge to the favour, two of the jurors were sworn to be triers; and their oath was, *You shall well and truly try whether A. (the jurymen challenged) stand indifferent between the parties to this issue.*

Dyer, 45. a.
pl. 27.

[*A fortiori*

then, no cause to set aside a verdict. 1 Str. 643. Com. Rep. 601.]

6. Where the Degree and Quality of the Juror is a good Cause of Challenge; and herein who are exempt from serving on Juries.

Vide tit.
Privilege.

It seems to be agreed, that all persons, whose attendance is required in the superior courts of justice, such as serjeants at law, counsellors, attornies, and other officers of the courts, are so far privileged as not to be summoned on juries: also, peers of the realm are excluded, as not coming within the qualifications mentioned in the writ, viz. *ad faciendum quand. jurat. patrie*; for they are not *pares patrie*, but *pares* of an higher rank; and therefore it is clearly (a) agreed, that if a peer be returned on a jury, and bring a writ of privilege, he shall be discharged: also, it seems to be the (b) better opinion, that even without such a writ he may challenge himself, or be challenged by either party.

(a) Dyer,
314.
Moor, 167.
(b) 2 Roll.
Abr. 646.
Co. Lit. 157.
9 Co. 49.
6 Co. 53.
Jones, 153.
Pasch. 17
Car. 2. Sir
Edw. Bainton's case.

But members of the House of Commons seem not to have any privilege to be exempt from serving on juries; yet in the case of Sir *Edward Bainton*, who was returned on a jury in *B. R.* the court would not force him to be sworn against his will, he being a parliament-man, and the parliament then sitting.

4 Inst. 269.
— And it is
said, that
they may

Tenants in ancient demesne are not to be impanelled to appear at *Westminster*, or elsewhere in any other court, upon any inquest or trial of any cause.

have a writ *de non ponendis in assis & juratis* against the sheriff, or any one who hath return of writs; and if notwithstanding such writ the sheriff will return them, they may have an attachment. 1 Co. 105.— A juror summoned at the bar, that he was a tenant in ancient demesne, and had his charter in his hand, and prayed to be exempted from the jury, and discharged; but the court did not regard it, but caused him to be sworn; and it was holden, that his proper remedy was against the sheriff, and that if he had made default and lost issues, he might shew his charter in the Exchequer upon the amercement estreated, and there he should be discharged. Leon. 207.— By the common law a freehold in ancient demesne was not a sufficient qualification for a juror. 9 H. 7. 1. pl. 2. Bro. Challenge, 157. Co. Lit. 156. b. But it is made so by 4 & 5 W. 3. c. 24. *Vide ante.*

Sid. 127.
245.
Raym. 113.
Hard. 389,
&c.

It seems agreed, that the king by grant or his charter may exempt one, two, or more from serving on juries; but he cannot exempt a whole county or hundred, because in such case there would be a failure of justice; also it seems, that such exemption does not extend to jurors returned into the King's Bench, unless there be express words including that court; also, by the better opinion, the sheriff

sheriff cannot return such privilege of exemption, but each particular juror must come in and demand it.

By the statute of *Westminster* 2. cap. 38. it is expressly provided, "That neither old men above the age of seventy years, nor persons perpetually sick, nor those who are infirm at the time of their summons, nor those who do not reside in the county, shall be put in juries, or in the lesser assizes." In the construction of which it hath been holden, that though such persons may sue out a writ of privilege for their discharge, grounded on this statute, yet if they be actually returned, and appear, they can neither be challenged by the party, nor excuse themselves from not serving, if there be not a sufficient number without them *.

Clerks or persons in (a) holy orders, coroners, ministers of the forest, officers of the army, and other officers and ministers belonging to the king, are exempt from serving on juries.

(a) Where before the return the party became a minister of the church, and at the day of the return he appeared, and prayed to be discharged, according to the privilege of those of the ministry; the court would not allow of his prayer, because that at the time of the panel made he was a layman. *Becher's case.*

By the 6 *W. 3. cap. 4.* "Every person using and exercising the art of an apothecary in the city of *London*, or within seven miles thereof, being free of the society of apothecaries in the said city, and who shall have been duly examined and approved, &c. for so long time as he shall exercise the said mystery, and no longer, shall be exempted from serving on any jury or inquest; and other persons exercising the said art of an apothecary in any other parts of this kingdom, who have served as apprentices seven years, according to the statute 5 *Eliz. cap. 4.* shall likewise be exempted from serving on juries for so long time as they shall use and exercise the said art, unless such person voluntarily consent to serve."

By the 7 & 8 *W. 3. cap. 21.* all registered seamen are exempted from serving on juries.

By the 7 & 8 *W. 3. cap. 34.* it is enacted, "That no Quaker, or reputed Quaker, shall serve on juries."

7. Where from the Quality of either Party it is a good Cause of Challenge, that a Knight is not returned.

Here we must observe, that if a peer be empleaded by a commoner, yet such case shall not be tried by peers, but by a jury of the country; for though the peers are the proper *pares* to a lord of parliament in (b) capital matters, where the life and nobility of a peer is concerned, yet in matter of property the trial of facts is not by them, but by the inhabitants of those counties where the facts arise, since such peers living through the whole kingdom, could not be generally cognisant of facts arising in several counties, as the inhabitants themselves where they are done; but this want of having noblemen for their jury was compensated as much as possible, by returning persons of the best quality.

And therefore if a peer of the realm or lord of parliament be demandant or plaintiff, tenant or defendant, there must be a

2 Inst. 446.
F. N. B.
165.

* But the court, on application, will generally excuse, if there is a sufficient number remaining.

Dalt. Sher.
121.
Trial per
Pais, 86.

4 Leon. 190.

(b) In which case a peer cannot challenge any of his peers, because the whole peers sit upon him, who are his proper judges.
Moor, 621.
Co. Lit. 156.

Co. Lit.
156. a.
6 Co. 53.

(a) By 24.
G. 2. c. 13.
§ 4. this
challenge is
taken away.
(b) That a
bishop being
indicted for

trespass, a knight ought to be returned. Leon. 5. (c) That if a knight be but returned on a jury when a nobleman is concerned, it is not material whether he appear and give his verdict or no. Mod. 226.

Co. Lit.

156. a.

Leon. 303.

Dalf. 68. Jenk. 11. 89.

In an attaint there ought to be a knight returned of the jury, and in a writ of right four knights were to be returned.

8. Of Trials *per Medietatem Linguae*, where an Alien is Party.

By the 28 E. 3. cap. 13. § 2. it is enacted, "That in all manner of inquests and proofs which be to be taken or made against aliens and denizens, be they merchants or others, as well before the mayor of the staple as before any other justices or ministers, although the king be party, the one half of the inquest or proof shall be denizens, and the other half aliens, if so many aliens and foreigners be in the town or place where such inquest or proof is to be taken, that be not parties, nor with the parties in contracts, pleas, or other quarrels, whereof such inquests or proofs ought to be taken; and if there be not so many aliens, then shall be put in such inquests or proofs as many aliens as shall be found in the same towns or places, which be not thereto parties, nor with the parties as aforesaid, and the remnant of denizens which be good men, and not suspicious to the one party nor to the other."

2 Hawk.

P. C. c. 43.

§ 35.

(d) And therefore it hath been adjudged,

quorum qui-

libet habeat quatuor libras terras, &c., shall be applied to the *English* only. Cro. Eliz. 272. 841.

2 Hawk.

P. C. c. 43.

§ 36.

2 Hawk.

P. C. c. 43.

§ 38.

Also it is settled, that those on the grand jury, or who find an indictment against an alien, need not be aliens.

Neither is it necessary, that the petit jury in an action or appeal by an alien against an alien, should be half aliens, and half *English*; for the words are, *All inquests, &c. between aliens and denizens.*

Dyer, 28. pl.

180. 145

pl. 60. 304.

pl. 51. 357.

pl. 45. 2 Roll.

Abr. 643.

Cro. Eliz. 869.

(e) If upon an indictment of felony against an alien he plead not guilty, and a common jury be returned, if he doth not surmise his being an alien, before any of the jury sworn, he hath lost that advantage; but if he allege that he is an alien, he may challenge the array for that cause, and thereupon a new precept or *venire* shall issue, or an award be made of a jury *de medietate linguae*; but it is more proper for him to surmise it upon his plea pleaded, and thereupon to pray it. 2 Hal. Hist. P. C. 272.

If an alien neglect to pray the benefit of the statute (e) before the return of a common *venire*, he can neither except to such *venire*, nor pray a subsequent process *de medietate linguae*.

The return of a *venire de medietate linguæ* ought to (a) shew which of the jurors are denizens, and which aliens, and a full number of each must appear to be sworn, if there be not enough to make up a full number of six denizens and six aliens, the justices of *nisi prius* (b) may, by construction of the statutes which gave a *tales de circumstantibus*, award such *tales* for so many denizens and aliens as shall be wanting.

cases within the statutes of jeofail. Cro. Eliz. 84. (b) 10 Co. 104. Cro. Eliz. 305.

If on a *venire* of half denizens and half aliens the sheriff return twelve all aliens, and among them some who in truth are not such, the party shall not be concluded by such return, but may notwithstanding challenge the array for want of a sufficient number of aliens.

Some of the precedents of awards of *venires de medietate linguæ* mention, that the aliens to be returned shall be of the same country whereof the party alleges himself; but others direct generally, that one half of the jury shall be aliens, without specifying any particular country; and these last seem most agreeable to the statute, and to be confirmed by the late practice, and great number of authorities.

It hath been holden, that denizens so made by letters patent are denizens within the intent of this statute; also, that before the union of *England* and *Scotland* under *James I.* a *Scot* was not an alien within the meaning of this statute.

It hath been holden, that as to treason this statute is repealed by 1 & 2 Ph. & Mar. cap. 10. which requires that trials of treason shall be according to the common law.

By the 1 & 2 P. & M. cap. 4. § 3. & 5 El. cap. 20. § 3. *Egyptians* are to be tried by the inhabitants of the county or place where they shall be taken, and not *per medietatem linguæ*.

9. Of Peremptory Challenges.

By the common law, in all capital cases (in which only peremptory challenges were allowed) the prisoner could challenge thirty-five peremptorily; and this was because the trial by the petty jury came instead of the ordeal, and the petty jury of twelve being after the manner of the canonical purgation, and because the whole *pares* were not on his jury, but only a select number was chosen by the criminal himself, as was usual among the canonists, therefore they took a middle way, and gave the defendant liberty to challenge peremptorily any number under three juries, four juries being as many as generally appeared, to make the total *pares* of the county.

This kind of challenge, as has been observed, was allowable by the common law in all capital cases, both upon indictments and appeals, and also in misprison of high treason; but it was enacted by 33 H. 8. cap. 23. § 3. *That it should not be allowed in any cases of high treason, nor misprison of high treason; which statute*

tute being repealed by 1 *Ph. & Mar. cap. 10.* the ancient course of the common law as to trials of treason is restored, and consequently such challenge revived; but it is made a doubt, whether by any statute it is revived in case of misprision of treason, the statute 1 *Ph. & Mar. cap. 10.* not extending, as it is said, to misprision of high treason.

It is enacted by 22 *H. 8. cap. 14. § 7.* made perpetual by 32 *H. 8. cap. 3.* that no person arraigned for any petit treason, murder, or felony, be admitted to any peremptory challenge above the number of twenty; but it has been holden, that 1 & 2 *Ph. & Mar. cap. 10. § 7.* which restores the course of the common law as to trials of treason, has revived the old challenge of thirty-five in trials of petit treason; and therefore it is agreed, that at this day, in cases of high treason, and petit treason, the prisoner may challenge thirty-five peremptorily, and twenty in all other capital offences.

This peremptory challenge seems, by the better opinion, to be only allowable when the prisoner pleads the general issue; therefore by the common law, if a man were outlawed of felony or treason, and brought a writ of error upon the outlawry, and assigned some error in fact, whereupon issue was joined, he could not challenge peremptorily; the like law if he had pleaded any foreign plea in bar or in abatement, which went not to the trial of the felony, but of some collateral matter only.

This peremptory challenge seems, by the better opinion, to be only allowable when the prisoner pleads the general issue; therefore by the common law, if a man were outlawed of felony or treason, and brought a writ of error upon the outlawry, and assigned some error in fact, whereupon issue was joined, he could not challenge peremptorily; the like law if he had pleaded any foreign plea in bar or in abatement, which went not to the trial of the felony, but of some collateral matter only.

There seems to be some diversity of opinions in case of a prisoner's challenging peremptorily more than he is allowed by law; and herein my Lord *Hale* lays down the law to be, that at common law if the prisoner peremptorily challenged above thirty-five persons, and insisted upon it, and would not leave his challenge, then in case of an indictment of high treason it amounted to *nihil dicit*, and judgment of death should be given against him; but in case of petit treason or felony, the prisoner anciently was put to *peine fort & dure*, as declining the trial the law appointed; the consequence whereof was only the forfeiture of his goods, but it amounted to no attainder, and consequently no escheat of his lands; and thus, says he, the practice was until the beginning of the reign of *H. 7.* but afterwards, by the advice of all the judges of both benches, it was resolved, that the party so peremptorily challenging above thirty-five, should have judgment of death, and that it amounted to an attainder; for having pleaded to the felony, and put himself upon the country, here could be no standing mute; and therefore the judges resolved on this course, as most consonant to law, to be practised in all circuits; but for all this, adds he, the better opinion of later times, as well as of former is, that the judgment in the case of such a peremptory challenge of above thirty-five at the common law, in case of felony, was not an attainder but only penance, to which the party was awarded without having any jury impanelled.

There

There seems also some diversity of opinions, as to what is to be done with a prisoner who, since the statute of 22 H. 8. cap. 14. challenges about twenty in felony; and herein the better opinion seems to be, that he shall neither forfeit his goods, nor have judgment of death, nor of *peine fort & dure*, but shall only be overruled as to his challenges, so far as they exceed twenty, and put upon his trial; and herewith agrees my Lord Hale, and that, he says, for two reasons; 1. Because the statute hath made no provision to attain the felon, if he challenges above the number of twenty. 2. Because the words of the statute of 22 H. 8. cap. 14. are, *That he be not admitted to challenge above the number of twenty*; so that if he challenge above twenty peremptorily, his challenge shall only be disallowed.

2 Hal. Hist.
P. C. 296.
270.
2 Hawk.
P. C. c. 43.
§ 9. 4 Bl.
Comm. 354.

If twenty men are indicted for the same offence, though by one indictment, yet every prisoner is allowed his peremptory challenge; and if there be but one *venire fac.* awarded to try them, the persons challenged by any one shall be withdrawn against them all.

2 Hal. Hist.
P. C. 263.

If A. be indicted and plead not guilty, the jury appear, he challenge six of the jury for cause, and the cause be found insufficient, and the six be sworn, and the rest of the jury challenged off, whereby the inquest remains *pro defectu juratorum*; a *tales* granted, and the jury appear; the prisoner may challenge peremptorily any of the six that were before challenged, for cause allowed and sworn, for it is possible a new cause of challenge may intervene after the former swearing; but if a man challenge him for cause, he must shew a cause happened after the former swearing.

2 Hal. Hist.
P. C. 270.

But if the prisoner, upon the first panel, had challenged for instance fifteen peremptorily, and then the jury remains for default of jurors, and a *disfringas* with a forty *tales* is granted, he shall challenge peremptorily no more than will fill up his number, viz. in case of felony, at this day, five more, and in case of treason, or petit treason, twenty more, to make up his full number of twenty peremptory challenges in the first case, and thirty-five in the last.

2 Hal. Hist.
P. C. 270.

10. Of Challenges by the King.

The king, or any one on his behalf, may, on sufficient cause, challenge either the array, or the polls, in the same manner as a private person may; also by the common law, the king, without assigning any reason, but barely alleging *quod non sunt boni pro rege* might have challenged peremptorily as many as he thought proper.

Co. Lit. 156.
2 Inst. 431.
2 Hal. Hist.
P. C. 271.

But this is remedied by 33 E. 1. stat. 4. commonly called *ordinatio de inquisitionibus*, which enacteth as follows; "Of inquests to be taken before any of the justices, and wherein our lord the king is party, howsoever it be, it is agreed and ordained by the king, and all his counsel, that from henceforth, notwithstanding it be alleged by them that sue for the king, that the jurors of those inquests, or some of them, be not indifferant for the king, yet such inquests shall not remain untaken for that cause; but if they that sue for the king will challenge any of those jurors,

" they

" they shall assign of their challenge a cause certain, and the truth
 " of the same challenge shall be inquired of according to the cus-
 " tom of the court."

Moor, 505.
 Co. Lit. 239.

In the construction of this statute it hath been clearly settled, that the words thereof being general, it extends to all causes, as well criminal as civil, whereto the king is party.

Co. Lit. 156.
 Vent. 309.
 Raym. 473.
 Sain. 81.
 2 Hal. Hist.
 P. C. 271.

It hath also been agreed, and is now the established practice of the courts, that if the king challenge a juror before the panel is perused, he needs not shew any cause of his challenge till the whole panel be gone through, and it appear that there will not be a full jury without the person so challenged; and if the defendant, in order to oblige the king to shew cause presently, challenge *touts paravails*, yet it hath been adjudged, that the defendant shall be first put to shew all his causes of challenge, before the king need to shew any.

11. At what Time a Challenge is to be taken.

Hob. 255.
 Vicars v.
 Langham.

It is laid down as a rule, that there can be no challenge either to the array, or polls, before a full jury appears; and therefore in a case where the plaintiff, after he had prayed a *tales*, challenged the array thereof for partiality in the sheriff; though it was objected, that this being by his own desire, he was afterwards estopped to take any exceptions to the sheriff; yet the challenge was allowed good, and the *venue* directed to the sheriffs; for if he had not prayed a *tales*, there could not have been a full jury, and then there could be no challenges.

Co. Lit.
 158. a.
 Yelv. 25.
 Cro. Car.
 241.
 Hob. 255.
 2 Roll.
 Abr. 658.
 Jenk. 310.

Also, it is laid down as a rule, that no juror can be challenged without consent after he hath been sworn, either in a criminal or civil case, or either at the suit of the king or subject, whether on the same day, or, according to the better opinion, on a former on the same trial, unless it be for some cause which happened since he was sworn.

2 Brownl. 275. 2 Hal. Hist. P. C. 274.

Co. Lit.
 158. a.

He who hath several causes of challenge against a juror must take them all at once.

Co. Lit.
 158. a.

If a juror be challenged by one party and found indifferent, the other party may challenge him afterwards.

Co. Lit.
 158. a.

In case of treason, or felony, if the prisoner challenge a juror for cause which is held insufficient, he may afterwards challenge him peremptorily.

Co. Lit.
 158. a.
 See now
 Stat. 4 Ann.
 c. 16. § 6.

A challenge for the hundred must be taken before so many be sworn as will serve for hundredors, or else the party loseth the advantage thereof.

& 24 G. 2. c. 18. § 3.

Co. Lit.
 158. a.

After a challenge to the array, the party may challenge the polls; but after a challenge to the polls, there can be no challenge to the array.

12. How such Challenge is to be tried.

Here we must take notice, that a principal cause of challenge is grounded on such a manifest presumption of partiality, that if it be found true, it unquestionably sets aside the array, or the juror, without any other trial than its being made out to the satisfaction of the court, before which the panel is returned; but a challenge to the favour, where the partiality is not apparent, must be left to the discretion of the triers.

If the array be challenged, it lies in the discretion of the court how it shall be tried; sometimes it is done by two attorneys, sometimes by two coroners, and sometimes by two of the jury; with this difference, that if the challenge be for kindred in the sheriff, it is most fit to be tried by two of the jurors returned; if the challenge found in favour of partiality, then by any other two assigned thereunto by the court.

As to a challenge to the polls, if a juror be challenged before any juror sworn, two triers shall be appointed by the court; and if he be found indifferent, and sworn, he and the two triers shall try the next challenge; and if he be tried, and found indifferent, then the two first triers shall be discharged and the two jurors tried and found indifferent shall try the rest.

If the plaintiff challenge ten, and the prisoner one, then he that remains shall have added to him one chosen by the plaintiff and another by the prisoner, and they three shall try the challenge; if six be sworn, and the rest challenged, the court may assign any two of the six sworn to try the challenges.

The triers cannot exceed two, unless it be by consent; which was taken up in imitation of the trial of the summons of the party, which was by two persons; this being (a) whether such a juror, as was described in the writ, was warned, viz. one *per qu. rei verit. melius sciri poterit, &c.*

the juryman challenged, and indifferent between the parties to this issue. Salk. 152. pl. 1. — Where a challenge is to the array for favour, the plaintiff may either confess it, or plead to it; if he pleads, the judges assign triers to try the array, who seldom exceed two, and being chosen and sworn, the associate, or clerk in court, doth declare and rehearse unto them the matter and cause of the challenge, and after he hath so done, concludes to them thus; and so your charge is to inquire, whether it be an impartial array or a favourable one; and if they affirm it, the clerk enters underneath the challenge *affirmatur*; but if the triers find it favourable, then thus, *calumnia vera. Trials per Pais, 165.*

The triers, as far as they act therein, are officers of the court, and liable to be punished for any misdemeanour; also it is said, (b) that if they find against law, and the direction of the court, they may be fined and imprisoned.

considered as jurors, and acting in a judicial capacity?

The truth of the matter alleged as cause of challenge, must be made out, by (c) witnesses, to the satisfaction of the triers; also the juror challenged may, on a *voir dire*, be asked such questions as do not tend to infamy or disgrace; such as, whether he hath a freehold, whether he hath an interest in the cause; and in a civil cause, whether he hath given his opinion before-hand upon

Co.Lit. 155.
157. b.

2 Roll.
Rep. 363.
Co.Lit. 158.
2 Hal. Hist.
P. C. 275.

Co.Lit. 158.
2 Hal. Hist.
P. C. 275.

2 Hal. Hist.
P. C. 275.

Co. Lit.
158. a.
(a) And his
oath is, You
shall well
and truly try
whether A.

Palm, 363.
(b) But *qu.*
whether
they are not
in this re-
spect to be

Co.Lit. 158.
*Trials per
Pais, 158.*
Salk. 153.
pl. 3.
(c) That
one witness
to prove the

challenge is
sufficient.
Show. 173.

Keeling, 9.
Trials per
Pais, 158.

(a) Salk.
153. pl. 3.
Coke's trial.

upon the right, which he might have done as arbitrator between the parties.

But in no case can a juror be asked, whether he hath been whipped for larceny, or convict of felony, or whether ever he was committed to *Bridewell* for a pilferer, or to *Newgate* for clipping and coining, or whether he is a villein or outlawed; because these kind of questions tend to make a man discover that of himself which tends to his disgrace; also it was holden in (a) a trial for high treason, that the prisoner, in order to challenge a juror, could not ask him, whether he had not declared his opinion before-hand that he was guilty, or would be hanged, because these questions tend to reproach, as charging him with a misdemeanour.

Skin. 101.
pl. 19.
Hutt. 24.
(b) That
such bill
must be,
that he over-
ruled the
challenge, not *quod recus.* the challenge. Skin. 101.

If a challenge be taken, and the other side demur, and it be debated and the judge over-rule it, it is entered upon the original record; and if at *nisi prius*, it appears upon the *postea* what the judge hath done; but if the judge over-ruled the challenge upon debate without a demurrer, then it is proper for (b) a bill of exceptions.

3 Leon. 222.

It is said, that a demurrer upon a challenge is not like to a demurrer upon a plea; for in case of a demurrer upon a challenge, as soon as the demurrer is agreed on at the bar, it is good enough, without other circumstances, such as counsel's hand, &c. and the prothonotaries of right ought to enter such demurrer.

(F) How Jurors are to be impanelled and sworn.

BY the 3 *Geo. cap.* 25, § 11, it is enacted, "That the name
" of each and every person who shall be summoned and im-
" panelled, with his addition and the place of his abode, shall
" be written in several and distinct pieces of parchment, or
" paper, being all, as near as may be, of equal size and bigness,
" and shall be delivered to the marshal of such judge of assize or
" *nisi prius*, or of the said great sessions, or of the sessions of the
" said counties palatine, who is to try the causes in the said
" county, by the under-sheriff of the said county, or some agent
" of his, and shall, by direction and care of such marshal, be
" rolled up all, as near as may be, in the same manner, and put
" into a box or glass to be provided for that purpose; and when
" any cause shall be brought on to be tried, some indifferent per-
" son, by direction of the court, may and shall, in open court,
" draw out twelve of the said parchments, or papers, one after
" another; and if any of the persons, whose names shall be so
" drawn, shall not appear, or be challenged and set aside, then
" such further number, until twelve persons be drawn, who
" shall appear, and, after all causes of challenge, shall be allowed
" as fair and indifferent; and the said twelve persons so first
" drawn

“ drawn and appearing, and approved as indifferent, their names
 “ being marked in the panel, and they being sworn, shall be the
 “ jury to try the said cause; and the names of the persons so
 “ drawn and sworn shall be kept apart by themselves, in some
 “ other box or glass to be kept for that purpose, till such jury
 “ shall have given in their verdict, and the same is recorded; or
 “ until such jury shall, by consent of the parties, or leave of the
 “ court, be discharged; and then the same names shall be rolled
 “ up again and returned to the former box or glass, there to
 “ be kept with the other names remaining at that time un-
 “ drawn; and so *toties quoties*, as long as any cause remains then
 “ to be tried.”

§ 12. Provided, “ That if any cause shall be brought on to be
 “ tried in any of the said courts respectively, before the jury in
 “ any other cause shall have brought in their verdict, or be dis-
 “ charged, it shall and may be lawful for the court to order
 “ twelve of the residue of the parchments, or papers, not
 “ containing the names of any of the jurors who shall not
 “ have so brought in their verdict, or be discharged, to be drawn
 “ in such manner as is aforesaid, for the trial of the cause which
 “ shall be so brought on to be tried.”

In capital cases the sheriff returns the panel of the jury, who
 being called, and appearing, the prisoners are told by the clerk,
 that these good men now called, and appearing, are to pass on
 their lives and deaths, therefore if they will challenge any of
 them, they are to do it before they are sworn; and if no chal-
 lenge hinder, the jury are commanded to look on the pri-
 soners, and then severally twelve of them, (a) neither more nor
 less, are sworn.

twelve shall serve. — But if eleven be sworn by mistake, no verdict can be taken of the eleven;
 and if it be, it is error; and so in a presentment; but if twelve be recorded sworn, no averment lies that
 one was unsworn. — Upon not guilty pleaded, twelve are sworn to try the issue; after their departure
 one of the twelve leaves his companions, which being discovered to the court, by consent of all parties,
B., another of the panel, is sworn in the place of *A.*, and afterwards *A.* returns to his companions, which
 being made known to the court, *A.* is called and examined, why he departed: he answered, to drink;
 and being examined whether he had spoken with the defendant, denied it upon his oath; whereupon *B.*
 was discharged from giving any verdict, and the verdict taken of *A.*, and the other eleven, and *A.* fined
 for his contempt. 2 Hal. Hist. P. C. 296.

2 Hal. Hist.
 P. C. 293.
 (a) But if
 thirteen are
 by mistake
 sworn, the
 swearing of
 the last by
 mistake is
 void, and
 the other

Although there be twenty prisoners at the bar for several felo-
 nies, and the oath be general to try between the king and the pri-
 soners at the bar, yet the jury is to inquire of no (b) more than
 what they are particularly charged with; and therefore though
 twenty have pleaded, and stand at the bar when the jury is sworn,
 yet the court may stay any number of the prisoners, and so the
 jury stand charged with no more than what are thus particularly
 charged upon them; and when they go from the bar, and have
 brought in their verdict touching these particulars charged upon
 them, then if the same jury pass upon the remaining prisoners,
 yet they are to be called over again, and the prisoners reminded
 of their challenges and the jury sworn *de novo* upon the trial of
 the rest of the prisoners.

2 Hal. Hist.
 P. C. 294.
 (b) An ex-
 ception was
 taken to a
 judgment in
 an inferior
 court, that
 it was twelve
probi electi,
triat, jurati,
 &c. without
 saying *ad*
verdict de
premissis
dicend.; and
 this was
 holden

error; for they might be sworn in another cause at the same court; and the difference was said to
 be

be betwixt a jury in criminal and civil matters; for the oath which the jury take in criminal matters, is that they shall truly try and true deliverance make of the prisoners at the bar, &c., so the court may charge them with as many prisoners as they think fit; but in civil matters the jury must be sworn awew in every several case. Mich. 29 Car. 2. in C. B. Watfon and Goodman.

(G) How to be kept and discharged.

2 Hal. Hist. **W**HEN the jurors depart from the bar, (a) a bailiff ought to
P. C. 296. be sworn to keep them together, and not to suffer any to
 (a) That a speak with them.
 bailiff is to
be sworn in a civil as well as a criminal case. Palm. 380.

2 Hal. Hist. After their departure they may desire to hear one of the wit-
P. C. 296. nesses again, and it shall be granted, so he deliver his testimony
 (b) There- in (b) open court; and also they may desire to propound questions
 fore in a to the court, for their satisfaction, and it shall be granted, so it
 civil case, be in open court.
 where the jury with-

drew to confer about their verdict, one of the witnesses, that was before sworn, on the part of the defendant, was called by the jurors, and he recited again his evidence to them, and they gave their verdict for the defendant; and complaint being made to the judge of assize of this misdemeanour, he examined the jury, who confessed all the matter, and that the evidence was the same in effect that was given before, *Et non alia nec diversa*; and this matter being returned upon the *postea*, the opinion of the court was, that the verdict was not good, and a *venire fac. de novo* was awarded. Cro. Eliz. 189. Metcalfe and Dean.

Co. Lit. The jury must be kept together without meat, drink, fire, or
227. b. candle, till they are agreed.

2 Hal. Hist.
P. C. 297. See Observations on the Statutes, 302. note (k), for the origin of this.

Salk. 201. So, in an inferior court, if the jury will not agree on their
Pl. 3. verdict, the way is, as in other courts, to keep them without
7 Mod. 1. meat, drink, fire, or candle, till they agree; and the steward may from time to time adjourn the court till such agreement.

Vent. 97. If they agree not before the departure of the justices of gaol-
2 Hal. Hist. delivery into another county, the sheriff must send them along with
P. C. 297. them in carts, and the judge may take and record their verdict
 But it is in a foreign county.
 made a

quære,
 whether in such cases the session may be adjourned before the verdict taken.

2 Hal. Hist. If there be eleven agreed, and but one dissenting, who says he
P. C. 297. will rather die in prison, yet the verdict shall not be taken by eleven, no nor yet the refuser fined or imprisoned; and therefore, where such a verdict was taken by eleven, and the twelfth fined and imprisoned, it was, upon great advice, ruled the verdict was void, and the twelfth man delivered, and a new *venire* awarded; for men are not to be forced to give their verdict against their judgment.

2 Hal. Hist. If the jury say they are agreed, the court may examine them by
P. C. 299. poll; and if in truth they are not agreed, they are fineable.

2 Hawk. It seems to have been anciently an uncontroverted rule, and
P. C. c. 47. hath been allowed even by those of the contrary opinion, to have
 § 1., and been the general tradition of the law, that a jury sworn and
 several au- charged in a capital case cannot be discharged (without the pri-
 thorities soner's

soner's consent) till they have given a verdict; and notwithstanding some authorities to the contrary in the reign of King *Charles the Second*, this hath been holden for clear law, both in the reign of King *James the Second*, and since the Revolution.

there cited;
2 Hal. Hist.
P.C. 294-5.
[Folt 29-
39. 76.]

Stevenfon's case. Leach's cases, 443.]

(H) In what Cases and in what Manner to have a View.

AT common law, in (a) most real actions, after the demandant had counted, the tenant might have demanded the (b) view of the land; or if it were a rent, or other thing, view of the land out of which it issued; and this was, that things might be reduced to a greater certainty; but because this was used often by the tenant for delay, and thereby the demandant greatly prejudiced; said, that at common law view did not lie in a writ of dower unde nihil habet, intrusion, breve d'entry en le quibus, nuper obiit, rationali parte. 2 Roll. Abr. 725. Booth, Real Actions, 38. (b) That there are two sorts of views in real actions; 1. View by the party. 2. View by the jurors, as in an assise of novel disseisin, waste, assise of nuisance, the party shall not have view, because the jurors shall have view. Booth, 38.

2 Roll.
Abr. 725
tit. View.
2 Init. 480.
Bro. tit.
View Fitz.
tit. View.
(a) But it is

By (c) *Westm. 2. cap. 48.* it is ordained and provided, "That from thenceforth view shall not be granted but in case when view of land is necessary; and if one lose land by default, and he that loseth moveth a writ to demand the same land, and in case when one by an exception dilatory abateth a writ after view of the land, as by non-tenure, or misnaming of the town, or such like, if he purchase another writ, in this case, and in the case before-mentioned, from henceforth the view shall not be granted, if he had view in the first writ. In a writ of dower, where the dower in demand is of land, that the husband aliened to the tenant, or his ancestors, where the tenant ought not to be ignorant what land the husband did alien to him or his ancestor, though the husband died not seised, yet from henceforth view shall not be granted to the tenant. In a writ of entry also that is abated, because the demandant misnamed the entry; if the demandant purchase another writ of entry, if the tenant had view in the first writ, he shall not have it in the second. In all writs also where lands be demanded, by reason of a lease made by the demandant, or his ancestor, unto the tenant, and not to his ancestor; as that which he leased to him, being within age, not whole of mind, being in prison, and such like, view shall not be granted hereafter; but if the demise were made to his ancestor, the view shall lie as it hath done before."

(c) 13 E. 1.
c. 28.

Since this statute, the demandant, as to any of the cases within the statute, may counterplead the view, *i. e.* allege matter in pleading which ousts him of view; as where he that loseth land by default brings a *quod ei deforciat* for the recovery of it, the tenant shall not have view, because he is well enough ascertained of

Booth, 37.
2 Roll.
Abr. 726.

the land by the former record : so where view was had in a former writ, and that writ was abated after view for some mistake that appeared upon the view, as non-tenure, misnaming of the town : so in dower, when it is brought against the same tenant that purchased the land of the husband : so, if the husband died seised, it is a good (a) counterplea of view in dower.

(a) For this vide Dower, letter (I).

2 Sand. 254.

(b) Wherever the plaintiff is to recover

per visum

juratorum,

there ought

to be six of

the jury that

have had the

view, or know

the land in question,

so as to be able to put the plaintiff in possession if he recover. Co.

Lit. 158. b.

2 Sand.

254-5.

In an action of waste, in which it was agreed that a view should have been awarded, and that six, at (b) least, of the jurors should have viewed the place, it was resolved, that if a view be awarded, though not returned by the officer, and the trial go on, and a verdict had, that the omission of the officer in not returning the view is not error ; for it was the duty of the court to examine whether the jury had a view or not ; and if they found they had not, the trial ought to have been stayed.

So, in an assise, in which it was likewise agreed, that a view

was requisite in the same manner, if the officer does not return the view, it is not error ; for the words of the writ are, *Et interim videant*, and not *Et interim haberi fac. visum* ; so that the jurors might have had the view when the officer was not present ; and if it were otherwise, the party might have challenged the jury for this cause ; and though the officer had returned, that the jurors had had the view, yet if upon examination in court it appeared otherwise, the parties could not be concluded by such return.

Palm. 363.

If the court make a rule, that the jury shall have a view, and that they shall not hear any evidence thereupon, and they notwithstanding hear evidence ; this is a good cause of challenge, and likewise a misdemeanour, for which it is said, they may be punished by the court.

Godb. 209.

Sir John

Gage v.

Smith ;

Et vide

Lutw. 1558.

Leon. 259.

In an action of waste it was agreed ; 1. That if six of the jury are examined on a *voir dire*, if they have seen the place wasted, that it is sufficient, and the rest of the jury need not be examined upon a *voir dire*, but only to the principal. 2. It was agreed, if the jury be sworn that they know the place, it is sufficient, although they be not sworn that they saw it ; and although that the place wasted be shewed to the jury by the plaintiff's servants, yet if it be by command of the sheriff, it is as sufficient as if the same had been shewn them by the sheriff himself.

Salk 665.

At the trial of a cause for want of a full jury upon the principal panel, some *talesmen* were sworn, and had the view, but the *disfringas* was returnable as an original *disfringas*, and so many of the original panel left out who were not at the view ; of which the defendant complained, and would have set aside the trial for irregularity ; but because no *venire* appeared to the court, and the matter stood upon record as an original trial, and the want of a *venire* was helped by verdict, and because the cause was tried by those that were sitteft,

viz. those who had the view, the court would do nothing in it.

But it was ordered, that for the future, when in order to a view the last juror is (a) withdrawn, the plaintiff shall take out a new *disfringas*, *amote* the last man of the panel, to distrain the other twenty-three, with an *apponas etiam decem tales*.

2 Salk. 665. pl. 2.
(a) At the assizes, if a view is demanded, it

must be after the jury is sworn, and then by consent a juror may be withdrawn. 6 Mod. 211.—and Holt, C. J. it may be without consent; and notwithstanding such view, a juror may be challenged when he comes to be sworn. 6 Mod. 211.

It is said, that before the court makes a rule for a view, the *venire facias* must be (b) returned; and then the court may make a rule, that so many of the panel shall view the premises.

2 Salk. 665. pl. 3. per Holt, C. J.
(b) That a

jury is never ordered to view before their appearance, unless in an assize. Mod. 41.

A view is grantable in such cases where the title is in question; and in such cases it may be granted on motion, on a bare suggestion, without any affidavit.

2 Salk. 165. pl. 1.

And to this purpose it is enacted by 4 & 5 Anne, cap. 16.
“ That in any actions brought in any of her Majesty’s courts of record in *Westminster*, where it shall appear to the courts in which such actions are depending, that it will be proper and necessary that the jurors who are to try the issues in any such actions should have the view of the messuages, lands, or place in question, in order to their better understanding the evidence that will be given on the trial of such issues, in every such case, the respective courts in which such actions shall be depending may order special writs of *disfringas* or *habeas corpora* to issue, by which the sheriff, or such other officer, to whom the said writs shall be directed, shall be commanded to have six out of the first twelve of the jurors named in such writs, or some greater number of them, at the place in question some convenient time before the trial, who then and there shall have the matters in question shewn to them by two persons in the said writs named, to be appointed by the court, and the said sheriff, or other officer who is to execute the said writs, shall, by a special return on the same, certify that the view hath been had according to the command of the said writs.”

[Upon this statute, it had become the practice to grant a view of course, upon the motion of either party: and a notion having prevailed, that six of the first twelve upon the panel, must attend upon the view, and that if they did not appear at the trial, the cause must be put off, the court of King’s

Bench thought it their duty to interfere, and to take care that their ordering a view should not obstruct the course of justice, and prevent the cause from being tried; and they thought it better that a cause should be tried upon a view had by any six, or by fewer than six, or even without any view at all, than that the trial should be delayed for a great length of time. Accordingly they resolved not to order a view any more, without a full examination into the propriety and necessity of it, unless the party applying would come into such terms, as might prevent an unfair use from being made of it. Agreeably to this resolution, they required a consent, which has ever since been made a part of the rule, that in case no view be had, or if a view be had of any of the jurors, though not six of the first twelve, yet the trial shall proceed, and no objection be made on either side, on account thereof, or for want of a proper return to the writ. 1 Burr. 252. Tidd’s Pr. 521.]

And by the 3 Geo. 2. cap. 25. a provision is made for a view, in the following words: “ That where a view shall be allowed in any cause, that in case such six of the jurors named in such panel, or more, who shall be mutually consented to by the parties or their agents on both sides, or, if they cannot agree,

“ shall

"shall be named by the proper officer of the respective courts of King's Bench, Common Pleas, or Exchequer, at *Westminster*, or the grand sessions in *Wales*, and the counties palatine, for the causes in their respective courts, or, if need be, by a judge of the respective courts where the cause is depending, or by the judge or judges before whom the cause shall be brought on to trial respectively, shall have the view, and shall be first sworn, or such of them as appear upon the jury to try the said cause, before any drawing as aforesaid; and so many only shall be drawn, to be added to the viewers who appear, as shall, after all defaulters and challenges allowed, make up the number of twelve to be sworn for the trial of such cause."

(I) What Irregularities and Defects in convening, or in the Qualifications of the Jurors, are amendable, and aided after Verdict.

Vide tit.
Amendment
and Jeofail.

HERE we may lay it down in general, that by the express words and intent of the several statutes of jeofail and amendments all irregularities as to the number, qualifications, and returns of the jurors are aided after verdict, so that the *venire* be of the same place, and in the same action, and between the same parties.

Where the want of a *venire*, *disfringas*, &c. is aided, but not a vitious one, and where a vitious one shall be taken as

So if there be no *venire facias*, or if there be such a fault in the *venire* as makes it a perfect nullity, so that it has no relation to the cause, yet if there be a good *disfringas*, that being one of the jury process, the omission of the former is cured; for the omission of any judicial writ is aided by the statutes, and a *venire*, that is a nullity, and has no relation to the cause, is as if there had not been any, and so of a *disfringas* where there is a proper *venire*.

none, *vide* Cro. Eliz. 483. Owen, 59. Moor, 465. Noy, 57. Moor, 684. pl. 535. 623. pl. 852. 696. pl. 967. Godb. 194. Leon. 329. Bull. 130. 3 Bull. 180. Brownl. 78. 97. Yelv. 69. Roll. Rep. 22. Jon. 304. Latch. 116. Yelv. 109.

2 Roll.

Abr. 201.

Moor, 599.

pl. 826.

S. P. (a) So,

where the

award upon the roll was in a cause against two defendants, but the *venire* against one, and amended. 3 Bull. 311.—*vide* Winch 73. Cro. Jac. 78.—But if by the roll the *venire* is awarded *de vicineto* of the right place, but the *venire* itself is of a wrong, and thereupon a jury is returned, and tries the cause, it shall not be amended; for it appears, that the trial was not had by such a jury as the roll and law require. Hob. 76. *vide* Lit. Rep. 253.—So, if there be no place on the roll to warrant the *venire*. Latch 194.—Also, in criminal cases, to which the statutes of amendment do not extend, the *venire*'s omitting any of the parties is error. 2 Hawk. P. C. c. 27. § 98.

Cro. Eliz.

467.

Noy, 57.

Owen, 59.

So, if the writ of *venire facias* out of the King's Bench be *venire facias 12 liberos & legales homines coram nobis apud Westmonasterium ubicunque fuerimus in Anglia*; but the roll is well, (the words *apud Westmonasterium* being omitted therein,) this being in
B. R.

B. R. the writ shall be amended by the roll; for this is but matter of form.

If the return of the *venire* be mistaken, this may be amended by the roll, and if the *teste* of the *venire* be out of term, or before plea pleaded, it is no error; for the *teste* of judicial writs being only matter of form, if mistaken, shall not vitiate, since they have the proper judges of the fact by such process.

Therefore if a *venire facias* be dated 7 July, and made returnable 6 July, a day before the date of the writ, this after verdict is amendable because a judicial process, and the default of the clerk.

So, if a *venire facias* be awarded upon the roll, to be returned *Octabis Trinitatis*, and the writ is made returnable six days after, *scilicet*, a day out of term, but the *distringas* is well without any fault, and after the jury impanelled find for the plaintiff, this writ of *venire facias* shall be amended by the roll; for this was the default of the clerk only; for the roll is the warrant of the writ.

The award of the *venire* must be to a day in the same term, or to the next term, but it must be in term, otherwise it is erroneous; because this is not such (a) a discontinuance as is aided by the statute, since it is an error in the court by awarding the process, which makes it utterly uncertain when or where the parties should appear to receive judgment, and it is an act of the court, which is erroneous, and not a mis-entry of the clerk, which the statutes do not intend to aid.

ance, and that being in a criminal case, not amendable. *Bull.* 141, 142. *Yelv.* 204. 6 *Mod.* 281. *Salk.* 51. pl. 14. *Ld. Raym* 1061. 2 *Salk.* 669. pl. 1. 6 *Mod.* 268.

If the place be totally (b) misawarded, this is not helped by any statute, because they have not the proper *judices facti*, unless they have them from the place where the fact arises; but if it is only misawarded in part, this is helped by the express words of (c) 21 *Jac.* 1. *cap.* 13. because it is supposed that the persons that were near any part of the place might know the fact in issue between the parties; and by the statute of (d) 16 & 17 *Car.* 2. *cap.* 8. the want of a right *venue* is aided, so as the trial was by a jury of the proper county or place where the action is laid.

Jac. 1., *vide* *Cro. Eliz.* 468. *Confl.* 38. 47. *Winch.* 69. 4 *Leon.* 84. *Cro. Jac.* 647. *Moor.* 91. pl. 212. *Lit. Rep.* 365. *Keliw.* 212. 5 *Co.* 36. (c) For this *vide* *Cro. Car.* 17. 162. 284. 480. *Jon.* 395. *Styl.* 201. 206. *Raym.* 67.—That this statute aids not unless the *venue* arises from several places, and one of those places is truly named. *Sid.* 20.—But if it arise from several places, though in several counties, and it is tried by one only, it is helped. 2 *Lev.* 122. *per* Haic.—By the opinion of the greater part of the judges, where by particular custom a trial was to be *de vicineto* of the four wards next adjoining, and the *venire* is awarded *de vicineto* of two of them only, it is helped by the statute. 2 *Sand.* 248. But *Sawders* *dubitavit*, whether it should extend to aid any proceedings except such as were according to the course of the common law. (d) That this statute does not extend to any trial in an improper county. *Mod.* 37. 199. 2 *Mod.* 24. But for the exposition of this statute as to this point, *vide* *Lev.* 207. *Sid.* 326. 2 *Lev.* 122. 164. *Sand.* 247. *Raym.* 181. 392. *Vent.* 263. 272. 2 *Keb.* 496. 2 *Jon.* 82.

If there be a blank left for the county to the sheriff whereof the writ should be awarded, yet it will be amended, because it cannot be awarded to the sheriff of any other county, and therefore it is the omission of the officer in entering the award of the court;

Yelv. 64.
Moor. 699.
Cro. Car. 9.

Cro. Eliz.
203. 467.
Cro. Car. 38.
Moor. 465.
pl. 657.

Cro. Car. 38.
Lit. Rep. 54.
Cro. Jac. 64.
Cro. Eliz.
760. *Moor.*
696. pl.
967. 711.
pl. 998.

Moor. 465.
pl. 657.
(a) *Venire*
returnable
on the 23d
of January,
and *distringas*
tested on
the 24th,
held a dis-
continu-
Cro. Jac. 283.

(b) Where
mis trials
by the *ve-*
nue not be-
ing awarded
of a right
place, were
not aided by
any of the
statutes of
amendment
before 21

Yelv. 169.

Cro. Eliz.
261. 468.

court; but if there were a local plea into another county, so that there are two counties mentioned in the pleadings, there the blank cannot be amended, because there is originally no award of the court to whom the process shall go; but where the plea carries the matter into another county, there the *venire* must be from the last place, because the declaration by such plea stands confessed.

Roll. Abr.
205. Child
and Sloper.
Cro. Car.
595. S. C.
Yelv. 64.
S. P. cited.

After issue joined, if upon the roll a *venire facias* be awarded to the sheriff of the county of *Somerset*, &c. and upon this a *venire facias* be made in this manner, *Georgius Dei gratia Somerset salutem*, &c. leaving out the word (*vicecomiti*); and upon this the sheriff of *Somerset* returns a jury, and thereupon a verdict, &c. this shall be amended by the roll, because this was the fault of the clerk merely, having the roll before him when he made the writ, by which he was directed to direct the writ to the sheriff of *Somerset*.

(a) But
where be-
fore the
statute of
21 Jac. 1.
c. 13., the
award of a
venire to a
wrong officer,
and his return thereupon, was error, *vide Brownl.* 134. Cro. Eliz. 574. 586. Moor, 356. pl. 482. Yelv. 15. 5 Co. 36. b.

If the court on an insufficient suggestion awards the process to an improper officer, yet this is aided after verdict; for that only makes an insufficiency in the return of the jury, and insufficient returns are aided; for it was the design of the (a) statute, that if the cause was tried by a right jury, it should not be material what officer got them together.

Cro. Eliz.
181. 536.
674.

But if on a suggestion of the roll, process be awarded to the coroner, and the sheriff return either the panel or the *tales*, it is said to be erroneous, because not collected by the proper officer, and therefore they are not the *judices facti* of that cause, and it appears on the record that the return is otherwise than the court hath directed.

Salk. 265.
Pl. 9.
Andrews v.
Lynton,
2 Ld. Raym.
884.

But the latest resolution is, that the returns of ministerial officers are to be challenged at the day of the return; for if the court then admits them to be their officers, and the parties do not except against them, they are concluded, since the proper *judices facti* are admitted by them to be returned.

Cro. Jac.
483.
Hob. 70.
Lamb and
Wileman, adjudged.

If a *venire* is awarded to the coroners, and returned by two of them only, whereas at the time of the award and return thereof there were two more, this is only a misreturn, and aided.

Hob. 70.
(b) In an
action, if
the *venire
facias* be
vicecomiti

But it is said, that if one sheriff of (b) *London* makes a return without the other, this is not helped, being no return at all; for they make but one officer, and the court knows that one sheriff there is two persons.

London, salutem, &c. *præcipimus tibi quod*, &c., where it should be *præcipimus vobis*, after verdict this shall be amended; for it is the default of the clerk. Owen 62. Cro. Eliz. 443. Roll. Abr. 200.

Hob. 13.
Roll. Abr.
204. Cro.
Eliz. 310.

If upon the return of the *habeas corpora* the surname of the sheriff be omitted, as where his name is *Bartholomæus Michel*, and it is returned *Bartholomæus, Miles*, sheriff, this shall be amended.

It

It was holden, that if before the statute of 21 Jac. 1. cap. 13. the sheriff did not return the writ of *venire*, or set his name on the back thereof, or omitted inserting *quod executio ipsius brevis patet in quodam pannello huic brevi annexo*, but it was *album breve*, it could not be amended upon examination of the sheriff, being the (a) principal process; but this is now helped by the statute, so that a panel of the jurors be returned and annexed to the writ.

21 Jac. 1. c. 13. it was holden, that the *venire*, being well returned, though the issue be tried on the *habeas corpora* or *disfringas*, which are not returned, or irregularly returned, in manner aforesaid, the *venire* being the principal process, and right, the others should be amended. Moor 868. pl. 1203. Hob. 130. Yelv. 110. Cro. Jac. 133. 443. Cro. Eliz. 466. 704. 2 Roll-Rep. 111. 210.

If the sheriff that returns his *venire* be discharged before the *teste* of the *venire*, it is error, and shall be tried by the record of his discharge; because, if the legal officer did not return the writ, the proper *judices facti* did not try the cause, and so the verdict is ill.

But if he be sheriff at the time of the award of the *venire*, and after his discharge he return the panel to the *venire*, this is no (b) principal cause of challenge; for the sheriff having returned the *nomina jurat.* to the court above on the *venire*, on which they have awarded a *disfringas* with a *nisi prius*, the sufficiency of that return is not to be controverted before the judge of *nisi prius*, but above, since the judges of *nisi prius* are bound down by a record of a superior court, on whose records it appears he is sheriff.

strong evidence of a partial array, since a person who had nothing to do with the return has inter-meddled therewith; and accordingly the array in this case was challenged for favour, and quashed.

The jury must come in the same action, and between the same parties, otherwise they are not judges in that cause; therefore in ejectment, where the *venire* was *de placito transgressionis*, omitting *& ejection. firmæ*, the court held the *venire* to be ill, because it was not in the same action; for an action of trespass and ejectment are different, and there might be an action of trespass between the same parties; but if the *disfringas* had been right, they would have adjudged this *venire* to be null, and the want of a *venire* is aided by the statute.

If in an action of trespass issue is joined between the plaintiff and two defendants, and one dies, and the *venire* is awarded between the plaintiff and both defendants, after such defendant's death, and verdict is taken for the plaintiff, and the death suggested on the roll, and judgment against the survivor, the *venire* being only a judicial process, and pursuing the award on the roll, it plainly appears to be the same cause, and that the trial was had by proper judges; and judgment being given against the defendant, who is charged with the whole action, it is good.

If the *jurata* mentions the issue to be *de placito transgressionis*, where the action is debt, and the award of the *venire* and *disfringas* debt, this shall be amended; for the *jurata* is an award of the *disfringas*, in pursuance of the award of the *venire*, and the *venire* being right, the (c) secondary process ought to be made accordingly;

3 Bulf. 220.
Cro. Jac.
528.
Noy, 115.
5 Co. 41.
Cro. Eliz.
587.
Brownl. 43.
(a) But
even before
the statute

Cro. Car.
421.

Cro. Eliz.
369. Hore
and Broom.
(b) But this
may be chal-
lenged for
favour, and
the illegality
of the officer
will be ad-
mitted as

Cro. Car. 32.
Hutt. 81.
Jon. 302.
Godb. 194.
Cro. Jac.
528.
Cro. Elis.
259.

Cro. Car.
426. Jon.
367. Piffin
v. Fenton.

Cro. Car.
275.
(c) That
the award
on the roll
being right,
shall amend

the *venire*, and the *venire* being right shall amend the *disfringas*, which is the proper process for convening the jurors in the King's Bench; so of the *habeas corpora*, which is the Common Pleas process. Lit. Rep. 252, 253.—Also, if a *disfringas* is awarded where it should be a *habeas corpora*, this is aided. Savil, 37.

Cro. Car. 275. Rull. Abr. 202. So, if the sheriff return *nomina jurat. inter partes predict. de placito transgressionis*, where the *venire* is *de placito debit.*, this shall be amended; for in *dors* *brevis* he says, *executio istius brevis patet, &c.*, which could not be, if it was not in the same action.

3 Mod. 78. Jackson and Warren. If the day when, and place where, the assize was to be holden, is not mentioned in the *disfringas*, it shall be amended by the roll; for if there had been no *disfringas*, the trial had been good, because the *jurata* is the warrant to try the cause, and that was right.

Salk. 48. pl. 5. In ejectment against seven defendants, who entered into the common rule, and pleaded to issue, the plea roll, *venire disfringas*, and *jurata* were right, but the issue on *nisi prius* roll was between the plaintiff and five defendants only; after verdict for the plaintiff this was amended; for the lessor's title was the gift of the action, and the only thing inquirable of by the jury.

(a) If a *venire facias* be & *habeas ibi hoc breve*, without these words, If the (a) number or (b) qualifications of the jury, as has been said, be omitted, it may be amended; for it is but form to award the particular number and qualifications in each roll, which is directed by the law in all cases.

nomina juratorum, this will be aided after verdict, being a judicial writ; though objected, that these words were of necessity and without which the court could not know who are the jurors, nor whom to demand to be sworn. 3 Bulf. 208. Roll. Abr. 200. 204. Cro. Eliz. 467. Moor 465. 657. Noy 57. 2 Brownl 167. — So, if the word *duodecim* be left out of the *venire facias*, this shall be amended after verdict. Roll. Abr. 204. (b) If a *venire facias* be *quorum quilibet quatuor libras terræ*, omitting the word *habeat*, this shall be amended after verdict. Roll. Abr. 204. — So, if the words *quorum quilibet* are omitted out of the *venire facias*, it shall be amended after verdict. Roll. Abr. 204. — So, if the words *qui nullâ affinitate attingunt* are left out of the *venire facias*, it shall be amended. Roll. Abr. 204.

(c) For the diversity, where the christian and where the surname is mistaken, vide Cro. Eliz. 57. The *nomina juratorum* on the *venire* are the proper parties to try the action; and if there be a mistake in the (c) christian name, it is incurable; for the statute does not extend to it, but it extends to cure surnames and additions; for there can be but one name of baptism, but there may be various surnames and additions; and therefore if it can be proved what person the sheriff meant by his surname or addition, it may be amended and set right. 222. Cro. Car. 203. Cro. Jac. 116.

Roll. Abr. 196, 197. 3 Bulf. 18. Hob. 64. Brownl. 174. Also, if the names of either christian or surname be wrong in the body of the *disfringas*, or in the panel returned, or in the panel of the jury sworn, yet if it can be proved to be the same man that was intended to be returned in the *venire*, having there his right christian name, he is the proper *judex facti*, and it may be amended by the statute.

Roll. Abr. 196. & vide Dan. 320-1. Several cases to this purpose. As if *Tippet* be returned in the *venire facias*, and in the *habeas corpora* and *disfringas juratores* he is named *Typper*, yet if his true name be *Tippet* according to the *venire facias*, and *Tippet* is sworn, and tries the issue, it shall be amended.

If the sheriff returns but twenty-three on the *venire*, and twenty-four on the *habeas corpora*, and the twenty-fourth omitted on the *venire* appears, and is sworn, the verdict is ill, because he is not returned according to the award of the court, in pursuance of the *venire*, and therefore has no authority to try the cause; for the award to distrain one not summoned is void, and he is not returned of the *tales de circumstantibus*, so that he is not a proper juror by the writ nor statute.

Jon. 302.
Fines and
North. Cro.
Jac. 278.
S. C. ad-
judged.

So, if twenty-five are returned, and the twenty-fifth is sworn, and tries the cause, it is not helped.

Cro. Jac.
647.

But if the twenty-fourth man had not been of the twelve that tried the issue, it would be aided by the statute; or if the trial had been by eleven of the twenty-three, and one of the *tales de circumstantibus*, it had been good. Cro. Eliz. 104. Brownl. 274. Jon. 357. Sid. 66.

Cro. Car.
223. 278.
5 Co. 36. b.
37. a.
Latch. 57.

[It is no objection that the jury were not summoned on the *venire*, or attached on the *disfringas*, for there can be but one general return since the balloting act, 3 Geo. 2. c. 25.: and besides, the want of a return is cured by the appearance of, and trial by a proper jury.]

Phillips v.
Phillips,
Andr. 248.

(K) What Irregularities or Defects in convening, or in the Qualifications of the Jurors, are aided by Consent.

HERE we may lay it down as a general rule, that all defects in convening, or in the qualifications of the jurors, are aided by consent of the parties; for the rule herein is, that *omnis consensus tollit errorem*.

Co. Lit.
125. b.
Dyer, 367.
b. pl. 40.

Therefore if a *venire facias* be awarded to the coroners, where it ought to be to the sheriff, or the *visne* come out of a wrong place, if it be *per assensum partium*, and so entered of record, it will stand good.

5 Co. 36. b.
Co. Lit.
125. b.
2 Roll.
Rep. 21. Godb. 428. Noy, 107.

One of the jury, after he had been sworn, and after he had heard part of the evidence, fell sick, and another being sworn in his place by consent of plaintiff and defendant, it was holden a good verdict.

Palm. 411.

(L) When and by whom to be paid.

JURORS in all civil causes are to be paid for their trouble, and attendance, and the (a) *quantum* is to be proportioned according to the distance of place, badness of the weather, &c., but if they take any money, or other reward, for giving a verdict, they are not only punishable at common law by fine and imprisonment, but to a *decies tantum* given by the statute of 38 E. 3. cap. 12. i. e. a forfeiture of ten times as much as he hath taken.

Carth. 242.
(a) That in
strictness on
a trial at nisi
prius in the
same coun-
ty, they are
only entitled
to 8 d., and
to 5 l. on a

trial at bar, where they come out of a foreign county. Trials per Pais, 62. 216.

But if some of the jurors appear, and the trial goes off *pro defectu juratorum*, those who appeared are not to be paid; for no body has

2 Lil. Re-
gist. 157.

has received any benefit from their attendance, and consequently not obliged to make them any recompence.

2 Show.

248. pl. 252.

But where a cause was appointed for trial at the bar of *B. R.*, by a jury of *Wills*, and a *venire* returned, and the jury summoned, but before the day the parties agreed, and the summons not being countermanded, several of the jury appeared; it was ordered on motion, that the attornies on both sides should pay them.

2 Leon.

174-5, for what coits

shall be paid upon praying a special jury, see 24. Geo. 2. c. 18. ; and for what fees allowed to jury-men, see § 2. of the same statute.

So, if the jury find a special verdict, the charges of the jury shall be equally borne by both parties.

(M) For what Misdemeanours punishable: And herein,

1. Where punishable by Attaint.

Glan. lib 8. c. 9.

2 Inst. 130.

Co. Lit. 394.

THE jury when impanelled judged under the penalty of an attaint by the old law, which was the only curb they had over juries; but this method, from the difficulty of attainting the jury, and severity of the punishment, has been seldom used of late; and the practice of granting new trials, where the jury find against evidence and the direction of the court, introduced in the room thereof; but since the attaint is only disused, and not taken away, we shall here set down the most considerable matters relating thereto.

Roll.

Abr. 285.

Bro. Attaint, 87.

Dyer, 55.

pl. 14.

Dyer, 369.

Goldb. 271.

Hob. 227.

(a) But then

the plaintiff,

in attaint,

may have

an answer

thereto, and

disprove it

as well as he

can; but he

cannot give other evidence,

nor enforce the first evidence with mere matter than was given and disclosed before.

Dyer, 212. pl. 34.

But herein, first, we must observe, that the judgment in attaint being so severe, all manner of evidence was admitted in support of the verdict; but against the verdict they admitted none that was not given at the former trial; because the jury might give in their verdict, not only on the evidence given in court, but on their own knowledge; and therefore (a) whatever otherwise they came to the knowledge of, they might give in evidence for the support of their verdict; but the evidence not offered on the trial can never be brought against them, because such evidence might have altered their judgment, had it been given; and the want of that light, which the party neglected to offer, cannot convict them of a falsity, which, if it had been offered, might have founded a different verdict.

Roll. Abr.

281, 282.

(b) Where

the evidence

of a witness

is false in an

immaterial

part, the

jury need not

give him credit

in any other part.

Cro. Eliz. 310.

(c) If a jury

give a verdict

on their

own knowledge,

they ought to tell the court so; but they may be sworn as witnesses; and the fair way is to tell the court, before they are sworn, that they have evidence to give.

The jury may be attainted two ways; 1st, Where they find contrary to evidence. 2^{dly}, When they find out of the compass of the *allegata*: but to attaint them for finding contrary to evidence is not so easy, because they may have evidence of their own conu- zance of the matter before them, or they may find on (b) distrust of the witnesses, on their (c) own proper knowledge.

(c) If a jury give a verdict on their own knowledge, they ought to tell the court so; but they may be sworn as witnesses; and the fair way is to tell the court, before they are sworn, that they have evidence to give. Salk. 405. pl. 3.

But

But if they find upon evidence that does not prove the *allegata*, there it is easy to subject them to an attain, because it is manifest that what is so found is on evidence not corresponding to their issue; and hence it is necessary that the matters in issue should be set forth with all convenient certainty, that it may be seen how far and when the jury are mistaken; as in trespasss, the quantity and value of the thing demanded must be so conveniently described, that if the jury find damages beyond such quantity and value, it may be apparently excessive, and they subject to the attain; and so on special contracts, they must be set forth so precisely, that if evidence be given of another contract, and not that in the allegations, and yet the jury find for the plaintiff, they may be subject to an attain.

An attain does not lie in a criminal case, as it does in a civil; and the reason of the difference, according to *Hawkins*, is, that in the last case a man's property only is brought into question a second time, and not his liberty or life; also, says he, it may be generally presumed that a jury is likely to be equally influenced with the fear of an attain from either of the contending parties; whereas if any such examination of their proceedings were allowed in criminal causes, they might be often in great danger of one side, by incurring the resentment of a powerful prosecutor, and provoking him to call their conduct in question, for their supposed partiality; but they could have little to fear from an injured criminal, who would seldom be in circumstances to make his prosecution formidable.

guilt is affirmed by two inquests, the grand inquest that present the offence on their oaths, and the petit jury that agrees with them; yet where the petit jury acquits, they stand as a single verdict; for they disaffirm what the grand inquest of twelve men have upon their oaths presented.

Where the king is sole party against the subject, and the jury find for the king, no attain lies; but it is otherwise where the suit is *tam pro domino rege quam pro seipso*.

No attain lies upon an inquest of office; therefore if a recovery be in a *quare impedit* by default, and a writ issue to the sheriff to (a) inquire of the damages and plenarty, no attain lies upon this inquest; for it is but an inquest of office.

several year-books there cited. 10 Co. 119. S. P. (a) Therefore, where the matter omitted to be inquired by the principal jury is such as goes to the very point of the issue, and upon which, if it be found by the jury, an attain will lie against them by the party, if they have given a false verdict, there, such matter cannot be supplied by a writ of inquiry, because thereby the plaintiff may lose his action of attain, which will not lie upon an inquest of office. Carth. 362. Ld. Raym. 59. 5 Mod. 76, 77. 118. Salk. 203. pl. 3. Skin. 595. pl. 8. 12 Mod. 85.

But if the inquiry be by the same inquest that inquired of the issue in the *quare impedit*, an attain lies.

So in an assise, if they are at issue upon the plea in bar and that is found for the plaintiff, and it is inquired over of the seisin and disseisin, if the disseisin be found by a false verdict, an attain lies thereupon.

In

Roll. Abr. 282.

Vaugh. 146.
1 Hawk.
P. C. c. 27.
§ 5.
But by Hal.
Hist. P. C.
310., the
king may
have an at-
tain; for
although a
man con-
victed upon
an indict-
ment can
have no at-
tain, be-
cause the

4 Leon. 46.
But for this
vide Cro.
Eliz. 309. 2 Jon. 14.

Co. Lit.
355. b.
Vaugh. 153.
11 Co. 6. a.
Roll. Abr.
280. and

Roll. Abr.
280.
10 Co. 119.
Fitz. At-
tain, 15.
Roll. Abr.
28.
10 Co. 119.

Roll. Abr. 280. In an action against tenant in tail, if he makes default, and he in the reversion prays to be received, supposing him to be tenant for life, which is counterpleaded, upon which they are at issue, and it is found against him in reversion, and the same inquest taxes the damages against the lessee, no attain lies upon this verdict, because the judgment against the lessee is given upon the default; and so this is but an inquest of office for the damages.

Co. Lit. 355. a. Roll. Abr. 280. An attain lies upon a verdict before the sheriff in a writ of inquiry of waste, because by the statute the sheriff is made judge in this case.

2 Roll. Abr. 280. No attain lies upon a verdict given by twenty-four jurors, nor does it lie upon a verdict given in an attain for the thing of which the jury is attainted; but if they find any collateral matter *præter* the attain, it lies thereupon, and they shall be attainted.

32 H. 6. 6. In a writ of (a) right, if the grand assise be taken upon the mere right, no attain lies thereupon; but if the issue be taken upon a collateral matter, and not upon the mere right, an attain lies thereof.
(a) Whether an attain lay in a plea real, because he might have falsified in an action of an higher nature, *vide* 2 Inst. 257.

Roll. Abr. 280. 2 Inst. 662. Co. Lit. 6. b. S. P. because witnesses cannot testify a negative, but an affirmative. (b) An attain does not lie for not finding a divorce, because that does not lie in their consance, being a record. Roll Abr. 281.—If the jury find a special matter which is not part of their charge, nor pertinent to the issue, no attain lies for this. 11 Co. 13.—Where it lies for finding falsely a matter of form only, the principal matter being true. Keilw. 67.

43 Ass. 41. Bro. Attaint, 82. Cro. Eliz. 309. S. P. *per Cur.* In an assise, if the jury find a special verdict, and refer it to the court whether upon the matter the tenant be a disseisor, and upon the matter the court adjudge him to be a disseisor, though in law he be no disseisor; yet no attain lies against the jury, (c) because it is not their fault, but the fault of the court.
(c) But following the direction of the court will not bar an attain; for if the judge declares the law to the jury erroneously, and they find accordingly, though this may excuse them from the forfeitures, yet however upon the attain the judgment is to be reversed, and a man shall not lose his right by the judge's mistake of the law. Vaugh. 145.

Roll. Abr. 282. An attain lies before execution sued, for the danger of the death of the petit jury in the mean time; for after the death of any of the petit jury, no attain lies.

9 H. 6. 2. Roll. Abr. 284. * *Qu.* An attain lies for excessive damages, as also where the jury give too little; but if they give excessive damages, and the court abridge them *, and make them reasonable, no attain lies against the jury, though they have made a false oath; for such abridgment is made upon the prayer of the party, and therefore he shall not have an attain also.

So, if the court increases * the damages, and makes them reasonable, whereas before they were too small, no attaint lies.

Roll. Abr.
284. * *Qu.*
ut supra;

unless in case of *mayhem*, on view, where consequences have ensued after the verdict, unforeseen, or not provided for, in point of damages at the trial.

So, if the jury give excessive damages, and after the plaintiff, to whom they are given, release part of the damages, by which the rest of the damages which remain are reasonable enough, no attaint lies; for hereby the defendant's cause of grievance is taken away.

Roll. Abr.
284.

In an attaint, if the plaintiff assigns the false oath in excessive damages, he ought to assign it in this manner, *scilicet*, that the goods for which the damages were given were but of the value of 40s. and that in the damages given over this sum they made a false oath.

12 E. 4. 5.
Bro. Attaint.

If in trespass against two one pleads not guilty, and this is found against him, and excessive damages given, and after the other defendant comes and pleads not guilty, and this is found against him also, he may have an attaint upon the first verdict, because bound by the damages given thereby; and though he is a stranger to the issue, yet he is privy in charge.

11 Co. 5. b.
Sir John Heydon's case. Hob.
66. Cro.
Jac. 351.
10 Co. 119.
Roll. Rep. 31. S. P.

In a *quare impedit* against two, they make several titles; and it is found for one defendant, and that the other disturbed him; the other may have an attaint upon this, for by this he loses the presentation.

Roll. Abr.
282.

He who is party to the recovery shall have an attaint, although he was not tenant at the time of the first writ brought, nor when the judgment was given.

Roll. Abr.
282.—The reversioner (by the

common law) after the death of tenant for life. Dyer, 1. pl. 5. 3 Co. 4.—And during the life of the particular tenant, *per* 9 Rich. 2. c. 3.

If an action of joint-tenancy be pleaded with a stranger, and the stranger join with the tenant in the maintenance thereof, and this be found against them, yet the stranger shall not have an attaint, because he is not party to the writ.

48 E. 3. 17.
Godb. 378.

So, in an action against *A.* and *B.* if it be found against them upon several issues, *A.* shall not have an attaint upon a false verdict against *B.* because he is not party to the issue.

11 H. 4. 27.
1 Roll.
Abr. 283.

So, in trespass against two, if one plead a release, upon which they are at issue, and the other plead the same plea as servant to him, if it be found against the master, the servant shall not have an attaint thereupon, for he is not party to the issue.

11 H. 4. 30.
1 Roll.
Abr. 283.

So, in waste against two, if one make default, and the other plead, and it be found against him, the other who made default shall not have an attaint thereupon, because he is not party to the issue.

Roll. Abr.
283.

If a villein be found free in a *homine replegiando* against the lord, and after the lord die, the heir shall have an attaint; so if the villein were found free by a false verdict, in an action of trespass brought by him against the lord, and after the lord die, the heir shall have an attaint, because hereby he loses his inheritance in the villein; but he cannot have an attaint for the damages; but the executors may, because they belong to them.

Roll. Abr.
283.

11 H. 6. 6.
Fitz. At-
taint, 61.
65. Keilw.
130., same
rule argu-
endo.

The petit jury can plead no plea but such as may excuse them of the false oath; and by the 23 H. 8. cap. 3. it is enacted, that after the plaintiff hath assigned the false oath, the petit jury, if they be the same persons, and the writ, process, return, and assignment good, shall have no answer, but only that they made a true oath; unless the plaintiff, in an attain upon the same verdict, hath before nonsuit discontinued, or had judgment against the petit jury.

Vide 6 Co.
44. a. S. P.
where it is
said to be
a good plea, yet

In an attain upon a verdict in trespass, one of the petit jury pleaded an award between the plaintiff and defendant, and whether this was a good plea *dubatur*. Keilw. 130.

Roll. Abr.
286.
Co. Lit.
20. a. S. P.
(a) And
therefore
no conu-
sance can be

In an attain brought by the issue in tail, upon a verdict in a *formedon* against his ancestor, the release of the ancestor is not any bar, for the attain is entailed as well as the land itself.

By the 23 H. 8. cap. 3. all attainments must be taken (a) in the King's Bench or Common Pleas, and not elsewhere; but a *nisi prius* may be granted.

granted upon an attain, because all attainments are to be taken either before the king in his bench, or before the justices of the Common Pleas, and in no other courts, &c. Co. Lit. 294. b.—Where a verdict and judgment given in the Exchequer was removed by *certiorari* into the Common Pleas, and an attain. Vide Dyer, 201. pl. 65. Moor, 17. pl. 60. N. Bendl. pl. 132. Keilw. 210. & vide Dyer, 81. pl. 65. Cro. Eliz. 645., in which book, because the record was not removed in *Banco*, it was adjudged against the plaintiff, and the court would not grant him a day to bring in the record, and said, the plaintiff, at his peril, ought to have brought it in before; & vide Cro. Eliz. 371, 372.—How to be removed, vide Roll. Abr. 394.—But if an attain be brought on a judgment in *Banco*, and the plaintiff assign the false oath, and the defendant plead *bonum & legale fecerunt sacramentum*, and thereupon they are at issue, and after the first record is removed by a writ of error, yet the process against the grand jury and the party shall not be stayed, but the court may proceed. Dyer, 284. pl. 35.

Of the Judgment in attain.

Co. Lit. 294.
Roll. Abr.
286.
(b) And was
so severe,
that few or
no juries
upon just
cause were
convicted.
3 Inst. 163.

THE judgment at common law was very (b) severe; and according to my Lord Coke importeth eight great and grievous punishments; 1. *Quod amittant liberam legem imperpetuum*; that is, they shall be so infamous as never to be received as witnesses, or to be of any jury. 2. *Quod forisfaciant omnia bona & catalla sua*. 3. *Quod terra & tenementa in manus domini regis capiantur*. 4. *Quod uxores & liberi extra domus suas ejicerentur*. 5. *Quod domus sue prostrentur*. 6. *Quod arbores sue extirpentur*. 7. *Quod prata sua arentur*. 8. *Quod corpora sua carceri mancipentur*.

Vide Co. Lit.
294.
(c) And by
the equity
of the sta-
tute it lies
against the
executors of
the party for
whom judgment
was given. Moor,
17. pl. 60. N. Bendl.
132. Keilw.
201. a. And. 24.
Dyer, 201. l. 65.

But the severity of this punishment was mitigated by the statute 23 H. 8. cap. 3. which prescribes the methods of proceeding in attain, and inflicts certain pecuniary punishments on the jurors, in proportion to the damages sustained by the party by the false verdict, in which the (c) party recovering is to be joined.

Roll. Abr.
286.
(d) If, dur-
ing the life
of the tenant
for life the reversioner
recovers in an attain,
the tenant shall be
restored to the possession
and

If a man recover in an attain, he shall be (d) restored to all that he hath lost by the verdict, as well his lands as the mesne profits; as also his damage, if he lost in a personal action.

of the tenant for life the reversioner recovers in an attain, the tenant shall be restored to the possession and

and mesne profits, and the reversioner to his arrearages of rent; but if the tenant be dead, or of covin with the demandant, the reversioner shall, &c. *per* 9 Rich. 2. c. 3.

So, if a man brings debt and is barred, and he brings an attaint, and it is found for him, he shall recover his debt. Roll. Abr. 285.

So, if the issue in tail recovers the land in an attaint upon a recovery against his ancestor, he shall recover the issues of the land from the death of the ancestor. 41 Aff. 18. Roll. Abr. 286.

2. How otherwise punishable.

And herein we must consider jurors either in a ministerial capacity, as persons bound to attend the court, to do the business for which they are returned till they are discharged; or in a judicial capacity, as judges of the fact to be tried.

In the former capacity they are liable to be punished in several instances; as for (a) refusing to appear, withdrawing themselves before they are sworn, or refusing to be sworn; for which every court of record may, of common right, impose such a reasonable fine on any one returned on a grand or petit jury, as shall seem convenient.

sons summoned on juries in courts of record, in cities, corporations, and franchises, and not attending, may be fined.

So, if after they are sworn they refuse to give any verdict at all. Noy, 49. 3 Bulf. 173. Vaugh. 152.

So, if they endeavour to impose upon the court; as where a petit jury offer a verdict to the court as agreed by their whole number, where in truth some of them have not agreed to it; or where they agree upon two verdicts; and first, to offer one of them to the court, and stand to it, if the court shall express no dissatisfaction to it; but if the court shall dislike it, then to give the other. Roll. Abr. 219. Cro. Eliz. 779. 2 Hawk. P. C. c. 22. § 17. 2 Hal. Hist. P. C. 309. S. P. and that in such case they shall be fined every one apart.

So, for misbehaving themselves after their departure from the bar; as where they do not all keep together till they have given their verdict, or where any of them carry any thing (b) eatable with them in their pockets, or eat or drink, or otherwise refresh themselves, without leave from the court, before they have given their verdict, though they were agreed on it, and were also all the time in the custody of the bailiff appointed to take care of them. Dyer, 78. pl. 41. 218. pl. 4. Cio. Jac. 21. Vaugh. 21. 2 Hawk. P. C. c. 22. § 18. (b) Which, if it be at

the charge of him for whom they give a verdict, avoids the verdict; otherwise, if they eat or drink at their own charge, or the charge of him against whom they give their verdict. 2 Hal. Hist. P. C. 306.

Also, where a jury, after they departed from the bar, being late on Saturday night, separated and went every one to his own house without giving a private verdict, or without consulting upon the evidence and gave a verdict according to the direction of the court; for this misdemeanour they were fined each forty shillings, and a new trial granted; and herein the chief justice said, that by such trial both parties may be prejudiced; for the jurors going at large, without consulting together, may well forget the evidence; and it is the right of the king's subjects to have their issues determined when

Pasch. 27 Car. 2. in B. R.

when the evidence is fresh in the memory of the jurors; and the suffering the jurors to go to their houses after a privy verdict is only by connivance, by the strict rules of law ought not to be suffered.

1 Lev. 140.

205.

2 Jon. 83.

3 Keb. 805.

[2 Salk.

645. 1 Str.

642.]

Also, where the jury have been divided, or in doubt about the evidence, and have agreed to determine the matter by throwing cross or pile, &c., and to give their verdict as the chance happened; this has been held such a misdemeanour, for which they have been ordered to attend, and for which they are punishable, and for which a new trial will be granted on the common rule of *juratores male se gesserunt*.

2 Hawk.

P. C. c. 22.

§ 19.

Jurors are likewise punishable for sending for or receiving instructions from either of the parties concerning the matter in question.

Cro. Eliz.

616.

2 Hal. Hist.

P. C. 306.

(a) But it is

no offence

in a juror to exhort his companions to join with him in such verdict as he thinks right. 1 Hawk.

P. C. c. 83. § 3.

So, if a jurymen have a piece of evidence in his pocket, and after the jury sworn and gone together he (a) shew it to them, this is a misdemeanour fineable in the jury; but it avoids not the verdict, though the case appear upon examination.

2 Hawk.

P. C. c. 22.

§ 20. and

several au-

thorities

where cited.

As to the punishment of jurors in their judicial capacity, there are several instances where jurors acquitting great and notorious offenders, contrary to clear and manifest evidence, and contrary to the judge's directions, have been punished in the star-chamber, and have also, not only in the King's Bench, but also by justices of oyer and terminer and gaol-delivery, been fined and imprisoned, and bound over to their good behaviour; but these methods were thought to be contrary to the opinions in the old books, and contrary to the general reason of the law; and being fully considered in (b) *Bushe's* case, it was there settled, and hath been ever since agreed to, that jurors are no way punishable, except by attain, for giving a verdict contrary to the judge's direction, and against what may seem to others clear and manifest evidence, for that they are the proper judges of the fact to be tried, and may be reasonably influenced by matters known only to themselves, as their own personal knowledge of the fact, or of the credit of the witnesses, or of the parties.

(b) Vaugh.

143.

2 Jon. 16,

17.

2 Hal. Hist.

P. C. 160.

161. 211.,

&c.

And herewith my Lord *Hale* seems to agree, and shews the unreasonableness of punishing a jury for going contrary to the direction of the court, in matters of law, because it is impossible any matter of law could come in question till the matter of fact were settled and stated and agreed by the jury, and of such matter of fact they were the only competent judges: also, says he, it were the most unhappy case that could be to the judge, if he, at his peril, must take upon him the guilt or innocence of the prisoner; and if the judge's opinion must rule the matter of fact, the trial by the jury would be useless.

2 Hal. Hist.

P. C. 313.

But he seems to admit, that the long use of fining jurors in the King's Bench in criminal causes, may give possibly a jurisdiction to fine in these cases, yet that it can by no means be extended to other

other courts of sessions, of gaol-delivery, *oyer and terminer*, or of the peace, or other inferior jurisdictions.

Also, by *Hawkins*, if it shall plainly appear in any case, that jurors are perfectly satisfied of the truth of a fact, whereupon they declare to the court, that they find it in such a particular manner; and the court directly tell them, that upon the fact so found, as they have agreed it to be, the judgment of the law is such or such, and therefore that they ought to give a verdict accordingly, yet they obstinately insist upon a verdict contrary to such a direction; it seems agreeable to the general reason of the law, that the jurors are finable by the court in such a case, unless an attaint lies against them; for otherwise they would not be punishable for so palpable a partiality in taking upon them to judge of matters of law, which they have nothing to do with, and are presumed to be ignorant of, contrary to the express direction of one, who by the law is appointed to direct them in such matters, and is to be presumed of ability to do it.

2 Hawk.
P. C. c. 22.
§ 21, for
which is
cited 2 Jon.
15, 16.
Vaugh.
144-5.
Palm. 363.
Et vide
Kel. 50.

Also, if a judge, for the better direction and information of a jury, shall ask them their opinions concerning such a particular fact, and they shall refuse to answer him, and obstinately insist to deliver in their verdict, as they think fit, contrary to his direction, it seems questionable whether they may not be fined in such a case also, unless an attaint lie against them; for that it is the duty of jurors to take the advice and information of the court, in order to be governed by it, as far as shall be consistent with their consciences.

2 Hawk.
P. C. c. 22.
§ 22.

3. How Abuses by others in relation to them are punishable; and therein of the Offence of Embracery.

Embracery is defined in general to be an attempt by either party, or a stranger, to corrupt or influence a jury, or to incline them to favour one side by gifts or promises, threats or persuasions, or by instructing them in the cause, or any other way, except by opening and enforcing the evidence by counsel at the trial, whether the jurors give any verdict or not, and whether the verdict be true or false.

Co. Lit. 369.
Moor, 815.
1 Hawk.
P. C. c. 85.

Also, it is an offence of this kind for a stranger barely to labour a juror to appear and act according to his conscience, or for any person to labour a juror not to appear; but it is no offence for the party himself, or for any person, who can justify an act of maintenance, to labour a juror to appear and give a verdict according to his conscience.

1 Hawk.
P. C. c. *ubi*
supr.

Also, it is an offence to give money to a juror after the verdict, unless it be openly and fairly given to all alike, in consideration of the expences of their journey and trouble of their attendance.

1 Hawk.
P. C. c. *ubi*
supr.

So, the bare giving of money to another, to be distributed among jurors, favours of embracery, whether any of it be distributed or not; and it is an offence of the like kind for a person by indirect means, to procure himself, or another, to be sworn of a *tales*, in order to serve one side: also, it is as criminal in a juror,

1 Hawk.
P. C. c. *ubi*
supr.

as in any other person, to endeavour to prevail on his companions to give a verdict on one side, by any other arguments besides the evidence produced, and the general obligations of conscience.

1 Hawk.
P. C. *ubi*
supr.

(a) How it
is further restrained and punished by statute, *vide* 5 E. 3. c. 10. 34 E. 3. c. 8. 38 E. 3. c. 12. and 1 Hawk. P. C. *ubi supr.*

The offence of embracery is punishable at (a) common law by indictment or action; and if it were not known before the trial, it will be a good cause to set aside the verdict.

1 Hawk.
P. C. c. 21.
§ 14.

Abuses by others in relation to juries, are punishable by fine and imprisonment; as if a man assault or threaten a juror for having given a verdict against him, he may be indicted as a disturber of the administration of justice, and one who is guilty of a contempt to the king's courts.

Hil. 10 Ann.
The Queen
v. Wake-
field.

Also, the court of King's Bench granted an information against a town-clerk, for publishing an order of the court against jurors who had found a person guilty of manslaughter only, upon an indictment of murder, by which order the said jurors were declared to be justly suspected of bribery.

Justices of Peace.

- (A) Of the ancient Officers, called Conservators of the Peace.
- (B) Of the first Institution, and general Statutes, which give Justices of Peace a Jurisdiction.
- (C) Of their Commission, and Manner of appointing them.
- (D) Who are qualified for the Office.
- (E) Of their Authority and Jurisdiction pursuant to their Commission, and the general Statutes relating to them: And herein,
 1. What Jurisdiction they have in relation to Treason and Misprision of Treason.
 2. What in relation to Felonies.
 3. What in relation to inferior Offences.

4. How

4. How far they have Power to proceed on Indictments not taken before themselves.
5. By what Justice the Jurisdiction must be exercised; and therein how far a Justice of a County may act out of it, or within a Liberty.

[(F) Their Indemnity and Protection by the Law in the right Execution of their Office; and their Punishment for the Omission of it.]

(A) Of the ancient Officers, called Conservators of the Peace.

IT seems to be clearly agreed, that before the statute 1 E. 3. cap. 16. there were no justices of the peace, and that they were first instituted by that statute; yet by the common law there were certain conservators of the peace, which were of two sorts: 1. Those who in respect of their offices had power to keep the peace, but were not simply called by the name of conservators of the peace, but by the name of such offices. 2. Those who were constituted for this purpose only, and were simply called by the name of conservators or wardens of the peace.

As to the first sort, the king is undoubtedly the principal from whom all authority of this kind is originally derived; but it is said, that he cannot take a recognizance for the peace, because it is a rule that no recognizance can be taken by any one who is not a justice either of record or by commission: also the lord chancellor, or lord keeper of the great seal, the lord high steward of England, the lord marshal, the lord high constable, and every justice of the King's Bench, and the master of the rolls, and, as some say, the lord treasurer, have a general authority to keep the peace throughout the realm, and to award process, and to take recognizances for it; but a peer, as such, seems to have no more power in this respect, than a mere private person.

Also, all courts of record, as such, have power to keep the peace within their own precincts; and the justices of gaol-delivery may take surety of the peace from a person committed, for not finding such surety.

Also, every sheriff is a principal conservator of the peace within his county, and may *ex officio* award process, and take surety for it; and, as some say, the surety so taken is to be looked on as a recognizance or matter of record, and not as a common obligation, because it is taken by virtue of the king's commission.

Also, a coroner is another principal conservator of the peace, and may bind any one to the peace who shall make an affidavit in his presence;

Lamb. book
1. c. 3.
2 H². Hist.
P. C. 44.
2 Hawk.
P. C. c. 8.

Dalt. chap.
1. Cromet.
6. Bro. Recognizance,
14.
[But neither privy-counsellors nor secretaries of state are, as such, conservators of the peace. 11 St. Tr. 320.]

10 H. 6. 7. b.
Lamb. book
1. chap. 3.

10 H. 7.
17. b. Bro. Peace, 13.
Cro. Car. 26.
F. N. B. 81.

Vide tit. Coroner.

presence ; but he is said to have no authority to grant process for the peace ; and it seems, that the security taken by him for the peace is not to be looked on as matter of record, but as matter *in pais*, only except where it is taken by him as judge in his own court for an affray in his presence.

*Vide tit.
Constable.*

Also, every high and petty constable are, by the common law, conservators of the peace within their several limits, and may take order for the keeping of the same.

The conservators of the peace, simply so called, were either ordinary or extraordinary.

Bro. Peace,
18. Pre-
script, 79.
22 E. 4.
35. b.
Lamb. book
1. chap. 3.
Co. Lit. 114.
Doct. &
Stud. book
1. chap. 7.
Crompt. 6.
Lamb. book
1. chap. 3.

The ordinary were either by tenure, *viz.* such as held their lands by this service ; or by election, *viz.* such as were chosen by the freeholders of a county, in pursuance of the king's writ for this purpose ; or by prescription, *viz.* such as claimed such a power by an immemorial usage in themselves and their ancestors, or predecessors, or those whose estate they had ; but the power of none of those conservators of the peace seems to have been greater than that of constables at this day, unless it were enlarged by some special grant or prescription.

The extraordinary conservators of the peace were persons specially commissioned in times of imminent danger, either from rebels or foreign invaders, to take care of and defend such a particular district committed to their charge, and to preserve the peace within the limits of it ; and these had power to command the sheriff, with his whole *posse*, to assist them.

(B) Of the first Institution, and general Statutes which give Justices of Peace a Jurisdiction.

(a) And therefore a person cannot be a justice of peace by prescription.
4 Leon. 149.

— They have no jurisdiction but what statutes give them, being created within time of memory.
Salk. 406. pl. 2.

JUSTICES of peace were (a) first instituted by the statute 1 E. 3. cap. 16. which provides in the following words : “ That for the better keeping and maintenance of the peace, the king willeth, that in every county good men and lawful, which be no maintainers of evil, or barrators in the county, shall be assigned to keep the peace.”

And by the 4 E. 3. cap. 2. it is further enacted, “ That there shall be assigned good and lawful men in every county to keep the peace, and at the time of the assignments mention shall be made that such as shall be indicted or taken by the said keepers of the peace, shall not be let to mainprize by the sheriffs, nor by none other ministers if they be not mainpernable by the law ; and the justices assigned to deliver the gaols shall have power to deliver the same gaols of those that shall be indicted before the keepers of the peace, and that the said keepers shall send their indictments before the justices, &c.”

(b) Altho' they are not named keep-

And it is further enacted by 18 E. 3. cap. 2. “ That two or three of the best reputation in the counties shall be assigned (b) keep-

“ers of the peace by the king’s commission, and at what time
 “need shall be, the same, with other wise and learned in the law,
 “shall be assigned by the king’s commission to hear and determine
 “felonies and trespasses done against the peace in the same coun-
 “ties, and to inflict punishment reasonably according to the law
 “and reason and the manner of the deed.”

are expressly called keepers of the peace, and the keeping thereof is the principal end of their office, it has been adjudged, that the caption of an indictment *coram A. B. & C. D. custodibus pacis & justiciariis domini regis* is good, without expressly naming them justices of peace. 2 Rol. Abr. 95.—Also, it has been resolved, that the description of justices of peace by the name of *justiciarii domini regis, ad pacem conservandam*, &c. is good, without saying *ad pacem domini regis*, for that is necessarily implied. 2 Hawk. P. C. c. 8. § 32.

ers, but justices of peace in their commission, yet inasmuch as by this statute they

And it is further enacted by 34 E. 3. cap. 1. “That in every
 “county of England shall be assigned, for the keeping of the
 “peace, one lord, and with him three or four of the most worthy
 “in the county, with some learned in the law, and they shall
 “have power to restrain the offenders, rioters, and all other bar-
 “rators, and to pursue, arrest, take and chastise them according
 “to their trespass or offence, and to cause them to be imprisoned
 “and duly punished according to the law and customs of the
 “realm, and according to that which to them shall seem best to
 “do, by their discretion and good advisement, and also to inform
 “them; and to inquire of all those that have been pillors and
 “robbers in the parts beyond the sea, and be now come again,
 “and go wandering, and will not labour as they were wont in
 “times past; and to take and arrest all those that they may find
 “by indictment or by suspicion, and to put them in prison, and
 “to take of all them that be not of good fame, where they shall
 “be found sufficient surety and mainprize of their good behaviour
 “towards the king and his people, and the other duly to punish,
 “to the intent that the people be not by such rioters or rebels
 “troubled nor endamaged, nor the peace blemished, nor mer-
 “chants nor other passing by the highway of the realm disturbed,
 “nor put in the peril which may happen of such offenders; and
 “also to hear and determine at the king’s suit all manner of felo-
 “nies and trespasses done in the same county, according to the
 “laws and customs aforesaid.”

[As the general standing authority to hear and determine was not given till this statute, it was not, probably, till then, that they were commonly reputed and called justices, as we find they are by the statute of 36 Edw. 3. ft. r. c. 12. which directs their sessions to be holden four times in the year. 2 Reeves’ Hist. 472.]

And it is enacted by 17 Rich. 2. cap. 10. “That in every com-
 “mission of the peace through the realm, where need shall be,
 “two men of law of the same county where such commission
 “shall be made, shall be assigned to go and proceed to the deli-
 “verance of thieves and felons, as often as they shall think it
 “expedient.”

And it is further enacted by 2 H. 5. stat. 1. cap. 4. “That the
 “justices of peace in every shire named of the *quorum*, (except
 “lords, and the justices of either bench, and the chief baron, and
 “serjeants at law, and the king’s attorney for the time that they
 “shall be occupied in the king’s service) shall be resident in the
 “same shire, and shall make their sessions four times by the year,
 “viz. in the first week after Michaelmas, Epiphany, Easter, and
 “the translation of St. Thomas the Martyr, and oftner if need be,

“ and that the same justices hold their sessions throughout Eng-
 “ land in the same weeks every year.”

* See the
 last edition
 of Burn's
 Justice.

2 Salk. 475.
 pl. 14.

These seem to be the most general statutes relating to the authority of justices of peace, besides which there are a very great number of subsequent statutes * which give them particular powers, sometimes to one justice, sometimes to two, sometimes in their sessions, sometimes out of their sessions; of which in this place I shall no otherwise take notice than by observing, that where by statute a special authority is given to justices of peace, it must be exactly pursued.

(C) Of their Commission, and Manner of appointing them.

Lamb.
 book 1. c. 5.
 Brook,
 Commis-
 sion, c. 5.
 Dalt. c. 3.
 Lev. 219.

[Justices of
 the peace
 may like-
 wise be by
 act of par-
 liament; as
 the Bishop

of Ely and his temporal steward, the Bishop of *Durham* and his temporal chancellor, and the Arch-
 bishop of *York* and his temporal chancellor of the liberty of *Hexam*, by stat. 27 H. 8. c. 23. § 20, 1, 2.]
 (a) Nor can a justice of peace of a corporation, created by patent, resign. Roll. Rep. 135.

2 Hawk.
 P. C. c. 8.
 § 2.
 4 Inst. 171.
 Lamb, book 1. c. 9.

The form of the commission of the peace, as it is at this day, was, according to *Hawkins*, settled by the judges about the 33 *Eliz.* and is in substance as followeth.

2 Hawk.
 P. C. c. 8.
 § 23.

Beginning with a salutation from the king to the several persons named in it, it afterwards assigns them, and every one of them jointly and severally, the king's justices to keep the peace in such a county, and to cause to be kept all statutes made for the good of the peace and quiet government of the people, as well within liberties as without, and to punish all those who shall offend against any of the said statutes, and to cause all those to come before them, or some of them, who shall threaten any of the people as to their persons, or the burning of their houses, in order to compel them to find surety for the peace or good behaviour; and if they shall refuse to find such surety, to cause them to be safely kept in prison till they shall find it.

2 Hawk.
 P. C. c. 8.
 § 23.

Then it goes on, and assigns them, and every two or more of them, (of which number either such or such a particular person among them is specially required to be justices,) to inquire by the oath of good and lawful men of the same county, of all felonies, witchcrafts, enchantments, sorceries, magic art, trespasses, forestallers, regrators, ingrossers, and extortions whatsoever, and of all

all other offences of which justices of the peace may lawfully inquire; also, of all those who shall go or ride armed, &c. or in companies, to the disturbance of the peace, and also of all innholders, and others, who shall offend in the abuse of weights or measures, or selling of victuals, &c. and also of all sheriffs, bailiffs, stewards, constables, gaolers, and other officers, who shall be faulty in the execution of their offices; and to inspect all indictments taken before them, or any of them, or other former justices of the peace for the same county, and to make and continue process against all the persons so indicted, till they shall be taken, or render themselves, or be outlawed, and to hear and determine all the felonies and other offences aforesaid; provided, that if a cause of difficulty shall arise, they shall not proceed to give judgment, except in the presence of some justice of one of the benches, or of assise.

And then it commands them to make inquiries of the premises, and to hear and determine the same, at certain days and places, which they, or any such two or more of them, shall appoint; and then it goes on, and commands the sheriff of the county to return before them, at certain days and places to be made known to him by them, such and so many lawful men of his bailiwick, by whom the truth of the premises may be best known and inquired; and then concludes, by assigning some one of them keeper of the rolls of the peace in the same county, and commanding him to cause to be brought before himself and his fellows, at the said days and places, the writs, precepts, processes, and indictments aforesaid.

2 Hawk.
P. C. c. 8.
§ 25.

My Lord Hale gives us the same commission, which at present, says he, consists of two clauses of *assignavimus*; by the first of which each of them is made a justice or conservator of the peace; by the second *assignavimus*, power is given to them, or two of them, whereof one of the *quorum*, to hear and determine felonies, and other matters; for the bare making them justices of the peace, without this clause, doth not give them power to hear and determine indictments; he also takes notice of a proviso in the said commission, *viz.* that in case of difficulty arising, then to respite judgment till the justices of assise come into the county, &c.

2 Hal. Hist.
P. C. 43.

Stamf. P. C.
B. 2. c. 5.

It seems agreed that justices of the peace may, by virtue of their commission, execute as well the statutes made before the reign of Edw. 3. for the better keeping of the peace, such as the statutes of *Winchester* and *Westminster*, &c. as those made since that time; and yet the statutes which ordain justices of the peace, say nothing of the execution of those former statutes; from whence, says *Hawkins*, it appears, that the king may, by commission, authorize whom he pleases to execute the statute.

Lamb. B. 1.
c. 9.
Dalt. c. 5.
Crompt.
7, 8.

2 Hawk.
P. C. c. 8.
§ 28.

(D) Who are qualified for the Office.

BY the statute 2 *H. 5. stat. 2. cap. 1.* it is enacted, "That justices of peace shall be made in the counties of *England* of " most sufficient persons dwelling in the same counties, by the " advice of the chancellor and of the king's council, without " taking other persons dwelling in foreign counties to execute " such office, except the lords and the justices of assises to be " named by the king and his council, and except all the king's " chief stewards of the lands and feignories of the duchy of " *Lancaster* in the north parts and in the south for the time " being."

By the 1 *Mar. sess. 2. cap. 8.* it is enacted, "That no person " having or using the office of a sheriff of any county, shall use " or exercise the office of a justice of peace, by force of any " commission, or otherwise, in any county where he shall be she- " riff, during the time only that he shall exercise the said office " or sheriffwick; and that all acts done by such sheriff by autho- " rity of any commission of the peace, during the time above- " said, shall be void."

Dalt. c. 3.
1 E. 6. c. 7.
§ 4.

[Also, if he made a *coroner*, this, by some opinions, is a dis- charge of his authority of justice. But if he be created a duke, archbishop, marquis, earl, viscount, baron, bishop, knight, judge, or serjeant at law, this taketh not away his authority.]

By 5 *Geo. 2. cap. 18. § 2.* No attorney, solicitor, or proctor, shall be a justice of the peace during the time he shall continue in the practice of that business.]

In an indict-
ment on this
statute, it
must be
shewn that
he had a
commission,
and did some act
pursuant thereto,
not having lands, &c.

By the statute 18 *H. 6. cap. 11.* it is enacted, "That no jus- tice of peace within the realm of *England*, in any county shall " be assigned or deputed, if he have not lands or tenements to " the value of 20*l. per annum*, except in cities, towns corpo- " rate, &c."

Cro. Jac. 643, 644.

And now by the 18 *Geo. 2. c. 20.* it is enacted, "That no per- son shall be capable of being a justice of the peace, or to act as " a justice of the peace, for any county within that part of " *Great Britain* called *England*, or the principality of *Wales*, who " shall not have an estate of freehold or copyhold, to and for his " own use and benefit, in possession for life, or for some greater " estate, either in law or equity, or an estate for years determin- " able upon one or more life or lives, or for a certain term, ori- " ginally created for twenty-one years, or more, in lands, tene- " ments or hereditaments, lying in that part of *Great Britain* " called *England*, or principality of *Wales*, of the clear yearly " value of one hundred pounds, over and above what will satisfy " and discharge all incumbrances that may affect the same, [and " over and above all rents and charges payable out of, or in re- " spect of the same; and who shall not be seised of, or entitled " unto,

“ unto, in law or equity, to and for his own use and benefit, the
 “ immediate reversion and remainder of and in lands, tenements,
 “ or hereditaments, lying or being as aforesaid, which are leased
 “ for one, two, or three lives, or for any term of years determin-
 “ able upon the death of one, two, or three lives, upon reserved
 “ rents, and which are of the clear yearly value of three hundred
 “ pounds; and who shall not, before he takes upon himself to
 “ act, at some general or quarter sessions for the county, riding,
 “ or division for which he does or shall intend to act, first take
 “ and subscribe the oath” of his having such qualifications above
 required.

The oath so taken and subscribed, shall be kept by the clerk of the peace among the records of the sessions.

And the clerk of the peace shall on demand forthwith deliver an attested copy to any person paying 2s. for the same; which being proved to be a true copy of such oath, shall be admitted in evidence on any issue in an action brought on this act.

And if any person shall act as justice, without having taken and subscribed the said oath, or without being qualified as above, he shall for every offence forfeit 100*l.* half to the poor of the parish wherein he most usually resides, and half to him who shall sue, with full costs. The prosecution to be in six months.

And in such action, the proof of the qualification shall lie on such person against whom it is brought.

And if the defendant intends to insist upon any lands not contained in such oath, he shall at or before the time of pleading deliver to the plaintiff or his attorney a notice in writing specifying such lands, and the parish and county where they are situate (offices and benefices excepted, which it shall be sufficient to ascertain by their usual names): And if the plaintiff in such suit shall think fit thereon not to proceed further, he may with leave of the court discontinue his suit, on payment of costs to the defendant as the court shall award.

Upon the trial, no estate, but what is contained in the oath and notice, shall be admitted as any part of the qualification.

Provided, that where the qualification or any part thereof consists of rent, it shall be sufficient to specify in such oath or notice, so much of the lands, out of which such rent is issuing as shall be of sufficient value to answer the rent.

And if the plaintiff or informer shall discontinue (otherwise than as aforesaid) or be nonsuit, or judgment be given against him, he shall pay treble costs.

But this shall not extend to any city, town, or liberty, having justices of their own; nor to any peer, lord of the privy council, judge, attorney or solicitor general, or to the justices of the great sessions of *Cheshire* and *Wales*, or to the eldest son or heir apparent of a peer, or of any person qualified to serve as a knight of the shire; nor to the officers of the board of green cloth or principal officers of the navy, or the two under-secretaries in each of the offices of the principal secretary of state, or to the secre-

tary

tary of *Chelsea* college, in their respective liberties; or to the heads of colleges or halls, or vice-chancellor of either of the universities, or to the mayor of *Oxford* or *Cambridge*.

And by 1 *Geo. 3. c. 13.* and 7 *Geo. 3. c. 9.* All persons who were justices at the demise of his late majesty, or who have been or shall be appointed justices by any commission granted or to be granted by his present majesty, or any of his successors, and have taken and subscribed, or shall after the issuing of the first commission whereby they shall be appointed justices take and subscribe the oath of office before the clerk of the peace or his deputy, and also the oath required by 18 *Geo. 2. c. 20.* shall not be obliged during the reign of his present majesty, or during any future reign in which such oaths shall have been so taken and subscribed, to take and subscribe the same again. And generally there is an indemnifying clause in some act in almost every session of parliament, provided they qualify according to 18 *Geo. 2. c. 20.* within a time in such act limited.

2 *Ld. Raym.*
1030.

3 *Inst. 12.*

Although a man be a *mayor*, yet it doth not follow that he is a justice of the peace, for that must be by a particular grant in the charter. *Per Holt, C. J.* But although he be not a justice of the peace by the charter, yet there are many cases, saith *Dr. Burn*, wherein he hath the same power as a justice of the peace given unto him by particular statutes; as for instance, with regard to the customs, ale-houses, Lord's day, swearing, gaming, weights, servants, fuel, leather, orchards, soldiers, and divers others.]

(E) Of their Authority and Jurisdiction pursuant to their Commission, and the general Statutes relating to them: And herein,

1. What Jurisdiction they have in relation to Treason and Misprision of Treason.

Dalt. c. 90.
Hal. Hist.
P. C. 305.
350. 372.

IT seems to be clearly agreed, that justices of the peace have not jurisdiction to (a) hear and determine treason, *præmunire*, or misprision of treason.

2 *Hal. Hist. P. C. 44.* 2 *Hawk. P. C. c. 8. § 34.* (a) In *Hal. Hist. P. C. 372.*, it is laid down as the opinion of Chief Justice Roll, that justices of the peace may take an indictment of treason, though they cannot determine it.—But in another place, viz. *Hal. Hist. P. C. 305.*, my Lord Hale says expressly, that they cannot take an indictment of it.

Vide the
authorities
supr.

(b) And these informations taken upon oath, as they ought to be, and sworn to by the justice, or

But as these offences are against the peace of the king and of the realm, any justice of the peace may, either upon his own knowledge, or the complaint of others, cause any person to be apprehended for any such offence, and such justice may take the examination of the person so apprehended, and the (b) information of all those who can give material evidence against him, and put the same in writing, and also bind over such as are able to give any such evidence to the King's Bench or gaol-delivery, and certify his proceedings to the same court to which he shall bind
over

over such informers; and this doctrine seems to be established by constant practice, especially since the statutes of 1 & 2 Ph. & Mar. cap. 13. and 2 & 3 Ph. & Mar. cap. 10. which, directing justices of peace to proceed in this manner against persons brought before them for felony, seem to give them a discretionary power of proceeding in like manner against persons accused of the above-mentioned offences.

his clerk, that took them, to be truly taken, may be read in evidence against the prisoner, if the informant be dead,

or not able to travel, and sworn so to be; also, says my Lord Hale, by the opinion of some, if he were bound over, and appear not, they may be read; but this, he says, is questionable. 2 Hal. Hist. P. C. 305. But for this *vide* 2 Hawk. P. C. c. 46.

Also, by some acts of parliament, justices of peace may take indictments of particular treasons; but those presentments they must certify into the King's Bench or gaol-delivery, as the case shall require; as upon the statute of 5 Eliz. cap. 2. for maintaining the authority of the see of Rome; 13 Eliz. cap. 2. for bringing in bulls for absolution, *Agnus Dei*, &c. 23 Eliz. cap. 1. for withdrawing and reconciling, or being withdrawn from the king's allegiance.

2 Hal. Hist. P. C. 44.

Leon. 239.

So, by the statute of 3 H. 5. cap. 7. as to treason for clipping, &c. power was given to the justices of peace to inquire and make process thereupon, and anciently that clause was put into their commission, but now omitted; for by the stat. of 1 Mar. cap. 1. the act of 3 H. 5. cap. 6. is repealed, and consequently the acts 3 H. 5. cap. 7. that gave power to justices of peace to inquire touching it.

2 Hal. Hist. P. C. 45.

2. What in relation to Felonies.

It seems to have been a matter of some doubt, whether justices of peace, as such, have power to hear and determine felonies, &c. and this doubt seems to have arisen from the general words of 3 & 4 E. 3. cap. 1. which is express, that the persons assigned to keep the peace shall have power, among other things, to hear and determine felonies, &c.

Cro. Jac. 32. Yelv. 46. 2 Roll. Rep. 151. Dyer, 69. pl. 29. 2 Hawk.

P. C. c. 8. § 33.

But it seems to be now settled, that justices of peace have no power to hear and determine felonies, unless they be authorized so to do by the express words of their commission; and that their jurisdiction to hear and determine murder, manslaughter, and other felonies and trespasses, is by force of the second *assignavit* in their commission, which gives them, or two of them, whereof one of the *quorum*, power to hear and determine felonies, &c.

Stamf. P. C. 53. Crompt. 120. 2 Hal. Hist. P. C. 43. 2 Hawk. P. C. c. 8. § 33.

And hence it hath been lately adjudged, that the caption of an indictment of trespass before justices of the peace, without adding *necnon ad diversas felonias*, &c. *assignat.*, is naught.

Domus Rex v. Carter, Trin. 7 Geo. 1. in B. R.

But though justices of peace, by force of their commission, have authority to hear and determine murder and manslaughter, yet they seldom exercise a jurisdiction herein, or in any other of fences

fences in which clergy is taken away; and this, says my Lord *Hale*, is for two reasons:

² Hal. Hist. P. C. 46. 1. By reason of the monition and clause in their commission, viz. in cases of difficulty to expect the presence of the justices of assize.

2. By reason of the direction of the statute of 1 & 2 Ph. & Mar. cap. 13. which directs justices of the peace, in case of manslaughter and other felonies, to take the examination of the prisoner, and the information of the fact, and put the same in writing, and then to bail the prisoner, if there be cause, and to certify the same, with the bail, at the next gaol-delivery; and therefore, in cases of great moment, they bind over the prosecutors, and bail the party, if bailable, to the next gaol-delivery; but in smaller matters, as petty larceny, and some cases, they bind over to the sessions; but this is but in point of discretion and convenience, not because they have not jurisdiction of the crime.

3. What in relation to inferior Offences.

⁶ Mod. 128. The jurisdiction herein given to justices of peace by particular statutes is so various, and extends to such a multiplicity of cases, that it were endless to endeavour to enumerate them: also, they have, as justices of the peace, a very ample jurisdiction in all matters concerning the peace.

Lev. 139. And therefore, it hath been holden, that not only assaults and Sid. 271. batteries, but libels, barrettry, and common (a) night-walking, and (a) Latch. haunting bawdy-houses, and such like offences, which have a direct tendency to cause breaches of the peace, are cognizable by 173. Poph. justices of the peace, as trespasses within the proper and natural 208. Cro. meaning of the word. Jac. 32. Yelv. 46.

Salk. 406. But neither perjury nor forgery at common law, nor any other pl. 2. such like offences, which do not directly tend to cause a personal Crompt. wrong or open violence, are cognizable by them, unless it be by 120. Lamb. B. 1. c. 12. the express words of their commission, or some statute.

4. How far they have Power to proceed on Indictments not taken before themselves.

² Hal. Hist. P. C. c. 46. Justices of the peace may proceed upon indictments taken before their predecessors, which depends upon the statutes 11 H. 6. ² Hawk. cap. 6. and 1 E. 6. cap. 7. § 6. the former of which, reciting the 120. Lamb. inconveniences that pleas and processes upon indictments before § 31. justices of the peace had often been discontinued by making new commissions of the peace, to the great loss of the king, &c. ordains, that such pleas, suits, and processes before justices of the peace shall not be discontinued by new commissions of the peace, but stand in force, and that the new justices, after they have the records of the same pleas and processes before them, may continue, and finally hear and determine the same; and this is confirmed by the 1 E. 6. cap. 7.

But

But justices of peace have no power to proceed on indictments taken before a coroner, or before justices of oyer or gaol-delivery, or to deliver persons suspected by proclamation. 2 Hal. Hist. P. C. 46.

But if an indictment be taken before the sheriff in his torn, by the statute of 1 E. 4. cap. 2. those indictments are delivered to the justices of peace at their next session, and they may proceed on those presentments. 2 Hal. Hist. P. C. c. 46.

5. By what Justice the Jurisdiction must be exercised; and therein how far a Justice of a County may act out of it, or within a Liberty.

Every single justice has regularly a jurisdiction through the whole county, which he alone may exercise for the preservation of the peace; and this jurisdiction he has by virtue of his commission, which constitutes him a justice of peace; but the power of hearing and determining offences is by the commission given to two, or more, (a) *quorum unus*, &c. and therefore if two justices, *quorum unus*, be impowered to do a thing, it must appear that one was of the *quorum* *. 2 Hal. Hist. P. C. 44.
5 Mod. 322.
Comb. 200.
(a) Cannot be a session without a justice of the *quorum*.
3 Mod. 14.
152. 2 Ld.

Raym. 1238. — * Orders of justices are not to be vacated, for not expressing one of them to be of the *quorum*. 26 Geo. 2. c. 27. [And by 7 Geo. 3. c. 21., in cities, boroughs, towns corporate, franchises, and liberties, which have only one justice of the *quorum*; all acts, orders, adjudications, warrants, indentures of apprenticeship, or other instruments, done or executed by two or more justices qualified to act therein, shall be valid, although neither of the said justices shall be of the *quorum*.]

So, if a thing be required to be done by two justices, they must both be present at the execution of it; as if two justices adjudge a person the father of a bastard child, and the examination is said to be by one of them, this is naught; for the examination being a judicial act ought to be by both, and it is not sufficient that one of them examined, and made a report to the other; but if they are both present, and one alone examines, or asks questions, it is well enough: So, where two justices are enabled to bail a person, they ought both to be present to do it, and not one of them first to sign the recognizance, and then send it to another. 6 Mod. 180.
2 Salk. 477.
pl. 22. *Vide* tit. *Bastardy*, (D).
[Where the act to be done is of a judicial nature, the justices must both be present at it, as in the instances put in

the text, and in making orders of removal, *Rex v. Wyke*, Andr. 238.; appointing overseers, *Rex v. Forrest*, 3 Term Rep. 38.; assenting to the binding of parish apprentices, *Rex v. Inhabitants of Hamstead Ridware*, *id.* 38.; but where the act to be done is merely ministerial, the concurrence of the justices together is not requisite; as, it seems, in the allowance of a poor-rate. *Rex v. Justices of Dorchester*, 1 Str. 393.]

A single justice cannot bail a person, that is committed by order of the sessions; for he that bails must have as high a power as he who commits. Keb. 857.
897. *Vide* tit. *Bail*.

[One magistrate cannot supersede the warrant of commitment of another magistrate without a legal inquiry and examination of the matter.] Rex v. Brooke,
2 Term Rep. 190.
2 Keb. 73.

But whatsoever power is given to a justice, or to two justices of the peace, by any statute, is given to the sessions of the peace, which consists of a collection of justices.

2 Keb. 559. It has been holden, that where a statute says the next justice, it must be the next; but where it says the justices of the peace in or near the place, there, any justice of peace in the county will serve.

Rex v. Loxdale,
1 Burr. 447. [So, the statute of 43 Eliz. c. 2. § 1. for the appointment of overseers, which makes mention of *justices in or near the parish or division*, Lord Mansfield said, was only directory.

Rex v. Price,
Cald. 305. So, where a statute directs an act to be done by justices *acting for the division*, any justice within the county, acting within the division, is for this purpose a justice of the division.

Rex v. Stevens,
Cald. 302. So, the authority given by the stat. of 43 Eliz. c. 7. to convict before any justice, *&c. of the county, city, or town corporate, where the offence shall be committed*, is constructively given to any justice, *&c. of any place, district, or liberty*, in any county where, *&c. as to a magistrate of the Isle of Ely in the county of Cambridge.*]

2 Hal. Hist. Justices of the peace are to execute their authority as justices of the peace within the county wherein they are justices, and cannot regularly do a judicial act out of such county.

P. C. 50.
2 Hawk. P. C. c. 8. § 29.
13 E. 4. s. b. Therefore, if a justice of peace live or be out of the county wherein he is justice, he cannot by his warrant fetch a person out of the county whereof he is justice, to come before him in the county where he is.

2 Hawk. And as justices of the peace have no coercive power out of their county, they cannot make an order of bastardy, or such like orders, out of their county.

Cro. Car. But a justice of peace may do a ministerial act out of the county, such as examine a party robbed, whether he knows the felons according to the statute or not.

2 Hawk. Also, by the better opinion, recognizances and informations voluntarily taken before them in any place are good; for those, says my Lord Chief Justice *Hale*, are acts of voluntary jurisdiction, and may be done out of the county, as well as a bishop may grant administration, institution, or orders out of his diocese.

2 Hal. Hist. But a justice of peace cannot imprison a person for not giving a recognizance, or commit a person for a crime, for these are acts of compulsory jurisdiction, which he cannot exercise out of his proper county.

2 Hal. Hist. If *A.* commits a felony in the county of *B.* where he lives, and goes in the county of *C.* and is there taken, a justice of the peace of the county of *C.* may take his examination and informations in the county of *C.* though the felony were committed in the county of *B.*; but my Lord *Hale* says, that upon his arraignment in the county of *B.* he would never allow these examinations to be given in evidence, because though he may commit and examine, and give an oath to the informers, yea and bind them over to give evidence, or commit them, yet that is but for necessity of preserving the peace, for he hath really no jurisdiction in the case.

If *A.* commit a felony in the county of *B.* and upon a warrant issued against him by a justice of peace in the county of *B.* he is pursued and flies into the county of *C.* and there is taken, he must not, by virtue of that warrant, be carried to a justice of peace of the county of *B.* where he committed the felony, but to a justice of peace in the county of *C.* where he was taken.

Hal. Hist.
P. C. 580.

But if *A.* were taken by the warrant in the county of *B.* and break away into the county of *C.* and be there taken upon fresh suit by them that first took him, he may be either brought to a justice of the county of *C.* where he was last taken, or before the justice of the county of *B.* by whose warrant he was first taken, for in supposition of law he was always in custody.

Hal. Hist.
P. C. 581.

But if he escape before arrest into another county, if it be a warrant barely for a misdemeanour, it seems the officer cannot pursue him into another county, because out of the jurisdiction of the justice that granted the warrant; but in case of felony, affray, or dangerous wounding, the officer may pursue him, and raise hue and cry upon him into any county; but if he take him in a foreign county, he is to bring him to the gaol or justice of that county where he is taken, for he doth not take him purely by the warrant of the justice, but by the authority which the law gives him, and the justice's warrant is a sufficient cause of suspicion and pursuit.

2 Hal. Hist.
P. C. 115.

If *A.* be a justice of peace in two adjacent counties, though by several commissions, as the recorder of *London* is, he, whilst he lives in one county, may send his warrant to apprehend malefactors in another, and send them to *Newgate*, which is the common gaol both for *London* and *Middlesex*.

2 Hal. Hist.
P. C. 581.

The justices of the peace have jurisdiction of felonies arising within the verge.

4 Co. 46. 2.
Wigg's case.
2 Hal. Hist. P. C. 52.

Justices of the peace for a county have, by their commission, an express authority as well within liberties as without, and may execute their office within a town which has a special commission of the peace for its own limits, unless such commission have a clause that no other justices, except those named in it (*a*), shall in any way concern themselves in the keeping of the peace within the liberties of such town.

2 Hawk.
P. C. c. 8.
§ 29.
2 Hal. Hist.
P. C. 49.
[(a) For
without ex-
press words,
without a

ne intrumittant clause in the commission or charter, the county justices shall not be excluded. *Blankley v. Winstanley*, 3 Term Rep. 279. *Talbot v. Hubble*, 2 Str. 1154. *Rex v. Sainsbury*, 4 Term Rep. 456.]

Also, it seems, that though such commission have a special exclusive clause, of which the justices have notice, yet their acts within a liberty are not void, though perhaps they may be punished for proceeding in defiance of such restrictive clause, as for a contempt of the king's prohibition.

2 H. H.
P. C. 47.
2 Hawk.
P. C. c. 8.
§ 29.

[Also, by 9 Geo. 1. c. 7. a justice dwelling in the city or precinct that is a county of itself, within the county at large, may act at his own dwelling-house for such county at large.

And by 24 *Geo. 2. c. 55.* if any person against whom a warrant shall be issued, shall escape, go into, reside, or be in any place out of the jurisdiction of the justice granting the warrant, any justice of the peace where such person shall be, upon proof on oath of the hand-writing of the justice granting such warrant, shall indorse his name thereon, which shall be a sufficient authority to execute the warrant within such other jurisdiction.

And the justice may further order (if he thinks fit) the party, according as he shall appearailable or notailable upon the face of the warrant, to be brought before himself or some other justice or justices of that county, or to be carried back into the county from which the warrant did issue.

Rex v.
Morgan,
Cald. 156.

[Under the statute 11 *Geo. 2. c. 19.* for the more effectual securing of the payment of rents and preventing of frauds by tenants, justices either of the county from which tenants fraudulently remove goods, or of that in which they are concealed, may convict the offenders in their respective counties.]

Rex v.
Sainsbury,
4 Term
Rep. 451.

Where two sets of magistrates have a co-ordinate jurisdiction within a district, they may all act together; but if the jurisdiction previously attach in the one set, any attempt in the other set to wrest it from them, is illegal, and the subject of an indictment.

Rex v.
Whitbread,
Doug. 551.
n.

The jurisdiction of justices of the peace and of commissioners of excise, is, as to the excise laws, exactly the same, within their respective jurisdictions.

9 Ann.
c. 23.
1 *Geo. 1.*
ft. 2. c. 57.
7 *Geo. 3.*
c. 44.
10 *Geo. 3.*
c. 44.

The jurisdiction of justices of the peace and of commissioners under the the hackney-coach statutes is co-extensive, and therefore, a justice of the peace after convicting a coachman for refusing to go with his coach, may immediately commit him to the house of correction, if he do not pay the penalty.

c. 44. Duck v. Addington, 4 Term Rep. 447.

Dalt. c. 173.

Regularly, a justice of the peace ought not to execute his office in his own case; but cause the offenders to be convened or carried before some other justice, or desire the aid of some other justice being present. And therefore, the mayor of *Hereford* was laid by the heels for sitting in judgment where he himself was lessor of the plaintiff in ejectment, though he by the charter was sole judge of the court.

Per Holt,
C. J.
1 Salk. 396.

Case of Fox-
ham Tith-
ing in Wilts.
2 Salk. 607.

So, where a justice of the peace who was surveyor of the highways, joined in making an order at the sessions in a matter which concerned his office, and his name was put in the caption, the order was for this reason quashed.

Burr. Settl.
Ca. 194.

So, an order of removal of a poor person from *Great Chart* to *Kennington* was quashed, because one of the justices who made the order was an inhabitant of *Great Chart* at the time, and charged to the poor rate there.

This last determination seemeth to have given occasion to the stat. 16 *Geo. 2. c. 18.* which enacts, that the justices may do all things appertaining to their office, so far as the same relates to the laws

laws for the relief, maintenance, and settlement of the poor; for passing and punishing vagrants; for repair of the highways; or to any other laws concerning parochial taxes, levies, or rates, notwithstanding that they are rated, or chargeable with the rates within any place affected by such their acts. Provided, that this act shall not empower any justice for any county at large, to act in the determination of any appeal to the quarter sessions of such county, from any order, matter, or thing relating to any such parish, township, or place, where such justice is so charged or chargeable.

And in some cases, if the justice shall act in his own cause, it seemeth to be justifiable, as, when a justice shall be assaulted; or, (in the execution of his office especially,) shall be abused to his face, and no other justice present with him; then, it seemeth, he may commit such offender until he shall find sureties for the peace for his good behaviour, as the case shall require: but if any other justice were present, it were fitting to desire his aid.

Justices of the peace, it seemeth, may supersede their own order *quia improvidè emanavit*, if it have not been acted upon.

Suffex, 1 Str. 6. 1 Sess. Ca. 106. No. 98. S. C.

Lord Hale saith, (contrary to the opinion of Lord Coke,) that the justices out of sessions may issue their warrant for apprehending persons charged with crimes within the cognizance of the sessions, and bind them over to appear at the sessions, although the offender be not yet indicted. But in another place he saith, this seemeth doubtful; and one thing which seemeth to make against it is, that in most cases of this nature, though the party were indicted, or an information preferred, yet a *capias* was not the first process, but a *venire facias* and *distringas*. And Serjeant Hawkins on this point saith thus: It seems, that anciently no one justice could legally make out a warrant for an offence against a penal statute or any other misdemeanour, cognizable only by a sessions of two or more justices; for that one single justice hath no jurisdiction of such offence, and regularly, those only who have jurisdiction over a cause can award process concerning it: yet the long, constant, universal, and uncontrolled practice of justices of the peace seems to have altered the law in this particular, and to have given them an authority in relation to such arrests, not now to be disputed. However, as Dr. Burn very well observes, the authority of justices of the peace being by the statute law, and no statute having expressly given to them such power, (unless in special cases; which operate against, rather than establish a general power,) it seemeth best in ordinary cases, and more consonant to the practice of the superior courts, to issue a summons against the offender, and not a warrant, in the first instance; unless in cases of felony, or where the offender in other respects is to suffer corporal punishment.

By the act of 18 Geo. 3. c. 19. justices of the peace are enabled to give costs upon complaints determined before them out of sessions: and by the 33 Geo. 3. c. 55. to impose fines upon con-

Dalt. c. 173.
Rex v.
Revel,
1 Str. 420.

Parishes of
Pancras and
Rumbald in
No. 98. S. C.

1 H. H.
P. C. 579.

Id. 2 H. H.
P. C. 113.

2 Hawk.
P. C. c. 13.
§ 16.

Vol. 3. tit.
Justices, &c.
31.

stables, overseers of the poor, and other peace or parish officers for neglect of duty, and on masters of apprentices for any ill usage of their apprentices, whether bound by any parish or township or otherwise, provided that not more than the sum of ten pounds be paid upon the binding of them.]

[(F) Their Indemnity and Protection by the Law in the right Execution of their Office; and their Punishment for the Omission of it.

Aston v.
Blegreve,
1 Str. 617.
Kent v. Poc-
cock, 2 Str.
1168. Rex
v. Revel,
1 Str. 420.

A Justice of the peace is strongly protected by the law, in the just execution of his office. He is not to be slandered or abused: if he is slandered in his presence, he may commit, or indict the party: if in his absence, he is entitled to redress himself by action.

Rex v. Pocock, 2 Str. 1157.

2 Hawk.
P. C. c. 13.
§ 20.
Rex v.
Young,
1 Burr.
556.
Rex v. Cox,
2 Burr. 785.
Rex v.
Palmer,
2 Burr. 1162.
Rex v.
Jackson,
1 Term
Rep. 653.

He is not punishable at the suit of the party, but only at the suit of the king, for what he doth as judge, in matters which he hath power by law to hear and determine without the concurrence of any other; for, regularly, no man is liable to an action for what he doth as judge: but in cases wherein he proceeds ministerially, rather than judicially, if he acts corruptly, he is liable to an action at the suit of the party, as well as to an information at the suit of the king. But he must have acted *corruptly* to subject himself to punishment by information: for though he should even act illegally, yet if he has acted honestly and candidly, without oppression, malice, revenge, or any bad view or intention, an information will not be granted against him, but the party complaining will be left to his ordinary legal remedy, by action or indictment.

Rex v.
Webster,
3 Term
Rep. 388.

Nor will the court grant an information against him for an improper conviction, unless the party complaining make a full exculpatory affidavit.

Rex v.
Fielding,
2 Burr. 719.

Nor shall he be liable to be punished both ways, that is, both criminally and civilly: but before the court will grant an information, they will require the party to relinquish his civil action, if any such is commenced. And even in the case of an indictment, and though the indictment is actually found, yet, the attorney-general, (on application made to him,) will grant a *noli prosequi* upon such indictment, if it appear to him that the prosecutor is determined to carry on a civil action at the same time.

7 J. 1. c. 5.

He is enabled to plead the general issue in any action that may be brought against him for any thing done by virtue of his office; and to give the special matter in evidence; and if he has a verdict in his favour, is entitled to double costs. And such action shall not be laid but in the county where the fact was committed.

21 J. 1.
c. 12.

And by stat. 24 Geo. 2. c. 44. it is enacted, that no writ shall be sued out against, or copy of any process at the suit of a subject

shall

shall be served on any justice for any thing done by him in the execution of his office ; until notice in writing shall have been given to him or left at his usual place of abode by the attorney for the party, one month before the suing out, or serving of the same; containing the cause of action, and indorsed with the attorney's name and place of abode ; for which he shall be entitled to a fee of 20 s. and no more. And unless it is proved on the trial that such notice was given, the justice shall have a verdict and costs. Nor shall any evidence be permitted to be given by the plaintiff on the trial, of any cause of action, except such as is contained in the notice. And the action must be commenced within six months after the act committed.

But where the plaintiff in such action shall obtain a verdict, and the judge shall in open court certify on the back of the record, that the injury for which such action was brought, was wilfully and maliciously committed, the plaintiff shall have double costs.

If a justice will not, on complaint to him made, execute his office, or, if he misbehave in his office, the party grieved may move the court of King's Bench for an information, and afterwards may apply to the court of Chancery to put him out of the commission.

And a magistrate forfeits the protection of the law in the execution of his office, by beginning a breach of the peace himself.]

Crom. 7.
2 Atk. 2.

Rex v. Symonds,
Ca. temp.
Hardw. 249.

014.6937





UC SOUTHERN REGIONAL LIBRARY FACILITY



D 000 952 394 5

